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From the Desk of Professor-In-Charge

On behalf of Campus Law Centre, it is my proud privilege to present Tenth volume of the Journal of the Campus Law Centre (JCLC) to its esteemed readers. It is a Flagship Journal of the Campus Law Centre, University of Delhi which is designed for contribution from legal academia, judges, advocates, and research scholars on the matters of contemporary legal issues. In preparation of this issue, we have strived to keep up the tradition of maintaining high academic standards which the JCLC has been known for. This volume, as earlier volumes, contains thought provoking and scholarly papers on various contemporary and topical legal issues.

We are pleased to present fourteen articles that in their own ways contribute to a better understanding of a range of issues traversing international law, human rights law, comparative jurisprudence, animal protection law, sports and disability laws, criminal law, victimology, environment law, right to education, mental health, religion and liberty, trademarks law. The topics we cover transcend jurisdictional boundaries, making it possible not just to deepen and internationalise Indian public law debates, but also to present distinctive Indian viewpoints.

I take this opportunity to express my sincere thanks to not only to the contributors of this issue but also to Dr. Neha, editor and the members of the editorial committee.

I would like to thank our readers and request their valuable feedback, which will help the editorial committee to improve the quality of the journal.

Professor (Dr.) Alka Chawla
Professor-in-Charge
Campus Law Centre

Editor's Note

Welcome to the Tenth issue of the Journal of Campus Law Centre (JCLC), a collaborative effort between academicians, researchers, professionals and other scholars. Our journal aims to provide a platform for projecting the results of legal scholarship by espousing research and reflection on the legal issues of the day.

JCLC is and has always been faculty reviewed, following a double-blind peer review process. The speciality of this volume lies not only in the factum of creative contents of this compilation but more so for the reason of such contributions being made by thorough scholars and researchers. The horizons of this work are as wide as it starts from human rights of migrant labour and disabled persons to animal protection law, criminal law, environment law, right to education, mental health, trademarks law and so on.

On behalf of the Editorial team, I would also like to express my gratefulness to the authors of articles published, and acknowledge generous help which both the authors and editors obtained from the peer-reviewers. I also feel irresistible to acknowledge the contributions made by all the members of editorial committee who spent long and tedious hours in editing the Journal.

Lastly, I would like to express my heartfelt gratitude towards the Editor-in Chief, Professor (Dr.) Alka Chawla, Professor-In Charge, CLC for her tremendous support and cooperation throughout the publication and giving me the opportunity to serve as the Editor of this Journal.

Dr. Neha
Editor
Journal of the Campus Law Centre

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AN ANALYSIS OF THE CHALLENGES IN ENFORCEMENT OF HUMAN RIGHTS OF MIGRANT LABOURERS

Dr. Abhishek Sharma Padmanabhan*
Dr K V K Santhy**

Abstract

Migration is a basic human phenomenon that often involves the perilous movement of individuals across boundaries. This has repercussions for the protection of human rights. All people, regardless of where they were born or what country they now call home, are entitled to the protections guaranteed by the numerous international human rights laws. As a result, a State has duties to recognise the existence of all types of migrants under its control and to provide them the opportunity to assert their human rights. In addition to the basic rules protecting human rights, numerous international laws have been developed to explicitly safeguard the rights of a large number of different categories of migrants. In spite of this, migrants nevertheless face a number of difficulties both throughout the migration process and after they arrive in their new countries, especially those who have irregular immigration status or are undocumented.

The purpose of this article is to explore the key worldwide international mechanisms for safeguarding the human rights of international migrants and the problems that migrants often face with the intention of determining the elements that are responsible for the poor protection of migrants' rights. The authors herein suggest that that treaty bodies should routinely require States' Parties to incorporate migrants' rights into national plans of action on human rights, enforce immigration laws in accordance with human rights and the rule of law, and provide effective border security and regional engagement in order to deter illegal migration.

Keywords:

Labour Rights, Migration, Human Rights, Rule of Law, International Law

I

Introduction

Ever since they were first inhabited, people have been pushing the bounds of the globe further and further out, which has resulted in them becoming less able to defend themselves. However, many individuals are obliged to leave their houses owing to circumstances such as poverty, a lack of fair economic possibilities, social prohibition, pervasive viciousness, oppression, violation of basic freedoms, armed conflict, xenophobia, and natural corruption. These are only few of the reasons why people are forced to leave their homes. Migration across International borders is a complicated topic that has far-reaching repercussions for our

economic, social, and physical well-being in today's interconnected globe. This is because migration has become increasingly commonplace. Movement enriches the lives of people in both the country in which they were born and the country in which they ultimately settle, and it is deeply connected with international ties, commercial activity, and social interaction. As a direct consequence of this, the current influx of people from all over the world has seen a significant uptick in its overall level.

The vast majority of people who move around the world do so legally, but irregular migration is a major source of anxiety for travellers and public concern about migration because it occurs when people try to avoid the system by using informal means, such as recruiting dealers or succumbing to dealers, because there are no lawful ways for them to cross borders legally[1]. This causes anxiety for migrants' and public concern about migration because irregular migration occurs when people try to avoid the system by using informal means, such as recruiting dealers or succumbing to dealers[2]. In many cases, untried explorers and innovative introductions are required to triumph over particular challenges. The denial of fundamental freedoms linked with migration, such as trafficking (particularly of women and children) and the discrimination of illegal migration as a modest source of labour for the underground economy, has received a lot of attention from the media in recent years. Due to this, people all across the world, including Government officials, bureaucrats, and regular citizens, began viewing migration as an urgent and important strategic matter[3].

Protecting the rights of migrants (both legal and unauthorized) is turning into an issue of growing significance in the global community. This shows the general acceptance of universal rights as well as the safety they provide for migrants traveling through the area. The beginning point is the question of whether or not law and order and universal ideas of common liberties are really possible, given the need for huge areas of strength[4]. According to the findings of the (International Organization for Migration (IOM), 2017 all people, regardless of whether or not they are in the process of relocating, have the right to have their fundamental

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[1] Baker, P., Gabrielatos,. "A useful methodological synergy? Combining critical discourse analysis and corpus linguistics to examine discourses of Refugees and Asylum Seekers in the UK Press*"* 19(3) *Cornell Journal of Law and Public Policy* 273-306 (2008).

[2] Ryszard Cholewinski, "The Human and Labor Rights of Migrants: Visions of Equality" 22 *Duke Journal of Constitutional Law & Public Policy*. 177 (2008).

[3] Vucetic S. "Democracies and international human rights: Why is there no place for migrant workers?" 11(4) *Georgetown Journal of Law & Public Policy* 403 (2007).

[4] Special Rapporteurship on Migrant Workers and their Families, established by the Inter American Commission on Human Rights (IACHR) in 1997, *available at* http://www.cidh.org/ Migrants/defaultmigrants.htm (Visited on August 29, 2023).

rights respected, protected, and honoured in accordance with the Universal Declaration of Human Rights (1948) and other important global fundamental rights regulations. The implementation of international treaties such as Convention relating to the Status of Refugees (1951)[5], the Protocol Relating to the Status of Refugees 1967, and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families will be helpful for refugees all around the world, victims of illegal exploitation and trafficking. Expanding global relocation administration through legitimate UN plans and by casual State-driven initiatives is one of the ways in which the international community is working to find solutions to the difficulties caused by migration.

The High-level Dialogue (HLD) on International Migration and Development, which took place in New York City in both 2013 and 2016, is illustrative of the efforts that have been made by the international community. In both the instances, there was a resounding consensus that the world nations have to come together to form a coalition in order to rein in migration and protect the rights of migrants. The New York Declaration for Refugees and Migrants was developed during the 2016 High-Level Dialogue to recognize that states have a shared duty to respond to enormous influxes of refugees and migrants in a caring, sensitive, compassionate, and people-centred manner. This was done in recognition of the fact that states have a shared obligation to respond to massive influxes of refugees and migrants. Abuse, exploitation, discrimination, separation, and other serious violations of the fundamental liberties of migrants are all too common, both during the move and in the destination country[6]. Despite these attempts, the data shows that the fundamental rights of migrants are routinely violated to the point that they describe the current global situation. The problem is not so much a lack of global instruments as it is a lack of coordinated effort on a worldwide scale to ensure that the ones that do exist are implemented properly. In other words, the problem is not so much a lack of global instruments as it is a lack of global effort[7].

The need to learn more about the regulations that safeguard the rights of migrants served as the impetus for this study. Specifically, the authors were interested in learning more about the legislations' reach, the challenges that migrants face, the frequency with which they

[5] United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, "Convention relating to the Status of Refugees", (July 1951) and "Protocol Relating to the Status of Refugees", (Jan. 1967).
[6] Adib, A., & Guerrier, Y. "The interlocking of gender with nationality, race, ethnicity and class: The narratives of women in hotel work" 10(4) *Harvard Human Rights Journal* 413 (2003).
[7] Australian Bureau of Statistics. *Labour force status and other characteristics of recent migrants* (Canberra, 2008).

migrate, and the potential solutions to these issues[8]. The focus of this analysis is on significant global accords that guarantee universal fundamental freedoms as well as specific global arrangements, dialogues that protect the freedoms of migrants.

II

The regulatory framework governing Global Migration

The concept of Global Governance has been defined as, "process in which the combined framework of legal norms and organizational structures regulate and shape how States act in response to International migration, addressing rights and responsibilities and promoting International cooperation including processes such as dialogues and initiatives that have taken place or that relate to governance at the global level"[9]. Freedom of movement and other fundamental rights rely heavily on the concept of administration, as migration is an abnormality involving numerous performers (states), it provides a required counterpoint to the notion of the board, which may be perceived as more concerned with regulating or at least preventing migration. Maintaining global standards and making allowances for the liberties of migrating individuals is vital in protecting the rights of migrant population

The second is to cultivate strategies based on evidence and an administration-wide strategy, and the third is to collaborate with other groups to address relocation. The goals are to improve the financial well-being of both migrants and society as a whole; assure safe, efficient, and dignified travel for everybody and to efficiently handle the adaptable elements of emergencies. The sovereignty of a state over its territory as well as its citizens is an important factor in international law for determining migration policy. There are substantial and procedural requirements that limit the use of State authority, but states have broad authorities in this area, including the ability to set down their own affirmation, residence, expulsion, and citizenship regulations. States have limited their capacity to regulate mobility by entering into settlements and agreements and accepting standard global legislation as an outgrowth of their authority and a pursuit of their preferences and commitments. Therefore, there is a significant backdrop of strength for concerted work on different matters directly related to passengers' shared liberties. The global refugee regime, labour migration, and counter-trafficking initiative provide as examples. As a result, even if a country's confirmation laws are broken, it still has a

[8] Colic-Peisker, V. "At Least You're the Right Colour': Identity and Social Inclusion of Bosnian Refugees in Australia" 31(4) *Journal of Ethnic and Migration Studies* 615 (2005).
[9] Cholewinski, R. "Human Rights of Migrants: The Dawn of a New Era?" 24 *Georgetown Immigration Law Journal* 615 (2010).

duty to provide protection to transient immigrants[10]. This means that not only does basic worldwide regulation and other sorts of regulation help to safeguard the freedoms of migrant population, but so do multilateral treaties, bilateral agreements and domestic laws[11].

2.1 International Legal Instruments relating to Human Rights of Migrant Population:

The rule of law's protections for human rights serves as the foundation for Governmental management of international migration. As a result, many nations have taken on the difficult task of guaranteeing that everyone, including migrants, enjoys the protections of International human rights law. Governments are obligated to protect, defend, and advance human rights in accordance with these laws. With the Universal Declaration of Human Rights as its cornerstone, the modern International human rights framework was established. "Human rights are global, indivisible, inalienable, and interdependent; these principles form the basis of the International human rights framework. Article 2 of the Universal Declaration of Human Rights recognizes the responsibility to respect and defend all people. Independence from tyranny and oppression. Articles 3, 4, 5, 11, 12, 13, 17–24 of the UDHR guarantee a wide range of rights, including freedom of expression, the right to a fair trial, protection of one's home, family, and correspondence from Government intrusion, and protection against torture and other cruel, inhuman, or degrading treatment or punishment. The International Covenant on Civil and Political Rights (1966) and the International Covenant on Economic, Social, and Cultural Rights (1966) were established to strive to make the UDHR's guarantees of rights a reality. The Universal Declaration of Human Rights and many other treaties together form an International Bill of Human Rights. In contrast to the UDHR, both covenants include legally obligatory articles that require the State Parties to protect these rights for all residents inside their borders."

The concept of non-discrimination is established as one of the basic rights that impose responsibilities on States by articles 2(1) of the ICCPR and 2(2) of the ICESCR. It must be noted that this idea does not ban all discrimination against those who were not born in the country. All forms of discrimination must adhere to the principles of fairness and impartiality if they are to be authorized under International human rights law. Potential beneficiaries extend beyond the populations of the countries that have ratified the treaties. All migrants, even those who cross the border illegally, are protected by these treaties and regulations. For instance,

[10] Delanty, G., Wodak, R., & Jones, P. (Eds.). "Migration, Identity, and Belonging". (University of Liverpool Press, 2008).
[11] Ruhs M. "Economic research and labour immigration policy" 24(3) *Oxford Review of Economic Policy* 404-427 (2008).

Article 12 of the ICCPR guarantees all lawfully present individuals the right to freely migrate and live anywhere on the territory of any state that recognizes that right. Nobody has the right to enter anybody else's nation, and everyone has the right to leave their own. "Article 22 of the Covenant allows Governments to impose restrictions that are established by law and are consistent with the other rights guaranteed by the Covenant in order to maintain national security, public order, public health or morals, or the rights and freedoms of others. This suggests that Governments cannot prevent people from leaving if they so choose.[12]

The laws relating to human rights reached at the regional level are often applicable on a global scale. One such regional convention is the 1950 European Convention on Human Rights. It is been called the first legally binding instrument to implement UDHR safeguards. Articles 2-12 of the African Charter on Human and Peoples' Rights (ACHPR, 1981) provide that all individuals of African heritage have the right to be treated equitably by the law." Everyone has the freedom to travel within and between countries, including their own, so long as they do it lawfully and within the context of maintaining national security and public order. The right of immigrants to escape deportation requires that judgments be handed down in conformity with the law. Including the right to judicial protection, Articles 1-26 of the American Convention on Human Rights (1969) guarantee civil and political rights to every person without exception[13]. However, the full realization of civil, political, economic, social, and cultural rights is yet to come and will only occur over time. After much struggle, migrants and other marginalized groups are now afforded legal protection due to the universal human rights enshrined in the international bill of rights & the other human rights treaties listed above. The further information on many treaties that safeguard refugees, migratory workers, and victims of human is provided here.

The treaties which are relevant for the study and status of the Human Rights of the migrant labourers are : (a) Convention relating to the Status of Refugees,1951 (b) Protocol Relating to the Status of Refugees, 1967, (c) International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, (ICRMW), 1990[14], (d) Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, 2000, and (e) Protocol Against the Smuggling of Migrants by Land, Sea and Air.

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[12] Hune S., Niessen J. "Ratifying the UN migrant workers' convention: Current difficulties and prospects" 12(4*) Netherlands Quarterly of Human Rights* 393-404. (1994).
[13] *Ibid.*
[14] International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, G.A. Res. 45/158, U.N. Doc. A/RES/45/158 (Dec. 18, 1990) [hereinafter ICRMW]

According to the United Nations Office of the High Commissioner for Refugees (2007), the primary international treaties intended to protect refugees are the 1951 Convention Relating to the Status of Refugee and its Protocol (Refugee Convention). Both of these documents were signed in 1951. Article 14 of the Universal Declaration of Human Rights, which was adopted in 1948 and serves as the foundation for the 1951 Convention, ensures that people have the right to seek asylum in another country in order to protect themselves from being persecuted. The geographical and temporal restraints of the Convention were only ever relaxed once, and that was in the year 1967. In spite of this, it is still commonly held that it is the fundamental building block of modern refugee support all over the world. The exclusions were removed in Article 1 (3) of the 1967 Protocol, and as a result, the Convention is now applicable in every single country in the globe. The Convention establishes a legal responsibility for Governments to protect refugees, offers a definition of the term "refugee," and outlines the rights that refugees are entitled to have.

It formalizes the responsibility of nations to do so on a worldwide basis by distinguishing between distinct sorts of migrants and establishing processes for protecting their rights. The Convention is overseen by the Office of the High Commissioner for Human Rights, which is also in charge of keeping track of whether or not it has been ratified. The Convention on Migration for Employment (Revised) (No. C097) (1949) was followed by the Convention (No. 143) (1975) on migration under abusive conditions and the promotion of equality of chance to be treated of migrant employees. Both of these conventions were designed to ensure that migrant workers were afforded the same opportunities as their native-born counterparts. When considered as a whole, these texts provide a "charter" for migrant workers and the families they leave behind that is acknowledged on a global scale. The Convention on Decent Work for Domestic Workers is the only one of the eight Fundamental Rights Conventions that were passed by the International Labour Organization in 2011 that protects migrants from being exploited.

Both the Universal Declaration of Human Rights, which was published in 1948, and the International Convention on the Rights of Migrant Workers, which was ratified in 1990, strive to protect the rights of those who are forced to migrate in order to find work. Migrant workers and their families, regardless of legal status or documentation, are afforded protection under the treaty while they are traveling. This comprises every stage of migration, beginning with the decision to leave, continuing through traveling to one's final destination, remaining there for the duration of one's work, and then returning to one's home country. The Convention No. 97 of the International Labour Organization addresses not only the guidelines for the

systematic recruitment of migrants, but also the rights of migrants to join trade unions and benefit from them, as well as the rights of all workers to engage in collective bargaining, pay their fair share of social security and employment taxes, and access the courts.

The Convention No. 143 of the International Labour Organization is a follow-up to Convention No. 97 that addresses the plight of migrants who are unsure of their legal status. All people living in a Member State, including those who join the country illegally, are entitled to full protection of their human rights. Migrant workers and their families who have obtained legal status are afforded protections against discrimination in employment, education, and housing, as well as freedom of association, freedom of the press, and freedom of religion. In 2011, the International Labour Organization (ILO) bought the Convention No. C189 on Decent Work for Domestic Workers which has the potential to protect migrant workers[15]. The Convention provides those domestic employees, regardless of their immigration status, enjoy the same fundamental rights in the workplace as all other workers. These rights include protection from discrimination and retaliation. Essential principles and rights that must be observed in the workplace include the opportunity to organize and bargain collectively, the right to fair working conditions and pay, and the right to fair working conditions and remuneration. Due to the challenges that migrants are confronted with, three newly established International legal instruments that were designed to preserve the rights of migrant workers have, for the most part, been ineffective or, at best, had very little influence in defending migrants in reality. The fact that the majority of countries with high incomes make the choice to disregard these requirements is the primary driver of this problem. As a direct consequence of this, the rights of migrant laborers have been grossly infringed[16].

The social issue of trafficking and smuggling of migrants are governed by two different international conventions. The United Nations Convention against Transnational Organized Crime (2000) has an annex called the Protocol to Prevent, Suppress, and Punish Trafficking in Persons, in Particular Women and Children. This protocol was created as an appendix to the convention. The purposes of the Protocol are as follows: (1) to protect and aid victims of such trafficking, with full respect for their human rights; (2) to prevent and combat trafficking in persons, with an emphasis on women and children; and (3) to enhance cooperation among States Parties. Despite these precautions, the number of victims who have been found and the

[15] The ILO estimates that of the estimated 214 million international migrants in 2010, approximately 105.4 million are economically active. Along with their families, economically active migrants account for nearly 90 percent of all international migrants.

[16] Acosta, Diego and Freier, Luisa "Turning the immigration policy paradox upside down? Populist liberalism and discursive gaps in South America" 49 (3) *ABA Journal of Labor & Employment Law* 659 (2015).

number of traffickers who have been arrested has increased over the past decade. The United Nations Convention against Transnational Organized Crime (2000) is supplemented with an agreement called the Protocol against the Smuggling of Migrants by Land, Sea, and Air (2000). In Article 2 of the Protocol, it is stated that the goal of the document is to prevent and fight migrant smuggling and to strengthen cooperation between the States that are parties to the document. This is done to ensure that victims of human trafficking among migrants maintain their inherent worth as human beings. As will be shown in the next paragraphs, one form of migration that is not legal is that of smuggled migrants, which involves smuggling of persons across international borders. On the other hand, the majority of people view this activity more as a business transaction than a dire condition[17].

III

Lack of legal safeguards for recognition and enforcement of Human Rights of the Migrant Population

Although migrants' rights have been the subject of global dialogues and consultations, as well as the United Nations Declaration of Human Rights and other general and specialized worldwide human rights covenants, they have not yet been adequately protected. This is despite the fact that migrants' rights have been a focus of international efforts. Challenges await migrants not just throughout the journey across international boundaries but also once they have established themselves in their new country of residence. In recent years, immigration enforcement efforts have taken precedence in border regions, which has put protections for human rights at danger. Migrants are often denied Consular Protection, their personal belongings are treated poorly after they have been kidnapped, and their freedom is restricted; this occurs without consideration for the principle that protects the best interests of minors or for any of the other international law norms that pertain to minors. In most cases, victims of human rights violations in border areas have few available legal avenues to pursue justice.

There is a pattern of protection gaps and barriers that migrants face, including criminalization, return, or detention; a lack of due process and open trial guarantees; difficulty obtaining goods such as medical care, information, and legal counsel; inadequate child protection systems; or deplorable living conditions in facilities, camps, or opportunistic shelters[18]. There is a rising tide of xenophobia, incitement to hate, and violence against migrants. This can be attributed to several factors, including a lack of access to justice and

[17] Flynn and Flynn (eds.). *Challenging Immigration Detention. Academics, Activists and Policy Makers (*Edward Elgar Publishing, 2017).
[18] Diego Acosta Arcarazo and Anja Wiesbrock (Eds.). *Global Migration: Myths and Realities* (Routledge 2015).

remedies, as well as an inadequate framework for independent human rights monitoring[19]. This runs entirely counter to international regulations that have been put in place to safeguard the legal rights of migrants.

Women who migrate often experience sexism, racism, and other forms of discrimination, the nature of which can vary based on a variety of factors, including their ethnicity, immigration status, and social standing, among other things. Since they have a lower likelihood of lawfully migrating women are more likely to cross the border illegally than men are due of this disparity. Many women and girls believe they have no alternative but to engage in human trafficking and smuggling when authorized crossing points are closed because they have nowhere else to go. Due to this, they have a significantly increased risk of being used inappropriately or abused. Those who are victims of human trafficking, refugees, or women who breach the laws while traveling are at a much-increased risk of having their human rights violated.[20] As they are forced to board vessels that are unsafe for travel or because they get lost along the way, many migrants end up being detained either on land or at sea.

The regulation and management of migration has not kept up with the expanding effect of international mobility, many migrants are subjected to substantial violations of their rights while they are in transit, when they arrive at their destination, and/or when they return home. Abuse and exploitation of migrants, along with other violations of their human rights, may continue for a significant amount of time after they have arrived in the country to which they are relocating[21]. Both legally and illegally migrating people experience difficulties with language barriers, difficulties in adjusting to new cultures, and antagonism. Migrants are frequently the target of predation by unscrupulous employers, landlords, and service providers who take advantage of the migrants' limited negotiation power and proficiency in foreign languages. Even though they have the right to receive these services under the law, many undocumented immigrants choose not to use them out of fear that they would be deported.

Due to the current state of affairs, many migrants who make it to their destination are at risk of being trafficked or exploited by third parties. Migrants are particularly susceptible to exploitation in low-wage economic sectors that are either poorly regulated or unregulated entirely, which is at the core of the problem with human rights. Many nations rely on low-cost migrant labour from other countries to supply their agricultural supplies, domestic services,

[19] Crush, J. "The dark side of democracy: migration, xenophobia and human rights in South Africa" 38(6) *Berkeley Journal of Employment and Labor Law* (2001).
[20] Cholewinski, R. *Migrant Workers in International Human Rights Law: Their Protection in Countries of employment* (Clarendon Press, Oxford. 1997).
[21] Chan, J. "The Right to Nationality as a Human Right" 12 *Human Rights Law Journal* (1991).

and "sex industry." Illegal immigrants and those who lack the necessary paperwork could represent a vast untapped pool of adaptable labour. Workers who do not possess the required paperwork are especially at risk since they are more likely to be employed in fields in which safety and health regulations are either not applicable or are not strictly implemented. According to the International Labour Organization and the International Confederation of Free Trade Unions, migrants and immigrants may have a difficult time joining unions or groups in order to preserve their rights and interests. This is one of the challenges that they face. Even in countries where deportation is not explicitly prohibited by law, the mere prospect of it or the actual practice of it can easily scare people and stymie organizing efforts, particularly among those who lack the legal authorization to be employed. Mistreatment of migrant workers can take many forms, including but not limited to: low salaries; hazardous working conditions; a lack of social support; a failure to recognize their rights to organize and work freely; xenophobia; and other forms of discrimination[22].

IV

Barriers to the enforcement of Human Rights by Migrant Population

One important challenge to providing adequate protection for migrants' human rights is the low rate at which existing human rights treaties are ratified, implemented, and enforced. It has taken a long time and been very challenging to extend them de facto to many underrepresented groups (especially migrants), and this process is far from complete. Only 55 countries have so far signed the International Convention on the safeguarding of the Rights of All Migrant Workers & their Families[23]. This puts into question the efficacy of this law in protecting migrant workers. Although migrants are not explicitly named, their inclusion is suggested by the use of the all-encompassing term everyone or every person in several parts of the human rights legislation, which include broad requirements for the protection of the people's human rights. This results in the routine and flagrant violation of migrant rights. Human rights treaties ratified on a worldwide scale are the only means through which migrants' rights may be fully articulated and protected.

Despite the many causes of migration, only some groups of migrants are protected by laws enacted expressly to do so. It is possible that existing legal frameworks do not sufficiently handle the motives of migrants whose numbers have increased due to climate change, the

[22] Ferris, E.G. "Beyond Borders; Refugees, Migrants and Human Rights in the Post-Cold War Era" 25 Comparative *Labor Law Journal & Policy Journal* (1993)
[23] Gowlland-Debbas (Ed.) *The Problem of Refugees in the Light of Contemporary International Law Issues,* (Springer Nature Publishing 2018)

changing character of conflict, and other crises. A subset of migration that does not fall under refugee protection regimes is "survival migration," which is defined as persons moving outside of their country of origin because of an existential threat to which they have had no access to a domestic remedy or resolution. Other examples are plans for regulating immigrant integration and the movement of people for the sake of starting or reuniting families.

States are not obligated to apply the aforementioned precise legislation for the protection of migrants since they are dispersed among a variety of texts and the declarations, dialogues, and consultations are not legally binding. This demonstrates the necessity for legislation that provides a minimum standard of protections to all migrants, regardless of their motivations for leaving their home country. Punishing migrants with prison time for illegally crossing the border is another huge obstacle. "Unfortunately, migrants accused of such offenses are routinely subjected to hurried criminal proceedings without legal representation, despite the fact that such protections are essential in criminal processes that may end in a loss of liberty[24]."

V

Migrant Workers as a contributory factor for Economic Development

Relocation has repercussions not just for the ability of an individual's family to get assistance from the Government, but also for the economy on both the local and national levels. There is a possibility that global migration will have positive effects, particularly on agricultural nations, such as lowering unemployment rates, accelerating rural development, improving infrastructure, reducing orientation inequality, and reducing population stress in urban centres. Nomadic individuals have the potential to improve their standard of living in a variety of ways, such as securing employment with higher wages, alleviating poverty for themselves and their families, increasing the amount of money available within their own families, being able to send settlements to loved ones, and so on[25].

The communities that migrants bring back with them are the most important and least debated aspect of the relationship between migration and development. This is despite the fact that migration has a variety of distinct economic, social, and political effects on both the countries that are exporting migrants and the countries that are receiving migrants. It is possible

[24] United Nations Commission on Human Rights *Report of the working group of inter-governmental experts on the human rights of migrants,* United Nations, Geneva, UN document E/CN.4/1999/80 (July 1999)
[25] *Ibid.*

that the access to knowledge provided by the diaspora and the skills developed by returning migrants will promote innovation, the board, and foundations in the home nation, while at the same time reducing the financial and data requirements for starting a global corporation. Emerging economies are at risk from a variety of concerns, including the loss of talent and brainpower, as well as a shrinking workforce in rural areas.

There is no guarantee that migration by oneself will result in a nice experience. The legislative principles of the country that protect the rights of its citizens to enter and remain in the country outside of the country give birth to the inadmissibility of a visitor from another country. Even while disobeying such restrictions is immoral behaviour, doing so does not automatically label a person as a criminal or deprive them of their rights. Freedom to develop one's ideas and freedom to choose one's place of residence are two of the most fundamental rights, according to humanitarian documents such as the Universal Declaration of Human Rights (1948) and the United Nations Sanction (1945). This fundamental possibility runs counter to the generally held belief that nations have the right to decide who may enter their borders, live within their borders, and find employment inside their borders[26].

It has also been stated that the costs associated with ensuring the safety of illegal (i.e., without documentation) migrants to the destination country are rising. It is the responsibility of the country that is housing illegal immigrants to ensure safety for those individuals, regardless of whether or not those individuals have broken the law. Due to the positive impact that illegal migrants have on the economies of the countries in which they settle, one may argue that the substantial expenditure of resources that is necessary to ensure the safety of illegal migrants is entirely warranted. In addition, migration of any kind, whether it be legal or illegal, extremely long-term or temporary, and migration for commercial goals, all assist the economy since they bring in workers when there is a shortage of workers in the local area.

Migration also often results in financial gains for the state. However, contrary to popular belief, the expenses that illegal employees impose on people much outweigh the small amount that they pay in expenditures, leaving meaningless the idea that their presence is acceptable since they cover charges. This is because the costs that illegal workers impose on people greatly outweigh the small amount that they pay[27]. A significant number of academics hold the view that collaborating with illegal employees is a financially risky action. That is to

[26] Cholewinski R. *Migrant workers in international human rights law: Their protection in countries of employment* (Clarendon Press 1997).
[27] United Nations High Commissioner for Refugees The *State of the World's refugees; A Humanitarian Agenda* (Oxford University Press, Oxford. 1997)

say, illegal employees not only break immigration laws, but they also fail to pay their fair part of the costs connected with the services they consume, putting an unfair financial burden on citizens who are legally entitled to receive compensation for the goods and services they receive[28].

VI

Recommendations for recognition and enforcement of Human Rights of Migrant Population

On the basis of this historical context, the following recommendations have been made for the future:

1. As part of a comprehensive immigration reform, all illegal immigrants who are now residing in have nations should be a. awarded legal status to maintain their existing status and local charge commitments and be allowed to lawfully work. This would support their existing status and local charge commitments. As a direct result of this, states and municipalities would be forced to shoulder a bigger proportion of the financial burden caused by unlawful migrants.
2. There must be halt to the efforts to extradite any unlawful settlers who have established themselves there for an extended period of time; however, this does not cover individuals who suddenly show up there. There must have the possibility of being punished in two different ways. The first option is an amnesty program that allows those who have been living and working illegally in the nation for an extended period of time to apply for citizenship and have their status legalized. The second proposal is to restrict the ability of legal permanent residents (LPRs) to sponsor relatives who were born outside of the country for LPR status (also known as a green card). These policies would legalize the status of currently-present illegal (unpredictable) settlers provided that they do not represent a threat to public health. In addition, they would strengthen the migration requirement to prevent future unlawful immigrants from entering new nations or exceeding visa constraints.
3. It is imperative that there be true border security and provincial commitment, as well as the maintenance of migration laws, and a change toward legal mobility in accordance with the standards of global common liberty principles and law and order. A global barrier and neutral states require a restricting mechanism that aims

[28] Hathaway O. A. "Do human rights treaties make a difference?" 111(8) *Yale Law Journal* 1935 (2002).

to incorporate the already existing agreements, declarations, exchanges, and conversations that safeguard all migrants. This is true regardless of the purpose for the expansion of these migrant populations.

4. The Concerns regarding migration and reconciliation, including but not limited to legal safety, control of the labour market, job evaluations, social security, health care, education, housing, and transportation, should be planned for and handled as part of any legislation that are enacted along these lines. It is anticipated that a range of measures will be taken in order to shield migrant workers, both male and female, from abusive behaviour and to provide working conditions in which individuals can have the opportunity to feel respected, appreciated, and safe. This becomes more appropriate at the present-day context, when massive economic uncertainty dominates the landscape.
5. Those who have signed the New York Declaration have agreed to recognize and protect the rights of all migrants, irrespective of their immigration status and regardless of where they may be in the world. To be more specific, countries have the responsibility to maintain, protect, and respect the human rights of all foreign nationals as well as tourists from other countries while they are within their borders. In the event that the promise is broken, there should be repercussions that follow.
6. It is the responsibility of states to provide that temporary residents have complete access to all necessary Government services as well as civil and political rights. Everyone has the right to a minimum standard of living, which is guaranteed by the International Covenant on Economic, Social, and Cultural Rights (ICESCR). This right includes receiving medical care, receiving an education, receiving retirement benefits, having a job that is secure and safe, and having a decent place to live. When a crisis strikes, a nation that has few resources has a moral obligation to protect the most vulnerable people. Nevertheless, it is preferable to accommodate migrant population also to the greatest extent possible. Migrant Workers should be able to safeguard their rights, including the right to record instances of abuse, such as separation, brutality, or contempt, without the fear of being identified, confiscated, or imprisoned for doing so[29].
7. Make unlimited mobility legal despite the fact that it puts people's liberty at jeopardy and accept the consequences for doing so. According to the Worldwide

[29] Cox A., Posner E. "The rights of migrant" *84 New York University Law Review (*2009).

Common Liberties Standard, the legislation can be altered to reflect this in a way that makes it so that entering or attempting to enter a nation in an unapproved manner or without legitimate documents, or overstaying a grant of stay, would not constitute a wrongdoing. This would make it such that entering or trying to enter a country in an unapproved manner or without genuine documentation. It is essential to make use of management approvals that are pertinent, fundamental, and grounded in common sense. This will help achieve the goals of the New York Declaration for Migration by facilitating the study of agreements that hinder cross-border growth.

8. An obligation made by member states to ensure that all refugees and migrants are treated with dignity and respect in accordance with International common freedoms regulation and any other applicable rules was reiterated by those states as a way to help them remember the responsibility that is theirs and to serve as a reminder of their commitment to that responsibility. In terms of the way they deal with international relocation, it demonstrates that states continue to be loyal to the core global freedoms agreements that lie beneath the surface. It is not an effective deterrent and, shockingly, it is even less acceptable as a measure of relocation management to punish persons who are on the move but have a precarious legal footing or who are unable to make numerous court appearances. This is because these people are unable to make regular court appearances. In the context of decisions for extradition, some examples of procedural protections that should be agreed upon and made available to passengers include the following: written proof produced in a language and manner suitable for an expulsion. The migrant workers must have access to information on the available treatments and the automatic suspense impact of an evacuation request. This access will remain in place until the case has been settled. In order to lessen the incentives for rule breaking and better meet the demands of their labour markets for atypical work, states need to establish more legal avenues for migration. This will allow them to better satisfy the demands of their labour markets. Due to this, the chances of random, disruptive motions occurring will be cut significantly. When regular routes of travel are easier to access, the incentives for countries of origin, transit, and final destination to engage in dealing with individuals, engaging in double dealing, and badly mistreating tourists will be reduced.

9. One of the many issues that needs to be addressed through global movement regulations or strategies is the establishment of legal channels for the relocation of people who are seeking work opportunities in various nations. Protecting the rights of migrants or their families, such as those who have been carried or dealt, is another one of the many issues that needs to be addressed through global movement regulations or strategies. To ensure low and consistent levels of migration, the legislatures of the states from which individuals move have a number of responsibilities that must be satisfied. This is due to the fact that a significant number of people decide to leave their homelands because they are dissatisfied with the rate at which their governments are meeting their promises to them[30]. It is anticipated that the Conditions of Origin will support the implementation of an all-encompassing economic plan. The expansion and improvement of the economy will assist in the reduction of poverty and make it simpler for the Government to provide for the needs of the population. We have a fighting chance of putting a stop to the action if we use this technique.

VII

Conclusion

According to the findings of this article, the legal and regulatory framework governing migrant population rights faces major difficulties in application. This is why various migratory patterns are sometimes likened to a patchwork quilt, in which elements from many scales (national, state, local, International) are pieced together. Furthermore, the story illustrates the persistent violation of rights of the migrant population. Increased state collaboration within international administration, together with strictly enforced, far-reaching regulation and harsh penalties for offenders, is desperately needed by the international community. In a similar vein, advanced countries maintain efficient bureaucracies to deal with international migration issues, which they do by developing and enforcing relocation policies and communicating with and learning from one another's knowledgeable relocation experts. Host countries are obligated to meet the needs of their guests. In the social Government support state model, the Government may provide for people who are unable to do so on their own account, whether they are young, elderly, disturbed, handicapped, or jobless. In principle, it is the State's duty to guarantee that all foundations and their administrations are operating lawfully and that all benefits are

[30] Borjas G. J. "The Economic benefits from Immigration" 9(2), *Journal of Economic Perspectives* 22 (1995).

distributed equitably in accordance with clearly stated eligibility conditions and rights. Effective implementation of the authoritative structures is of highest significance when benefits and services are not supplied directly by Government entities. Implementing the suggestions from this study may reduce the freedom of movement for migrant population, but increase their average speed of travel.

INVISIBLE TRADEMARK INFRINGEMENT AND THE GOOGLE ADWORDS CONUNDRUM: AN ANALYSIS FROM THE PERSPECTIVE OF INDIAN TRADEMARK LAW

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Abstract

Modern businesses such as online retailers, service providers, etc., adopt various strategies to a gain an edge over competitors both in online and physical space. One of such advertising strategies is the use of Google AdWords Program which requires advertisers to bid on or buy keywords so that their advertisement appears more prominently when any online user searches for such keywords.

This practice might lead to a situation where an advertiser tries to capitalize on the goodwill of a registered trademark buy using trademarked terms as keywords on the Google AdWords Program. It is possible that a user searched for a particular business entity and landed on the website of its competitors because the AdWords Program displayed the latter's website as the prominent result.

This can be understood by a single example. If Google enables a registered trademark 'Giga' to be used as keywords by the proprietor's competitors, advertisements of these competitors will be displayed prominently whenever a consumer searches for 'Giga'. It may divert consumer traffic to the competitors' website which was meant for Giga's proprietor and may also lead to consumer confusion regarding the origin of goods and services.

Since keyword search is a back-end functioning of a search engine, the issue of trademark infringement becomes a tricky one.

The authors, in this paper, have tried to comprehensively examine the functioning of the AdWords Program and the approach taken by courts across the globe in relation to invisible infringement of trademarks. The emerging jurisprudence of invisible infringement has been critically analysed with special reference to the Indian trademark law.

Keywords: Google AdWords, Invisible Infringement, Keyword, Search Engine, Trademark, Advertisement, Digital Marketing

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I

INTRODUCTION

We are in the modern era of competitive digital marketing where most businesses have their presence online. Movement of internet traffic is important as far as online marketing is concerned and businesses resort to various tactics and techniques to ensure that they get maximum hits. In this regard, Google AdWords and its algorithm play a huge role.

Online advertising system can simply be defined as a method by which a search engine company, say Google, allows internet users free access to the search engine by entering a keyword. The series of results that the users get in this way is categorized as "natural" or "organic" that is to say, selected by the search engine company on the basis of the relationship between searched terms and keywords. Simultaneously, search engines also set up a commercial advertising system (such as Google AdWords), which along with the natural results is designed to display paid advertisements as well.

Google Ads provide systematic and optimum campaigns for businesses. Before going into the trademark issue relating to AdWords/keywords, it is important for us to have a basic understand of how Google Ads work. It is an auction-based algorithm where businesses bid their keywords to get traffic on their websites.

While buying keywords, a Google Adwords customer selects either one word or multiple keywords that offer an appropriate description of the goods and services on the customer's webpage. Customer also has the option to determine certain key aspects of the keyword for effective audience targeting which may include time or geographical location. Competitors of a particular trademark might get displayed right next to the search results of a specific keyword type by a user.

Prior to 2004, Google's trademark usage policy had restrictions in place for using keywords protected under a trademark on the request of the trademark proprietor. However, in recent years, Google has relaxed the restrictions to a considerable extent. Google's customers are now allowed to purchase trademarked keywords notwithstanding the objections raised by the trademark owner. Though this relaxation significantly increases the risk of litigation but it is still compared nothing to the revenue generated through such keyword purchases.

Google also has keyword tool in place that allows the customers to browse for trademark-specific words and phrases that would help them to effectively target audience. But Google still block use of trademarks within ad text because it is proved through various studies that

allowing customers to freely use trademarks in these ad texts can lead to customer confusion during their web search.

1.1 Google Keyword Bidding

A bid basically means the amount of money a business is willing to pay for a single click on a particular keyword in Google Ads. The rank of display of such keywords depends on the amount that has been bid on those keywords. Hence, the keyword auction is a system that decides the placement of a particular keyword or an ad-term in Google Ads.[1]

Google conducts consultation with businesses about their bidding strategy but it is ultimately the proprietor's prerogative. There are two methods two to adjust the keyword bid – manual and automated.

Automated bid method is highly recommended as it allows Google to maximize the output as per the strategy and budget of the investor.

However, one thing needs to be kept in mind that the bid amount is not the only factor that determines the rank of ad display. Google, as a part of its ad strategy, cannot just give away the priority rank to the highest bidder. It must first validate the content of bidder and assess its legitimacy. In other words, Google must first make itself sure as to the veracity of the content of the page an ad is promoting.

There are three factors that determine the quality score of a particular keyword which can be summarized as follows[2]:

(1) **Ad Relevance**: It is the measurement of the proximity of a keyword with the message of the ad. It is the measure of alignment of the keyword with the message that the ad is trying to convey to the people.

(2) **Landing Page Experience**: This depends on the relevance of the contents of the landing page for the who people who arrive at it after clicking on a particular ad.

(3) **Expected Click-through Rate**: Of the three, this is the most complex factor. It is an estimate of how likely an ad is going to appear or be shown.

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[1] Wesley Clyde, *Understanding Keyword Bidding in Google Ads, available at* https://www.newbreedrevenue.com/blog/understanding-keyword-bidding (last visited on November 6, 2023)

[2] *How does Google Ads algorithm work*?, *available at* https://orbitalads.com/blog-en/how-does-google-ads-algorithm-work#:~:text=Google%20calculates%20the%20Ad%20Rank,on%20your%20keywords%20of%20interest. (last visited on September 6, 2023)

Based on the above factors, Google determines the quality score on the basis of which businesses can calibrate their keywords in order to increase the score.

II

USE OF TRADEMARKS AS KEYWORDS ON GOOGLE ADS

Of late, quite a few instances have been witnessed where businesses resorted to using trademarks as keywords on Google Ads Program. It gives rise to an intriguing discussion as it provides us with an interesting intersection of digital marketing, technology, and the law.

Legally speaking, a trademark in the form word, symbol, logo, etc. cannot be used by anyone during trade to promote their products or services as it is likely to create confusion in the minds of consumers.[3] Against such kind of activities, the proprietor can claim remedies by way of an infringement suit (in case of a registered trademark) or passing-off action (in case of an unregistered trademark).

However, the issue of business using trademarked words as keywords on Google Ads is quite a complex one. Such use cannot be said to be an outright infringement because the said use is invisible or unapparent in nature. Such a use by a non-user of the trademark could only distract or divert and not create actual confusion in consumer's mind. Even the Google Ads Rules state that it does not investigate the issue of trademarks being used as keywords.

2.1 Trend in the European Union (EU)

Through a series of judgments delivered by the Court of Justice of the European Union (CJEU), a norm has been established that that the use of third-party trademarks as a keyword on the Internet constitutes an infringement regarding the trademark rights of the actual proprietor of the mark.[4]

2.1.1 The European Commission's Guess Decision

The decision of the European Commission (EC) in Guess case is arguably the most comprehensive ruling as far as the ad keyword issue is concerned. EC has recently imposed a fine on Guess for restricting retailers from using its trademark on Google AdWords for the purpose of advertisement. This restriction was basically a part of a package deal entered into by Guess with the retailers. The deal included some other restrictions as well, such as, territorial boundaries and resale price maintenance. EC has categorically held these agreements as anti-

[3] *The use of trademarks and Google Adwords, available at* https://merx-ip.com/2018/03/the-use-of-trademarks-and-google-adwords/ (last visited on September 9, 2023)

[4] C-236/08, *Google France vs. Louis Vuitton*; C-237/08, *Google France vs. Viaticum*; and C-238 / 08, *Google France vs. Centre national de recherche en relations humaines;* C-324/09*, L'Oréal SA vs. eBay International AG;* C-323/09, *Interflora Inc. vs. Marks & Spencer plc*

competitive. EC had presumed such restrictions to be harmful irrespective of the market impact. It is widely argued by critics that the EC's opinion that the restrictions imposed by Guess is against the mandate of competition law is a flawed one and sets a bad precedent. It is further contended that EC's findings give rise to a level of uncertainty as to whether the imposition of AdWords restrictions by brand proprietors to protect their distinctiveness in certain other circumstances would be justified under the canons of competition law or not.

In case of a registered mark, the owner has the exclusive right to restrict the usage to ensure that the products or services covered by such mark originate only from the owner or a connected party in course of trade. This was laid down by the European Court of Justice in the Google France case.[5] However, this ruling does not apply to retailers who resell the original and authentic products of a trademark proprietor. Under the trademark law, retailers are allowed to use the brand while reselling the products or services. Producer and retailer may voluntarily devise different kinds of arrangements while signing a distribution agreement.

For example, under an exclusive distribution system, lawful restrictions can be imposed on a retailer in relation to active advertisement of a particular product or service on the internet in jurisdictions that are outside the agreed territorial boundaries. As per the European Commission's Guidelines on Vertical Restraints, the exclusive distribution principle also applies in case of making a payment to a search engine or an online advertisement provider to display advertisements to users in a pre-defined territory.

The intersection of intellectual property protection and competition law has again been explored in the Guess decision which was published on 25-01-2019. A fine to the tune of 39 million Euros was imposed on Guess. The entire issue was of Guess' online search advertising restriction. The European Commission firmly laid down that Guess, under its Selective Distribution System, had a market strategy in place that included selling online to customers directly and thereby competing in the market with its affiliated retailers. Inspection of Guess' internal documents disclosed that Guess intentionally imposed restrictions on retailers' online dealings in favour of its own e-commerce strategy. Let us look at some of the restrictions that formed part of the agreements that Guess made with its retailers[6]:

[5] *Google France Sarl, Google Inc vs. Louis Vuitton Malletier,* 2009C-236/08; *Google France vs. Viaticum Luteciel*, 2009C-237/08; *Google France vs. CNNRRH*, 2009C-238/08

[6] Jolling De Pree, Bart de Rijke and Helen Gornall, *AdWord Restrictions: Commission's Guess Decision Creates Uncertainty for Brand Owners*, De Brauw, Blackstone, Westbroek (February 14, 2019), *available at* https://www.debrauw.com/articles/adword-restrictions-commissions-guess-decision-creates-uncertainty-for-brand-owners (last visited on August 30, 2023)

(1) Restriction on the use of brand names and trademarks of Guess in Google AdWords;
(2) Restriction on selling the products on the internet without obtaining prior authorization from Guess;
(3) Restriction on selling the products to the customers who are located outside the pre-defined territories;
(4) Restriction on cross-selling among other authorized retailers and wholesalers; and
(5) Restriction on fixing retail prices of products independently of Guess.

The European Commission had taken into account each single restriction under the cartel prohibition and vertical block exemption instead of analyzing the entire package of restrictions. The findings of the European Commission can be summarized as follows[7]:

(1) The Commission held that by implementing online search advertising restriction, Guess wanted to reduce the pressure of competition by authorized retailers on its own retail activities online, and in light of this argument the Commission rejected Guess' claim that such restriction protected the brand image of Guess in its popular selective distribution system.

(2) The Commission held that Guess suppressed intra-brand competition between authorized retailers by imposing online search advertising restrictions to restrict the retailers from selling outside the agreed territory. It was held that the said arrangement by Guess resulted in partitioning of the market and was in clear violation of the cartel prohibition provision as provided under Article 101(1) of TFEU.

There are certain conditions where keyword search restrictions could be justified. We can summarize them as follows:

(1) To prevent sales in another territory, however, the retailer may be allowed to use the trademark in combination with a geographical indication or language of a particular territory;
(2) To allow a supplier to have a control over pre-sales information and services through its website to disseminate information among potential customers about the products particularly in cases where quality is a crucial factor differentiating brands in the marketplace.

The Commission considered only a standalone online search advertising restriction and made its decision instead of looking into the whole package of restrictions employed by Guess which

[7] *Ibid.*

made it practically impossible for an authorized retailer of Guess to have an online presence. Therefore, the Commission has given rise to uncertainty about the ability to exempt such a restriction on a standalone basis. Moreover, the Commission has left little room for itself or even some other national authority regulating competition to assess a narrower restriction, such as a restriction to use a trademark in online search advertising in isolation, but which otherwise allows retailers to use the trademark in combination with other search terms or without restrictions offline.

Through its Guess judgment, the Commission has created uncertainty among global brand owners in relation to AdWords restrictions and exemptions and their interplay with competition law.

Under the laid down principles in the EU trademark jurisprudence, registered trademarks can be used as keywords to display sponsored links based on the condition that such use does not discredit the function indicating the place of origin of the brand or does not color its economic function in a bad light. It should also be made clear to the common internet user that the advertised products or services do not belong to the actual brand-owner or do not come from any other economically linked organization. In case such a thing is not made apparent, it must be clearly indicated under what circumstance products of a specific brand are being sold through an unofficial website.

The proprietor of a reputed and established trademark has the right to prevent a competitor from using a keyword similar for the purpose of advertising his products or services without the consent of the said proprietor or any person authorized by him in this regard. When a competitor's advertisement discredits or undermines the distinctive character of a trademark, it amounts to trademark dilution. Thus, an advertisement based on a keyword that undermines or blurs the distinctive quality of a renowned brand, amounts to dilution of such brand.[8]

However, a trademark proprietor does not have the right to prohibit any advertisement exhibited by her competitors using keywords corresponding to such trademark that present the consumers with an alternative to the proprietor's products or services and do not actually lead to any blurring or undermining the reputation or distinctive character of the trademark.

It is a very common practice in the world of online marketing to use a phrase or word that is registered as a trademark to attract internet traffic and potential customers. As discussed above, European Court of Justice has laid down that using a keyword that is identical to an already

[8] *Merck & Co., Inc., et al. v. Mediplan Health Consulting, Inc., d/b/a RxNorth.com*, 425 F.Supp.2d 402 (S.D.N.Y., March 30, 2006)

registered trademark is not the same as using the mark for business purpose. The court also laid down that the said practice is not in violation of the Trademark Directive, 1989, which contained a principle that using a registered trademark as keywords without a reasonable cause is detrimental to the distinctive nature of the mark. Though the 1989 Trademark Directive has been replaced by the Trademark Directive, 2008, but the principle still holds good.

2.2 Developments in other Jurisdictions

Several judgments relating to improper, illegitimate, or inappropriate use of trademarks as AdWords by businesses have been reported in the Argentine jurisdiction. Recently, in a case[9], the Argentine Court of Appeals injuncted the defendants from using the plaintiffs' trademarks "Veraz" and "Organización Veraz" in their publicity ads until the final judgment.

While in Mexico, the Federal Administrative Court ruled no person shall be allowed to incorporate any confusing signs on the internet and obtain registration in respect to the same afterwards with due permission of the registered proprietor of the said signs. Further, such an act that causes confusion among the internet users constitutes unfair competition. As per a proposal presented by the Mexican Institute of Industrial Property, use of a trademark on the internet by registering it as a domain name is deemed to be an inappropriate use and an act of unfair competition. So, the issue is whether the use of competitor's trademark as AdWords would also constitute an act of unfair competition. To address this issue, we must address the functional aspect of both trademark law and competition law – while the former gives a subjective right over an intangible property the latter regulates the activities of traders and ensures that the competition arises in the market on its own merits and is not manipulated through unethical behaviors.

In Andean Community[10], the use and commercialization of a trademark LATAM as an AdWord was in question. Plaintiff's appeal was rejected by the Division with Jurisdiction over Intellectual Property of the Court of the National Institute for the Defense of Free Competition and the Protection of Intellectual Property (INDECOPI) and denied the use of precautionary measures laid down by the European Courts in a case of alleged infringing use of trademarks as AdWords by a third party. INDECOPI held that there was a need to conduct an exhaustive

[9] *Organizacion Veraz v. Open Discovery S.A.* (May 28, 2009 – Federal Court of Appeals, Civil and Commercial Matters)

[10] Andean Community (*Comunidad Andina*) is a free trade area created with the aim of establishing a customs union of the South-American countries of Bolivia, Columbia, Ecuador and Peru). The associate members of the Andean Community include Argentina, Brazil, Chile, Paraguay and Uruguay.

analysis of the arguments presented by both the parties in order to come to a conclusion regarding the infringing use and commercialization of LATAM.

2.3 Exceptions in Some Countries

Google has recently updated its AdWords policy that is in line with the ruling of the European Court of Justice. It carries a prescribed format in which a trademark proprietor can submit his grievance in relation to the use of his mark as keywords in Google AdWords. In furtherance of such grievances, Google can investigate the matter and restrict the usage of the mark in the ads.

However, there are some countries that allow for authorized use of trademarks in the text of advertisements. Such a use is allowed when the components or the product is the prime option available on the main landing page. Further, if the proprietor of the mark has himself authorized the use, other people may also use it in ads. The process of approval is simple. One just needs to fill out and submit a Google Authorization Form. Countries where this exception exists are Canada, United States, Australia, United Kingdom, and New Zealand.

III

INVISIBLE INFRINGEMENT AND INDIAN TRADEMARK LAW

A common practice in digital marketing is to use a registered or a well-known trademark as metatags. Metatags are basically those words which are a part of a website's HTML programming source code. This practice is widely termed as keyword advertising and is aimed at deriving undue benefits out of the reputation of an established brand. It is also known as invisible infringement of trademark. The Indian trademark jurisprudence has been evolving continuously and there have been several notable judgments in relation to keyword advertising and invisible trademark infringement. We will delve into some vitally important cases in this regard.[11]

3.1 Bharat Matrimony – Google Case

It is notably the earliest case in India relating to the issue of invisible infringement.[12] Back in 2009, Bharat Matrimony (plaintiff) filed an infringement suit against Google and others (defendants), alleging that Google made it possible for Bharat Matrimony's competitors to use its trademarked name as a keyword in its internet searches. Further, it was contended by the plaintiff that the defendants permitted third parties to purchase keywords that automatically generate sponsored links whenever any user types phrases like matrimony in their online

[11] *Invisible Use of Third-Party Trademarks Considered Trademark Infringement*, *available at* https://www.azbpartners.com/bank/invisible-use-of-third-party-trademarks-considered-trademark-infringement/ (last visited on September 3, 2023)

[12] *Consim Info Pvt. Ltd. v. Google India Pvt. Ltd. and Ors.* 2013 (54) PTC 578 (Mad)

search. As per the plaintiff, this feature was used unfairly by its competitors and that it was a clear infringement of their trademark-related rights.

The defendants, on the other hand, argued that 'Bharat Matrimony' constituted a combination of generic and descriptive terms and thus, any company cannot claim exclusivity over the same. It was also contented by the defendant the use of 'Bharat Matrimony' as a keyword suggestion on its search engine doesn't constitute 'use in the course of trade' which is an essential requirement for setting up an infringement claim under Section 29 of the Trade Marks Act, 1999.

The Madras High Court laid down that defendants' use of plaintiff's trademark in their keyword search constituted 'use in ordinary course of trade. However, the Court did not find the defendants responsible for trademark infringement. It was observed by the court that intent of the defendants behind using the plaintiff's trademark was not to divert the online traffic but was only used in a descriptive sense. The court, while deciding in favor of the defendants, observed that if it restrained the defendants from using those keywords then it would result in an unfair monopoly over a very common term 'matrimony'.

One might argue that the entire business model of Google Ads runs on the concept of earning profits through advertisements and not sale. Therefore, where registered trademarks are used as a tool for advertising products of competitors on popular search engines like Google, appropriate responsibility must be attached to such search engines.

The matter was referred to the Division Bench which looked at the issue from a different perspective. It observed that registration of trademark of was prima facie evidence of its validity, and the defendants' act was indeed an infringement of plaintiff's trademark right. Following this, Google had informed the court that its AdWord policy had been amended and that they will not permit the use of plaintiff's trademark as keyword in online searched pending the conclusion of the trial court proceedings.

Bharat Matrimony had also approached the Supreme Court of India in search of relief. The Supreme Court granted interim injunction in favor Bharat Matrimony and asked the trial court to conclude the proceedings within six months.

As a part of their strategy of protecting their market, Bharat Matrimony approached the Competition Commission of India (CCI) alleging that Google's AdWord Policy was in violation Section 4(2)(a)(i) of the Competition Act, 2002. Bharat Matrimony claimed that Google was abusing its dominant position in the online search market by offering for sale trademark registered terms as keywords to the competitors for targeted advertising campaigns thereby allowing the opportunity to the competitors to enjoy a free ride off the goodwill and

brand value of a trademark proprietor, and killing fair competition. It was observed the CCI that Google AdWord Policy was indeed a sound policy that ensure free and fair competition in the digital space. This case was widely known as the starting point of CCI's intervention in the digital space.

3.2 Matrimony.com – Kalyan Jewellers Case

In March 2020, the Madras High Court again took up the issue of trademark infringement through Google AdWords.[13] In this case, the court refused to grant injunction to the plaintiff. The order was in line of the Bharat Matrimony case wherein the court held that the term 'matrimony' was generic and descriptive and cannot be infringed if used as keyword in an online search.

Currently, Google's AdWord Policy is clear in its functioning. While trademarked terms cannot be used as text or title, nothing prevents trademarks from being used as keywords to trigger a competitor's advertisement. It was further contended by Google that restraining advertisers other trademark owners from using trademarked keywords affects competition and gives rise to ad-space monopoly to trademarked terms.

3.3 Agarwal Packers – Google Case

Another matter relating to the issue of trademark infringement through use of trademarked terms as keywords on Google Ads came into light in 2017.[14]

DRS Logistics (plaintiffs and owner of Agarwal Packers and Movers) approached the Delhi High Court seeking an interim injunction against Google and Just Dial. They sought to refrain Google and Just Dial from using or allowing third parties to use their registered trademark in ad titles. The plaintiffs basically wanted to restrain the defendants from offering their trademarked terms to advertisers, including plaintiffs' competitors. Plaintiffs' contention may be summarized as follows:

(1) Use of the trademark 'Agarwal Packers and Movers' as an AdWords led to the diversion of targeted customers from the plaintiffs' website to that of their competitors'.

(2) Such diversion online traffic resulted in confusion among potential consumers.

The defendants' contentions can be summed up as follows:

(1) Keywords used in the AdWords program were merely back-end aspect and are invisible to the consumers.

[13] *Matrimony.com Limited v. Kalyan Jewellers India Limited*, 2020 (82) PTC 1 (Mad)
[14] *M/s DRS Logistics Pvt. Ltd. and Anr. v. Google India Pvt. Ltd. and Ors.*, CS/COMM 1/2017

(2) Use of a trademark as keyword does not constitute 'use' within the meaning of the Trade Marks Act, 1999, and hence, does not constitute trademark infringement.

The Delhi High Court rejected the arguments raised by the defendants. The court based its assertion on the existing jurisprudence pertaining to the of trademarks as metatags,[15] and held that use of trademarks as keywords, albeit invisible, can constitute trademark infringement under the Indian trademark law.[16]

The Court also made it clear in its order that invisible use of trademark intended to divert the traffic from trademark proprietors' website to that of the advertiser's or infringer's will prima facie constitute 'use' of trademark within the meaning of Section 29 of the Trade Marks Act, 1999.

The defendants' maintained their contention that even if using a trademarked term as keywords constituted 'use' of trademark as per the Indian trademark law, it did not constitute trademark infringement or passing-off since there was no consumer confusion. The court, while rejecting this contention, held that ads generated by third-party were likely to cause uncertainty as to the sources of the advertised products or services.

The following statement of the court firmly establishes its stance:

> *"Once the search engine has been made aware of a registered trademark in a certain jurisdiction, it is incumbent upon the search engine to exercise a higher duty of care to ensure protection of the goodwill attached to such trademark."*

The court took an aggressive approach in this case. It observed that Google's Ad policy was discriminatory in nature. It was put forth by the court that in the European Union, Google conducts an investigation into the use of keywords while the same is not the case in India that shows a serious lack of policy parity.

While the court dropped the petitions, it urged Google to investigate the case at hand and if it was found that the use of keywords amounted to trademark infringement to immediately cease such ads.

This case strengthened the jurisprudence of invisible trademark infringement in India. The Delhi High Court's ruling in this matter has established a very strong precedent for various pending lawsuits against Google over its AdWords across the country.

[15] *Hamdard Foundation & Ors v. Hussain Dalal & Ors.*, CS(OS) No.1225/2013
[16] *Amway India Enterprises & Ors. v. 1MG Technologies & Ors.*, CS (OS) 410/2018

However, in opinion of the authors, it could be a matter of deliberation that where a trademark's registration status is under question because of being too generic or descriptive on the spectrum of distinctiveness, whether the approach undertaken by the court in DRS Logistics would still hold solid ground.

3.4 MakeMyTrip – Booking.com Case

The same jurisprudence continued in this case.[17] The plaintiff (MakeMyTrip) contended that whenever a search of the term 'makemytrip' is carried out on Google, the first results that is displayed is that of defendants' (Booking.com) website. Justice Pratibha M. Singh of the Delhi High Court, through her ad interim injunction order, restricted the defendants from using plaintiffs' trademark on Google AdWords Program as it amounted to trademark infringement. There have been more instances of invisible infringement wherein the Court has taken a pro-plaintiff stance and has come down hard upon Google and its Ad Policy.

Recently, a trademark infringement action was brough by the renowned EdTech upGrad against Scaler and demanded INR 3 crore in damages.[18] The Delhi High Court decided in favor of upGrad and prevented Scaler from bidding on trademarks belonging to upGrad on the Google AdWords Program. In another case,[19] the Delhi High Court, while granting an injunction in favor of the plaintiffs, held that the defendants' use of plaintiffs' trademark "POLICY BAZAAR" as keyword in the Google Ad search constituted trademark infringement under Section 29 of the Trade Marks Act, 1999.

Therefore, the authors strongly believe that the stance of the Indian judiciary is abundantly clear as far as invisible trademark infringement through keywords and metatags is concerned.

IV

CONCLUSION

In our discussion, we have found out some glaring differences between the jurisprudential approach of India and other countries (particularly including the United States, the United Kingdom, and the European Union). The approach of courts of these jurisdictions towards Google AdWords Program also varies significantly. The realm of digital marketing is extremely competitive and trans-national in nature. On one hand, we see that Google gets leverage from European Courts, while on the other hand, we see a strong pro-plaintiff stance of the Indian courts.

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[17] *MakeMyTrip India Pvt. Ltd. v. Booking.com B.V. & Ors.*, CS (COMM) 268/2022

[18] See https://www.businessinsider.in/advertising/brands/news/upgrad-files-trademark-infringement-suit-against-scaler-demands-rs-3-crore-in-damages/articleshow/88025376.cms (last visited on November 5, 2022)

[19] *Policybazaar Insurance Web Aggregator & Anr. v. Acko General Insurance Ltd. & Ors.*, CS (COMM) 260/2019

A general overview of the international jurisprudence revealed that over fifty lawsuits relating to invisible infringement through Google AdWords Program were filed in the last decade, and majority of them resulted in an outcome that was unfavorable to the plaintiffs. This is a testimony to the pro-commerce approach of these courts. While it is evident from the case laws in India that Indian courts are very much determined to protect the interests of a registered trademark proprietor in the digital space. However, the most relevant judicial stand must lie somewhere in the middle of these two approaches. The interpretation of the word "use" in regards to keywords search on Google Ads must be done in a way to ensure synergy between the interests of business entities and the trademark law of a given jurisdiction.

A fine balance must be maintained to ensure that fair competition in the market is not stifled by providing overprotection to a brand especially in an era where online retailing and digital marketing have become the major source of profit for many upcoming entrepreneurs and proprietors.

ANIMAL TESTING & CRUELTY: A CRITICAL ANALYSIS OF INDIAN LEGAL SCENARIO

Siddhartha Misra*
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Abstract

In this paper an attempt has been made to analyse the current scenario animal cruelty due to pharmaceutical testing and how far the existing legislations to prevent cruelty against animals have been successful and what changes do we need to have so that, we can bring a balance and rescue the animals from suffering. Role of Committee for the Purpose of Control and Supervision of Experiments on Animals has been discussed and reviewed along with the Prevention of Cruelty to Animals (PCA) Act 1960. Also, alternative methods and legislative changes that can be inculcated have been discussed in the recommendation part of the paper.

Keywords: *Cruelty, Pharmaceutical Testing of Animals, Prevention of Cruelty to Animals (PCA) Act 1960, CPCSEA*

I

Introduction

Ideally, animals are as much entitled to the possession and ownership of earth and its resources as human beings. Accordingly the animals' should also be entitled to a just and fair treatment as cohabitants of mother earth along with the men. However, perhaps the nature has not been as kind to animals as it has been to human beings, for it blessed the latter with the capacity to think, reason and communicate. Notwithstanding, the value of animals to the survival of life on earth and to the well-being of the humans cannot be underestimated. Therefore, the 'animal welfare' is, no doubt, the concern of mankind which should earnestly find out ways of reducing sufferings of animals. Mahatma Gandhi had rightly said, "you can tell how great a country is by looking at how it treats its animals."[1] The concern for welfare of animals in India is not new rather the history of the movement to protect the rights of animals goes back to the 3rd century, when Asoka made it clear that no animals could be killed in his kingdom. However, with passage of time such morals have taken a dip and suffering of animals by men has increased manifold in numerous ways.

One of the commonest instances of animal suffering is large scale animal testing of industrial products. The safety and potency of many pharmaceutical and cosmetic products are currently

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[1]Gandhi, Mahatma, and Mohandas Karamchand Gandhi. *The essential writings*. Oxford University Press, 2008.

tested on animals around the world. Thousands of animals, such as rabbits, rats, mice and monkeys, are routinely subjected to chemical and other testing and procedures being confined in substandard conditions that result in their physical and mental suffering. Such testing and procedures often result out of profit motive of business enterprises and goes on unabated due to the helplessness of the voiceless animals that cannot raise voice against this cruel treatment. The truth about human brutality towards these voiceless creatures, which includes everything from wearing their skin made cloths to sleeping with their fur as blankets and testing and experimenting on them, speaks volumes of their inhumane treatment by human beings.

Despite the existence of numerous animal welfare laws, there is still requirement of clarifying animal rights and it is imperative that the distinction between animal welfare and animals' rights be made clear.[2] Like human rights of men, which are inalienable, animals too have inherent rights. In modern India, animal welfare is enshrined in the Constitution as a fundamental duty, under the Prevention of Cruelty to Animals Act of 1960, and the Wildlife Protection Act of 1972, both of which are national statutes, while state legislatures have also passed laws protecting cattle and prohibiting their slaughter. Indian Penal Code (IPC) 1860, punishes cruel acts such as killing, poisoning, maiming or rendering a creature which are punishable under sections 428 and 429 of the IPC.[3] Many similar laws have been enacted in response to changing circumstances to prevent unnecessary animal suffering. Additionally, general concepts such as tort law and constitutional law provide additional protections for animals. Thus, it is clear that legislative intent has been towards preventing cruelty against the animals. However, the question still remains that how far the same is true when it comes to economic considerations and use of animals for the purpose of medical science.

II

Animal Testing

The term "animal testing" refers to procedures performed on living animals for purposes of research into basic biology and diseases, assessing the effectiveness of new medicinal products, and testing the human health and/or environmental safety of consumer and industry products such as cosmetics, household cleaners, food additives, pharmaceuticals and industrial/agro-chemicals.[4] It is important to note that all procedures, even those classified as "mild," have the

[2]Festing, Simon, and Robin Wilkinson. "The ethics of animal research: talking point on the use of animals in scientific research." *EMBO reports* 8, no. 6 (2007): 526-530.
[3]Mishra, Archit, and Neha Choudhary. "Lack of Implementation of Animal Laws in India: A Critical Appraisal." *Supremo Amicus* 11 (2019): 91.
[4]Narayana, P. S., D. Varalakshmi, T. Pullaiah, and KRS Sambasiva Rao, *Research methodology in Zoology*, Scientific Publishers, 2018.

potential to cause the animals' physical as well as psychological distress and suffering. Often the procedures can cause a great deal of suffering. Most animals are killed at the end of an experiment, but some may be re-used in subsequent experiments. Some of the common animal procedures[5]include, forced chemical exposure in toxicity testing, which can include oral force-feeding, forced inhalation, skin or injection into the abdomen, muscle, etc; exposure to drugs, chemicals or infectious disease at levels that cause illness, pain and distress, or death, genetic manipulation, e.g., addition or "knocking out" of one or more genes.

Some of the methods of experimentation and testing include:

1. Ear-notching and tail-clipping for identification.
2. Short periods of physical restraint for observation or examination.
3. Prolonged periods of physical restraint.
4. Food and water deprivation.
5. Surgical procedures followed by recovery.
6. Infliction of wounds, burns and other injuries to study healing.
7. Infliction of pain to study its physiology and treatment.
8. Behavioural experiments designed to cause distress, e.g., electric shock or forced swimming.
9. Other manipulations to create "animal models" of human diseases ranging from cancer to stroke to depression
10. Killing by carbon dioxide asphyxiation, neck-breaking, decapitation, or other means

As the first country in South Asia to ban cosmetics testing on animals, India received high praise from commentators all over the world. Animal testing, on the other hand, becomes more problematic when it comes to drug testing, particularly for life-saving medications. Animal testing for pharmaceuticals has never been completely outlawed anywhere in the world. As far as animal experimentation is concerned, Indian law is governed by the Prevention of Cruelty to Animals (PCA) Act 1960 and its accompanying regulations. The Act regulates the experimentation of animals in its fourth section. The Act does not make it unlawful to conduct experiments on animals for the purpose of advancing by the new discovery of physiological knowledge or knowledge to combat disease, regardless of whether the experiment is being

[5]Smith, David, David Anderson, Anne-Dominique Degryse, Carla Bol, Ana Criado, Alessia Ferrara, Nuno Henrique Franco et al., "Classification and reporting of severity experienced by animals used in scientific procedures: FELASA/ECLAM/ESLAV Working Group report", *Laboratory animals* 52, no. 1_suppl (2018): 5-57.

conducted on humans, animals, or plants.[6] It foresees the establishment of a Committee for the Control and Supervision of Experiments carried out on animals by the Central Government, which will even have the authority to Prohibit Experiments if it becomes essential .To do so in accordance with the PCA, a statutory body has been established to exercise control and supervision over scientific research involving animals. Its primary purpose is to ensure that animals are used in research in an ethical manner.

In addition to this, it oversees the housing and feeding facilities, as well as anyone and any business that engages in animal testing and ensures that they are properly registered. This body also has the authority to direct individuals, organisations, and governments not to carry out specific experiments. To contradict any decision made by this body, on the other hand, will result in a fine of only Rs 200. In the same vein, a person who violates the PCA is subject to punishment, but the nature and severity of the punishment have not been determined. From the foregoing, therefore, it is inferable that the PCA is essentially powerless. We will discuss in-depth about these legislations in upcoming sections.

III

Ethical Considerations against Animal Testing

Throughout the history of biomedical research, animal use has been extensive. Aristotle (384 – 322 BC) and Erasistratus (304 – 258 BC) were two early Greek physician-scientists who used live animals in their experiments. A great Greek physician, Galen (129–199 AD), conducted animal experiments to improve knowledge about anatomical, physiological, pathological, and pharmacological aspects of health and disease. As an Arab physician in twelfth-century Moorish Spain, Ibn Zuhr (Avenzoar) introduced animal testing as an experimental method for testing surgical procedures before they could be applied to human patients.[7]

But people had mixed feelings about the relationship between humans and animals at this time. In the early Middle Ages, the saints are depicted as having a close friendship with animals. The priests were opposed to animal abuse and the exploitation of animals. Saint Benedict (480-547) had preached that religious people should abstain from eating animal products. Early Christians held that animals differed significantly from humans and considered any animal behaviour resembling human behaviour to be a miracle in itself. St. Francis of Assisi (1181-1226) is credited with preaching against animal cruelty in the 12th century. According to a folk tale, he

[6]Vasbinder, Mary Ann, and Paul Locke, "Introduction: Global laws, regulations, and standards for animals in research." *ILAR Journal* 57, no. 3 (2016) 261-265.

[7]Hajar, Rachel, "Animal testing and medicine", *Heart Views: the Official Journal of the Gulf Heart Association* 12, no. 1 (2011) 42.

persuaded a wolf to stop preying on people in the countryside. Isaiah, the prophet, also forbade the practise of animal sacrifice.[8]

Animal rights and animal welfare organisations have been outspoken in their opposition to the use of animals in biomedical research in recent years. It has been made more "humane" by laws in several countries. For centuries, people have debated the morality of animal testing. "Common sense without conscience may lead to crime, but conscience without common sense may lead to folly, which is the handmaiden of crime," wrote Theodore Roosevelt in the nineteenth century.[9] Jeremy Bentham's writings[10] are where the humane treatment principle for animals comes from (1748-1832).

Even though humans and animals have many differences, Bentham argued that both can suffer. He argues that moral consideration of animals is not dependent on the ability to speak or reason, but only on the ability to suffer. Bentham's position is that rationality and the ability to use language are as irrelevant to moral foundations as skin colour or the number of fingers. Bentham argues that animals are entitled to moral treatment because they share our capacity to feel pain and pleasure. He rejects the views of those (like Descartes) who believe that animals are not sentient and therefore have no interests. According to him, animals do have interests, but those interests are not morally significant because animals lack the characteristics other than sentience, as held by some (like Kant).

Bentham believes that our treatment of animals is morally important because they are sentient creatures and we have direct responsibilities to them. Because of this historic disagreement, many legal reformers have been influenced by Bentham, and the legal systems of the United Kingdom, the United States, and other countries have attempted to incorporate the humane treatment principle into their animal welfare legislations. Bentham's views were supported by John Stuart Mill (1806-1873), who was opposed to cruelty to animals. Both German and British courts began punishing animal cruelty at the end of the nineteenth century. It was not directly based on the Benthamite criterion of moral consideration for animals, but rather on the belief that cruel treatment of other creatures diminishes our direct obligation to God.[11]

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[8]Rowan, Andrew N., and Alan M. Goldberg, "Perspectives on alternatives to current animal testing techniques in preclinical toxicology", *Annual Review of Pharmacology and Toxicology* 25, no. 1 (1985) 225-247.

[9]Mahowald, Mark W, "An Odyssey with Animals: A Veterinarian's Reflections on the Animal Rights & Welfare Debate", (2009) 1396-1397.

[10]Kniess, Johannes, "Bentham on animal welfare", *British Journal for the History of Philosophy* 27, no. 3 (2019) 556-572.

[11]Szűcs, E., R. Geers, T. Jezierski, E. N. Sossidou, and D. M. Broom, "Animal welfare in different human cultures, traditions and religious faiths", *Asian-Australasian Journal of Animal Sciences* 25, no. 11 (2012) 1499.

Critics argue that "human benefits do not justify animal harm. Furthermore, many people believe that because animals are seen as inferior to humans and as having fundamentally different brains, no human-relevant findings can be drawn from animal research studies. People who believe in animal testing argue that experiments on animals are necessary for the advancement of medical and biological research. Toxicology and hygiene can only be determined by conducting experiments on animals, according to Claude Bernard, known as the father of physiology."[12] Except for differences in degree, these substances have the same effects on humans and animals. Using animals in scientific research became standard practise under Bernard's tutelage.

In the twentieth century, the use of animals for drug testing became increasingly important. Sulfanilamide was first prepared in 1937 by a pharmaceutical company in the United States using diethylene glycol (DEG) as a solvent and dubbed "Elixir Sulfanilamide." However, the company's chief pharmacist and chemist were completely unaware of the dangers of DEG to human beings. He dissolved the sulfa drug in DEG and added raspberry flavouring, and the company marketed the product. There were over a hundred people who died as a result of the preparation going wrong. There was no use of animals in this study. It was the result of the public outcry sparked by this incident and other similar tragedies that the 1938 Federal Food, Drug and Cosmetic Act was passed.[13]

IV

Rational behind Abolition of Animal Testing

It is no doubt unethical to profit from the use of animals in experimental research, and as animals have been a great source of entertainment and companionship for humans for millennia, it would be unjust to punish them for their generosity.

Even before they are enrolled in a protocol, animals in laboratories go through lives of deprivation, isolation, stress, trauma, and depression. When one considers the specialised needs of each species, this fact becomes even more apparent. Many primates, such as rhesus macaques and baboons, remain with their families and troops for many years or even their entire lives in the wild. Grooming, foraging and building nests for sleep are just some of the activities they engage in together every day. In contrast, primates are often kept in isolation in

[12]Festing, Simon, and Robin Wilkinson, "The ethics of animal research: talking point on the use of animals in scientific research", *EMBO reports* 8, no. 6 (2007): 526-530.

[13]Ericsson, Aaron C., Marcus J. Crim, and Craig L. Franklin, "A brief history of animal modeling", *Missouri Medicine* 110, no. 3 (2013) 201.

laboratory cages. Most labs do not allow social interactions, provide family groups or companions, or allow for nests or surfaces softer than metal.[14]

Animals, as living creatures, also have certain rights, and these rights are violated when they are used in testing and research. Forced to ingest toxins that can cause permanent harm or even death, they are deprived of their freedom. In the same way that a human would have been tested for a study, their meek nature is exploited and tests are conducted without their consent. It's also unethical because their fundamental and other rights are violated as a result of this practise.[15]To make matters worse, the pain and anguish they endure is unimaginably cruel. It is cruel and inhuman to put them through that, as there is no greater benefit to humans or a necessity to protect human health, especially, when it comes to cosmetic testing. When animals are used in various experiments and studies, they often suffer or die as a result of the conditions they are placed in. Excruciating agony and death are inflicted on all experimental animals.

Moreover, the new-age technology has made animal testing unnecessary because of emergence of new and alternatives testing methods and techniques. Animal experimentation could be justified if certain ethical and humane measures are taken to ensure animal safety. Almost 92 out of 100 experiments fail on humans because, obviously, what works on animals doesn't necessarily work on humans. Since no rational person would willingly turn into a helpless guinea pig, doctors and scientists argue that it is necessary to carry out such risky and (in most cases) useless experiments on animals that don't have the capacity to express their dissent.[16]

V

Legislative Measures to Control Testing on Animals

Although the use of animals in research has been hotly contested, numerous experiments involving animals have enabled us to gain a better understanding of modern medicine and science in general. It's no secret that animal experimentation and the act of conducting research go hand in hand. The three R's—replacement, reduction, and refinement—are the universal doctrine of Russell and Burch (1959), which governs the use of animals in research at the national and international levels. These laws, however, echo the same universal doctrine and ethical review processes that promote good animal welfare practises and ensure that the use of

[14]European Commission, "The welfare of non-human primates used in research, Report of the Scientific Committee of Animal Health and Animal Welfare, Adopted on 17 December 2002" (2002).

[15]Kramer, Lisa A., and Ray Greek, "Human stakeholders and the use of animals in drug development", *Business and Society Review* 123, no. 1 (2018) 3-58.

[16]Akhtar, Aysha, "The flaws and human harms of animal experimentation", *Cambridge Quarterly of Healthcare Ethics* 24, no. 4 (2015) 407-419.

animals at the designated establishment is justified, are, therefore, mandatory for all animal research institutions. [17]

Because animal welfare is considered "experimentation with responsibilities," there are numerous national and international organisations that oversee the conduct of animal experiments. Over a hundred countries are members of the International Committee for Laboratory Animal Science (ICLAS), which has established international guidelines for experimental procedures and researcher training. ICLAS is currently based in the United States. In India, the Indian National Science Academy published guidelines in 1992, which were revised in 2000. Many laws, particularly in the United Kingdom, the Netherlands, and the United States, have been put in place in some countries. Sadly, most of these laws do not include any mention of rehabilitation, which is a major problem. Some public and private sectors in India, including the National Centre for Laboratory Animal Science (NCLAS) in Hyderabad and the Central Drug Research Institute (CDRI), have excellent animal laboratory services. Despite the large number of facilities, many are in worn out condition and are in need of repair.[18]

Animal research in India has had a humane and ethical foundation since the Prevention of Cruelty to Animals Act of 1960 was passed. To ensure that animals are not subjected to unnecessary pain or suffering at any stage of their experimentation, including before, during, or after it, this law condemns any form of injustice toward animals. For this reason, the Committee for Control and Supervision of Experiments on Animals was established (CPCSEA).

However, CPCSEA was not operational until 1999. Aside from being able to discuss animal-related issues, the CPCSEA has the power to create rules to protect animal rights, such as "Breeding of and Experiments on Animals (Control and Supervision) Rules 1998." The CPCSEA has been rescuing animals from laboratories for many years[19]. They've also made sure that animals are treated humanely in laboratories, developed guidelines for the responsible use of animals, and, perhaps most importantly, introduced the idea of a fourth R: "rehabilitation" for retired laboratory animals. For this reason, post-experiment animal care

[17]Rogozea, Liliana, Daniela Eugenia Diaconescu, Eleonora Antoaoneta Dinu, Oana Badea, Daniela Popa, Oana Andreescu, and Florin Gabriel Leasu, "Biomedical Research Ethics." *Rom J Morphol Embryol* 55, no. 2 Suppl (2014) 719-722.

[18]Vasbinder, Mary Ann, and Paul Locke, "Introduction: Global laws, regulations, and standards for animals in research," *ILAR Journal* 57, no. 3 (2016) 261-265.

[19]Mandal, Jharna, and Subhash Chandra Parija, "Ethics of involving animals in research", *Tropical Parasitology* 3, no. 1 (2013) 4.

and rehabilitation costs are included in research costs mandated by the CPCSEA, which is a mandatory national policy for those who use experimental animals.

Nominations and representatives from national regulatory agencies, such as the Ministry of Health and Family Welfare, the Ministry of Environment and Forests, national academic and research councils, research institutes, eminent scientists, and animal welfare groups, are included in the committee. Organizations like PETA and the SPCA are among the many non-governmental organisations that work tirelessly to ensure that animals are treated humanely in their care. Animals' rights must be respected and humane treatment must be considered when using them in research.

5.1. 4R Principles

The 4R principles of Replacement, Reduction, Refinement, and Rehabilitation are emphasised by the committee. Main objective of the Committee is to ensure that animals are used properly in science. Using the 4R concepts (Substitution, Elimination, Refinement and Restoration) is encouraged by the Committee. This is why the committee's goal is to objectively evaluate and recommend whenever possible, complementary and effective approaches and models. It aids in the reduction and refinement of the number of animals used in testing by encouraging the use of innovative strategies to alleviate pain and suffering. Following experiments with established criteria on the website, it recommends that large animals (above rabbits) be rehabilitated. Additionally, it is critical that everyone work together to improve the current 4Rs by strengthening the conditions for substitution, elimination, refining, and recovery, as well as developing more and better terminology and changing administrative policies where possible. The 4 R's refer to replacement, reduction, refinement and rehabilitation.[20]

5.1.1. Replacement: Refer to methods which avoid or replace the use of animals and these can be absolute by using in silico (computer based programs) and in vitro methods (human volunteers) or relative replacement (e.g., invertebrates, such as fruit flies and nematode worms).

5.1.2. Reduction: Refers to methods, which allow researchers to obtain comparable levels of information from fewer animals, thereby minimizing animal use (e.g. improved experimental design, modern imaging techniques, sharing data, and resources).

[20]Hubrecht, Robert C., and Elizabeth Carter, "The 3Rs and humane experimental technique: implementing change", *Animals* 9, no. 10 (2019) 754.

5.1.3. Refinement: Refers to improvements in procedures, which minimize pain, suffering and distress and allow general improvement of animal welfare (e.g., improvement in the living conditions of research animals, anesthesia and analgesia for pain relief).

5.1.4. Rehabilitation: Refers to after-care and/or rehabilitation of animals post-experimentation. All researchers using experimental animals have a moral responsibility to the animals after use. Rehabilitation of experimental animals is a legal requirement in India.

Animal testing is necessary in developing countries like India, but this cannot be justified by causing unnecessary suffering to animals. The government should start a number of campaigns and services to raise public awareness about animal plight and suffering. Educating people about the fact that animals cannot be subjected to any form of cruelty or suffering should be a top priority. Projects and campaigns can be introduced in greater numbers.

VI

Examining the Prevention of Cruelty to Animals Act, 1960

The Act for the Prevention of Cruelty to Animals, which was passed in 1960 on December 26, 1960, was enacted in order to prevent the infliction of unnecessary pain or suffering on animals and, to amend the law relating to the prevention of cruelty to animals. This act was passed in order to fulfil both of these goals. This act addresses issues relating to the welfare of animals as well as the rules and regulations that must be adhered to when carrying out experiments on animals. The Act discusses the procedure in both Sections 14 and 20, which are consecutively numbered.[21] The act does not make it illegal to conduct experiments on animals if the experiments are conducted for the purpose of advancing by new discovery of physiological knowledge or of knowledge which will be useful for saving or prolonging life or alleviating suffering or for combating any disease, of any living being.

The government, on the advice of the Animal Welfare Board, may, by notification in the Official Gazette, constitute a committee as it may think fit to appoint thereto, for the purpose of controlling and supervising experiments on animals. In doing so, the government can control and supervise the experiments. Prior to, in the course of, or after the performance of experiments on animals, it is the responsibility of the committee to take any and all measures necessary to guarantee that the animals will not be made to endure any unnecessary pain or suffering.

[21]Qadri, Syed SYH, and Subbaraya G. Ramachandra, "Laws, regulations, and guidelines governing research animal care and use in India", In *Laboratory animals*, pp. 237-261, Academic Press, 2018.

6.1 The Committee for the Purpose of Control and Supervisory Experiments on Animals

Under the Prevention of Cruelty to Animals Act, 1960 (PCA Act), in India, animal experimentation is currently regulated by the amended Acts of 1998 and 2001. CPCSEA (the Committee for the Purpose of Control and Supervisory Experiments on Animals) is responsible for enforcing this rule. The PCA Act, Section 15(1), established it in 1964 as a statutory body under the Ministry of the Environment, Forests and Climate Change.[22] The Institutional Animal Ethics Committee, comprised of members and nominees appointed by this committee, oversees the registration of facilities and the housing, feeding, and conduct of experimental procedures in animals at the institution. The Committee's primary goal is to ensure that animals are used in research only when absolutely necessary.

Following the amendment of the PCA in 1982, the committee was granted the power to have jurisdiction over the registration of persons or institutions that carried out experiments on animals, in addition to other information that was required to be provided to the Committee by the persons and institutions that carried out the experiments. This authority was granted to the committee. The committee has its own set of rules that are designed to protect the following things:[23]

• That the person in charge of the institution where these experiments are being performed is responsible for the institution; and where the experiments are being performed outside of an institution by individuals, such individuals are qualified in that behalf, and they have the completely their responsibility.

• That the experiments are performed with due care and humanity, and that to the greatest extent possible, experiments involving operations are performed while the subject is under the influence of an anaesthetic.

The Committee has the authority to conduct inspections of any institution that performs experiments on animals at any time that it deems to be reasonable in order to ensure that the regulations are followed. If the Committee discovers that the regulations are not being followed, after providing the person or institution with an opportunity to be heard, the Committee may prohibit the person or institution from performing any such experiments either for a specified period of time or indefinitely, or the Committee may allow the person or institution to continue performing such experiments. If a person or an institution disobeys the

[22]Vijayasekhar, R. D., and Rayappa Sarah Mahimanjali, "A Socio-Legal Perspective of the Prevention of Cruelty to Animals Act, 1960 with Special Reference to Jallikattu, Bullock Cart Races and Cockfights", *IUP Law Review* 8, no. 4 (2018).

[23]CPCSEA Guidelines, Available at: https://cpcsea.nic.in/WriteReadData/userfiles/file/SOP_CPCSEA_inner_page.pdf.

order that was decided upon by the committee, then they will be punished as follows: the person will be subject to a fine that can go up to two hundred rupees, and if the disobedience or breach of condition took place in an institution, then the person in charge of the institution will be considered to be guilty of the offence and will be punished accordingly.

Under guidelines provided on the regulation of scientific experiments on animals by the Ministry of Environment and Forests in June 2007, certain ethical principles have been mentioned which the CPCSEA is supposed to follow. These principles are:[24]

Principle 1: Purpose behind carrying out the experiments

i. Experiments on animals might only be carried for the following reasons:
ii. To facilitate discovery in the field of physiology for advancement;
iii. To procure knowledge that would come in use for improving, saving or prolonging human life;
iv. To gain significantly in ensuring well-being of the people; and
v. To find a cure for a disease. The disease might be of plants, animals or human beings.

Principle 2: Avoid animal experimentation if an alternative exists

i. The animals that are least sentient i.e. capable of feeling emotions majorly pain should be used for animal experimentation. Wherever there was an alternative present and still, the experiment was conducted on an animal, then proper reasoning needs to be given as to what led to the decision of using the animals for experimentation.

Principle 3: Appropriate sedation and anaesthesia

Priority needs to be given to the object of causing minimum pain to the animal during an experiment. The animal is to be treated at par with human beings when it comes to deciding on inflicting pain. Investigators need to follow a humane approach and if the pain caused by an experiment would last more than a moment or a short span then anaesthesia or appropriate sedation needs to be rendered to the animal. Animals are to be treated with the utmost compassion and kindness.

Principle 4: Euthanasia, when allowed?

After the experiment is conducted on the animal then after experiment procedures and welfare also needs to be rendered to the animal. The investigator is responsible for the rehabilitation and aftercare of the animal. The investigator can decide on administrating euthanasia only in the following cases:

[24]Ibid.

i. When the animal is rendered physically or mentally incapable of functioning or perceiving the environment or loses its sentience.
ii. If the animal is undergoing excruciating long pangs of pain after undergoing an experimental procedure.
iii. If human lives get endangered due to non-termination of animals that underwent an experiment.
iv. This principle has been incorporated in Rule 9(cc) of the Breeding of and Experimentation on Animals (Control and Supervision) Rules, 1998.

Principle 5: Suitable living conditions

The living conditions for the animals should be suitable for their species. For biomedical purposes, the animals must be handled by a trained scientist or veterinarian.

6.1.1. Functions of CPCSEA

Functions of CPCSEA include registrations of establishments that conduct experiments on animals or breed; selection of nominee for Institutional Animal Ethics Committee of the registered institutions; based on reports of inspections conducted by CPCSEA, approving animal facilities shown fit for housing animals by the report; granting permission for experiments that involve animals; recommending the import of animals for usage in experiments; and taking action in case of violation by establishments.

6.2 Breeding of and Experiments on Animals (Control and Supervision) Rules, 1998 (enforced in 1982)

The rules embody the principles and make registration with CPCSEA a necessity amongst other essentials. The important rules have been discussed below.[25]'Experiment' as defined under Rule 2 (e) of the Rules states that an experiment is either a programme or a project that involves the usage of animals. Such usage is undertaken for acquiring knowledge related to biology, physiology, ethology or is of a chemical or physical nature. Under the rules, the animals can be further used:

i. In the production of reagents (a substance or mixture used in other reactions);
ii. In the production of antibodies or antigens;
iii. For procedure related to diagnostics and testing;
iv. For establishing transgenic stock;
v. For saving and alleviating lives;

[25]The Breeding of and Experiments on Animals (Control & Supervision) Amendment Rules, 2001, Available at: https://cpcsea.nic.in/WriteReadData/userfiles/file/2001.pdf.

vi. In an activity that will result in a significant gain in the well being of people of the country;

vii. In an activity that will help come up with a cure for a disease related to human beings, plants or animals; and

viii. Any activity taken up for the fulfilment of any of the aforementioned objects would qualify as an 'experiment'.

Rule 10 concerning procurement of animals states that "Animals for experimentation can be acquired from 'registered' breeders. Alternative legal sources are to be used in the case of non-availability of registered breeders. In case of procurement from legal sources, written permission from the appropriate authority should have been sought. If there is a replacement method that enables non-use of an animal, then it should be given the priority. In cases of despite there being the availability of a replacement technique, the animal is used for an experiment, the decision of going ahead with the usage of the animal be strongly justified."

Rule 14 on Suspension of Registration of an Establishment by CPCSEA specifies when can CPCSEA suspend or revoke a registration of an establishment:

i. If in the report of the Member Secretary or the authorized officer it is proved that the rules are not being followed by the establishment or a breeder and the directions given by the Committee to rectify such violation, haven't been implemented, then the Committee decides on suspending or revoking the registration of the establishment.

ii. The breeder or the establishment should be allowed to be heard.

iii. No minor violation should result in revocation or suspension. Minor violation is an act that doesn't have any direct effect on the well-being of the animal or that doesn't lead to pain, suffering, any other adverse health disorder and death of the animal.

6.3 Institutional Animal Ethics Committee (IAEC)

In exercising the rule-making power given under sections 17(1), 17(1A), and 17(2) of the PCA Act, the CPCSEA enacted the Breeding of and Experiments on Animals (Control and Supervision) Rules 1998. These rules were further amended in 2001 and 2006. Rule 3 of this regulation provides that every establishment involved in the breeding of animals for trade and performing experiments on animals must be registered by CPCSEA. This committee was formed under Rule 13 of the Breeding of and Experiments on Animals (Control and Supervision) Rules 1998. The committee comprises a group of people whose main function is to overlook the functions of the establishment during an experiment. For experimentation on large animals, the case is forwarded to CPCSEA. The committee is constituted for 3 years. At

the time when the registration is renewed, it is supposed to be reconstituted. Quorum is of 6 members.

Other than having scientists from various fields, IAEC should comprise a socially aware member and a nominee of CPCSEA. It is necessary that a CPCSEA nominee must be present during meetings. The Chairperson conducts the meetings, and for certain situations, an alternate chairperson is appointed. The member secretary of the committee is responsible for preparing the minutes of the meeting and the copy of the minutes is to be sent to the Member Secretary of CPCSEA within 15 days otherwise the meeting doesn't get considered as valid.

It is mandatory to constitute an Institutional Animal Ethics Committee (IAEC) at the time of registration, which is comprised of a group of people who have been nominated by CPCSEA for controlling and supervising animal experiments in the establishment (Fig 2). Furthermore, rule 8 states that any registered institution must obtain permission from the IAEC and, in the case of large animals, the CPCSEA before acquiring an animal or performing experiments on an animal. While granting permission, the IAEC or CPCSEA can impose conditions to ensure that animals do not suffer unnecessarily before, during, or after experiments .

According to rule 9(g), "experiments shall not be conducted for the sole purpose of attaining or retaining manual skill except in schools, colleges, and programmes duly scrutinised and permitted in registered establishments by the CPCSEA." No experiment shall be repeated without prior justification under Rule 9(k) if the outcome is already conclusively known. Rules 9(g) and 9(k) provide the basis for prohibiting the use of animals for teaching purposes as they are mainly performed to acquire animal experimentation skills and these experiments yield already known results.

6.4 Other Rules & Regulations By Institutions

As per Section 17(d) of the PCA Act, many educational regulatory bodies came forward with stricter regulations to tackle the issue of animal abuse for study in educational institutions. They include:

i. University Grants Commission

In order to ensure compliance with the Wild Life (Protection) Act, 1972, and the PCA Act, 1960, the University Grants Commission (UGC) imposed a ban on the use of animals in

research, dissection, and coursework for undergraduate and postgraduate students in colleges that teach zoology, physiology, anatomy, and related subjects.[26]

ii. Medical Council of India

When it came to the MCI's position on the issue, the guidelines that were issued by the organisation were ambiguous and even contradictory. In their circular, they had stated that they would keep up with the clinical aspects of teaching while at the same time establishing central or departmental animal houses. Because of this misunderstanding, every college that falls under the MCI has been required to obtain a CPCSEA licence in order to maintain the animal houses.[27]

iii. Pharmacy Council of India

The notification that was issued by the PCI was very similar to the notification that was issued by the UGC. It had been declared that educational institutions are required to stop the dissection of animals in the graduation level, and a blanket ban was placed on the utilisation of animals for any and all purposes. In addition, the clarification helped to uphold the notion that experiments on animals could be carried out so long as they were preceded by an exhaustive investigational review and followed by the acquisition of a permit from the Institutional Animals Ethics Committee.[28]

VII

Conclusion

It is amusing to think that despite many efforts that have been made, India still ignores the industries such as agriculture, science, medicine, and technology in which animals are used and mistreated. In 2013, the Bureau of Indian Standards put a stop to the practise of using animals in the cosmetics industry. Instead, artificial methods and computer simulations were to be used to fulfil the requirements for animal testing. In 2016, the ban was extended to include the industries of soap and detergent. The Uttarakhand High Court "extended the rights of a living person to the animal kingdom" when it ruled in 2018 that animals are legal entities and that they have "extended the rights of a living person to the animal kingdom" in the case of *Narayan Dutt Bhatt vs. the Union of India*[29]. It is apparent that the evolving jurisprudence implies that animals, just like people, should not be subjected to inhumane treatment, just as it

[26]University Grants Commission, "Guidelines for discontinuation of dissection and animal experimentation in zoology/life sciences in a phased manner" (2014).
[27]PETA, Medical Council to Universities: Use Non-Animal Teaching Methods (PETA India, 13th May 2014).
[28]PETA, 'Pharmacy Council of India Bans Animal Experimentation' (PETA India, 5th September 2014).
[29]Narayan Dutt Bhatt v. Union of India [2018] SCC Utt 645.

is unacceptable to subject a human being to such treatment. This judgement has, in some way, contributed to the reduction of abusive practises with regard to the welfare and protection of animals.

Even though laws have been made to protect animals' interests and rights, authorities are still abusing animals used as test subjects by testing on them and hurting them. This happens even though laws have been made to protect animals' rights and interests. Even though it is against the law in India to test cosmetics and soaps on animals, this does not mean that the rules for importing cruelty-free products are always followed. In China, testing on animals is still done for cosmetics, medicine, and scientific research, which kills many of the animals used in the tests. India still buys things from China. Also, international businesses with operations in India still test on animals, and so do some schools in India that give degrees in medicine and the sciences. Also, cruel things are still done to animals in the towns, hamlets, and smaller cities. Now, lawmakers should pay attention not only to Indian companies, but also to multinational companies that do business in India, as well as to those who let the wrongdoers get away with it.

Not only should the person who did the crime be punished, but so should those who knew about it but didn't say anything or report it. It's long past time for the market and society to take a number of important, all-encompassing steps that are required by law. The Pharmacy Council of India (PCI) told all pharmacy schools in India in 2003 that they should use CAL software instead of doing animal experiments in the classroom. The JIPMER in Pondicherry has come up with the EX-PHARM Blank CD as a replacement for these animal tests. This CD has been made especially to replace animals in first-year courses in Medicine, Pharmacology, and Veterinary Science. In 2011, the University Grants Commission made it illegal to dissect or experiment on living animals in Zoology and other life science classes.

In April 2016, Union Minister Menaka Gandhi and the Indian Ministry of Health and Family Welfare worked together to make a law that makes it illegal to test any household products made in India on animals. In a similar way, the European Union, Norway, and Israel have stopped using animals to test cosmetics. But the Chinese government requires that certain cosmetics made in China, like hair dye and sunscreen, be tested on animals. It also requires that all cosmetics brought into the country be tested on animals. Animal testing is a bad thing that has to be done, and it can't be stopped. Because of this, the ethics committees' laws and rules should be strictly followed. In order for a country to grow as a whole, it is important to look at this issue from a more global perspective.

7.1 Suggestion for use of Alternative Methods

There are four methods that can be utilised in place of the use of animals in research that is conducted in the areas of biomedical science and behavioural science. These methods include reduction of pain or experimental insult, substitution of laboratory mammals for domestic or companion mammals, and substitution of cold-blooded for warm-blooded vertebrates; also includes substitution of laboratory mammals for domestic or companion mammals; also includes reduction of pain or experimental insult; also includes substitution of laboratory mammals for domestic or companion mammals.[30]

Use of living systems, such as in vitro cultures (of cells, tissues, and organs), embryos, invertebrates, microorganisms, and plants; a reduction in the number of animals that are used in experiments; improved experimental design and statistical analyses of the results; a reduction in the number of animals that are used in experiments. a reduction in the number of animals that are used in experiments. a reduction in the number of animals that are used in experiments.[31]

The utilisation of non-living systems as a replacement method, such as chemical or physical systems, in addition to the utilisation of computer simulations as a tool. There is a growing demand for health research at the moment, and it is anticipated that advancements in medical care will continue to be dependent on experiments conducted on animals. Currently, there is a growing demand for health research. There are a lot of questions that need to be answered in regards to diseases and conditions such as stem cells and gene therapy, both of which are in the beginning stages of their respective development. It is not yet time to give up on finding a vaccine and other treatment options for HIV/AIDS and malaria. This work must continue. In order to combat diseases like Alzheimer's and Parkinson's, which are currently in the spotlight, there is a significant amount of work that needs to be done regarding the creation of more effective prophylactic vaccines and curative drugs. This work needs to be done in order to combat diseases like Alzheimer's and Parkinson's.

In recent years, there has been a growing danger posed by remerging diseases that were once eradicated, such as leprosy and tuberculosis, as well as newly discovered diseases, such as SARS, chikungunya, dengue, and others. This is in addition to the danger posed by newly discovered diseases, such as SARS, chikungunya, and others. The pandemic of coronavirus

[30]Jain, Manshu, RituGilotra, and Jitendra Mital, "Global trends of animal ethics and scientific research", *Journal of Medicinal Plants* 5, no. 2 (2017) 96-105.

[31]Balls, Michael, "Replacement of animal procedures: alternatives in research, education and testing", *Laboratory animals* 28, no. 3 (1994) 193-211.

disease 2019 (COVID-19), which is caused by the SARS-CoV-2 virus, poses an extraordinary threat not only to the public health all over the world, but also to the socioeconomic stability, food security, and other social goods that are important to society. Recombinant technology has led to the development of a number of new drugs and vaccines of a new generation, and many more are currently in the process of being developed to combat the challenges posed by these diseases and many others. Recombinant technology has also been instrumental in the development of many other drugs and vaccines of a new generation.

It is common practise to make complementary use of alternative methods in addition to conducting experiments on animals, and this occurs in research that is both fundamental and application-oriented. Research on the various molecular and cellular components of life processes is carried out in vitro or in silico to the greatest extent that is practically possible. However, scientific research on animals is indispensable if we are to gain a deeper comprehension of the intricate interconnections that are found throughout the organism as a whole. We have the ability to significantly reduce the number of animals used for testing as well as the amount of stress that is inflicted on them if we take into careful consideration and select the most appropriate methods. This is something that we are able to do if we choose the most appropriate methods.

7.2 Recommendations

More severe punishments should be imposed on those who break the rules. The fines imposed by the various acts designed to safeguard the rights of animals are hardly substantial. If a person "(o) promotes or participates in any shooting match or competition wherein animals are released from captivity for the purpose of such shooting: he shall be punishable (in the case of a first offence, with a fine which shall not be less than ten rupees but which may extend to fifty rupees and in the case of a second or subsequent offence committed within ten years, with imprisonment for a term not exceeding one year or with both such fine and imprisonment.)"

A violation of this section carries a fine of only ten rupees. This would apply, for example, to the killing of an animal for entertainment. The state of affairs does not change at any point in the performance. Section 13(b) of the 1940 Drugs and Cosmetics Act reads as follows: "(b) any drug or cosmetic other than a drug or cosmetic referred to in clause (a), the import of which is prohibited under section 10, or any rule made under this Chapter, shall be punished with imprisonment for a term which may extend to six months, or with fine which extend to five thousand rupees, or both."

A fine of up to one thousand and five hundred rupees may be imposed. Therefore, there is no effective deterrence, and the law is not being effectively implemented, because the amount of

the fine is so low. Therefore, the higher fine will not only ensure that the law is being properly implemented, but will also increase the level of deterrence.

Chapter 2 of the Act for the Prevention of Cruelty to Animals, enacted in 1960, includes a provision for the creation of an Animal Welfare Board of India. This Board first convened in 1962 and has continued to function continuously since then. The Board has implemented several policies and procedures to reduce animal suffering and stop the violation of animals' rights brought on by human activities like animal experimentation. The Animal Welfare Act was written in 2011 to address animal rights abuses, with help from the Animal Welfare Board of India. In India, the Animal Welfare Board has had a lot of success in bettering animal conditions. Accordingly, they propose setting up a system that will be headed by the Animal Welfare Board of India. The Animal Welfare Board of India will be better able to monitor the building in this way.

As an alternative to maintaining the State Welfare Board System, which has been shown to be ineffective, the Animal Welfare Board of India may decide to establish District level Animal Welfare Associations. This would be done in place of continuing with the current system. These Associations will be statutory bodies, and they will have perpetual succession built into their structures. The AWBI will be in charge of putting them all together in their final form. The members will consist of two to three representatives from each non-governmental organisation (NGO) that is doing notable work to protect the rights of animals whose rights have been violated as a result of illegal experimentation or any other form of illegal activity. The purpose of this group is to protect the rights of animals whose rights have been violated as a result of illegal experimentation or any other form of illegal activity. There is room for approximately five or six notable nongovernmental organisations within the Association.

The membership of the Association will also include a representative from the general public who is willing to donate their time to the cause of protecting animal rights. In addition to these representatives, the membership will include a representative from the general public. All of these members will contribute their time without expecting to be compensated. They will be expected to show up for at least one meeting each and every one of the 30 days in a given month. Any member of the society will be able to make a complaint to the Association in complete secrecy by using a particular post box number that will be set aside for the express purpose of receiving such communications. This box will be opened at every single meeting, and we will have a discussion about the issues that have been brought up in the submissions. If the solution to a particular problem lies within the scope of authority held by the Association, then the Association is able to put that solution into action and compile a comprehensive report

regarding the subject matter of the problem. They are obligated to make a report and submit it, along with all of the other information that is relevant to the situation, to the AWBI Multi-District Representative in the event that the solution falls outside of the Association's purview of responsibility.

On a more positive note, India has made progress in protecting the rights of animals while also keeping the interests of the different people involved in the process in mind. But can they take care of themselves well enough to reduce the number of abuse cases? No is the right answer, and here's why: In the 2018 ruling from the Uttarakhand High Court, the judges talked about "animal rights," but those rights were only for "non-citizens." This means that the animals are missing out on some very important rights that only citizens have. In the same way that some animal rights are protected, but the loopholes for keeping human rights have been closed, the same thing has happened with human rights. Animals being mistreated in labs is a horrible thing to see. They are tortured for no reason, with the only exception being that it is for the good of people. Even when there was nothing else that could be done, the "animals are better than humans" argument would have been made. Even so, the idea of going back to older ways of testing on animals in this day and age, when there is so much technology available, seems ridiculous.

SPORTS AND DISABILITY: LOOKING THROUGH GENDER LENSES

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Abstract

This article examines the intricate intersection of gender and disability within the context of sports, shedding light on the distinctive challenges encountered by women athletes with disabilities. The historical context marked by male dominance in sports, along with the concept of ableism prevailing in the sporting landscape, necessitates a critical appraisal of systemic biases and inequalities. It highlights the transformative potential of sports emphasizing holistic benefits encompassing physical, psychological, and social dimensions. However, for women athletes with disabilities, formidable barriers, including limited opportunities, inadequate support systems, and structural constraints, pose significant impediments. Moreover, the article delves into issues such as gender-based pay disparities and media representation. It also provides an overview of the legal framework in India for ensuring accessible sports for women with disabilities, emphasizing constitutional provisions of equality and non-discrimination, and the pivotal Rights of Persons with Disabilities Act of 2016[1]. Notable government initiatives, including the Khelo India scheme, are discussed, alongside a significant legal case exemplifying discrimination against a woman athlete with disabilities. It reinforces the importance of recognizing access to sports as a fundamental human right for individuals with disabilities, as emphasized in international legal frameworks, including articles from the Universal Declaration of Human Rights[2], the United Nations Convention on the Rights of Persons with Disabilities[3] and the International Covenant on Economic, Social, and Cultural Rights[4]. The article advocates for inclusive sports design and promoting gender-sensitive policies to empower women athletes with disabilities, fostering inclusivity within the realm of sports.

Keywords:

Sports, India, Gender-Sensitive Policies, Women Athletes with Disabilities, Inclusivity.

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[1] Act No. 49 of 2016
[2] Universal Declaration of Human Rights, G.A. res. 217A (III), U.N. Doc A/810 at 71 (Dec.10,1948).
[3] United Convention on the Rights of Persons with Disabilities, 3 May 2008, 2515 U.N.T.S.3 .
[4] International Covenant on Economic, Social and Cultural Rights, 3 January, 1976, 993 U.N.T.S.3.

I

Introduction

Sports, with their profound ability to bestow independence and self-empowerment through individual performance and competition, have long stood as a symbol of freedom and choice. Yet, within the realm of sports, an enduring narrative of male dominance has persisted throughout the annals of history. In contemporary times, despite notable advancements in gender equality, women continue to encounter significant disparities in athletic success when compared to their male counterparts. The interplay of gender and disability further compounds this issue, casting a spotlight on the unique challenges faced by women athletes with disabilities. As we delve into the complexities of this intersectionality, it becomes apparent that the question of how gender and disability intersect in the sporting arena demands a closer examination. This article examines the deeply ingrained prejudices and systemic obstacles that have perpetuated gender discrimination and exclusion in the world of sports.

The concept of disability sports, denoting sports tailored to accommodate individuals with disabilities[5], is a testament to society's evolving understanding of inclusivity and equality. However, it is crucial to recognize that the prevailing sports landscape predominantly caters to those who are physically fit and able-bodied. This inherent bias against individuals with disabilities is rooted in the phenomenon known as "Ableism". Ableism constitutes discrimination and social prejudice against people with disabilities, premised on the erroneous belief that conventional abilities are inherently superior. At its core, ableism perpetuates the damaging notion that individuals with disabilities require "fixing" and defines them primarily by their disability. Much like racism and sexism, ableism employs stereotypes, misconceptions, and generalizations to classify entire groups of people as "less than"[6].

In the sporting world, ableism's influence is pervasive and exclusionary, portraying sports as a realm reserved solely for those without disabilities. This prejudiced outlook not only hinders the participation of athletes with disabilities but also perpetuates the stigmatization of their capabilities. Examining the myriad impediments that hinder the participation of women with disabilities in athletic events reveals a landscape marred by gender discrimination, structural inequalities, and a pervasive gender pay gap. These challenges extend beyond the mere underrepresentation of female athletes with disabilities and encompass systemic issues such as

[5] Karen P. DePauw, "Girls and Women with Disabilities in Sport," 70 *Journal of Physical Education, Recreation & Dance* 50–2 (1999).

[6] Ashley Eisenmenger, "Ableism 101 - What is Ableism? What Does it Look Like?" *Access Living*, 2019*available at*: https://www.accessliving.org/newsroom/blog/ableism-101/ (last visited September 14, 2023).

the lack of funding for equipment, limited media representation, infrastructure barriers, and misconceptions regarding the impact of sports on the female physique.

The intersectionality of gender and disability in sports casts a glaring light on the compounded disadvantages faced by women athletes with disabilities. In both the sporting arena and broader society, these women grapple with double discrimination, which permeates every facet of their lives. The challenges they confront in sports mirror the barriers they encounter in education, employment, and social inclusion. The enduring disparities between male and female athletes with disabilities underscore the urgency of addressing these issues and dismantling the deeply entrenched biases and structural inequalities that persist.

This examination of the intersectionality of gender and disability in sports serves as the backdrop against which Article 14 of the Indian Constitution[7] assumes paramount importance. Article 14, a fundamental right enshrined in the Indian Constitution, guarantees the right to equality before the law and the equal protection of the laws within the territory of India. This constitutional provision serves as a cornerstone of India's democratic framework, embodying the principle of equality as a fundamental tenet of the nation's legal and moral ethos. It is within the context of Article 14 that the rights and challenges of women athletes with disabilities find a legal foundation. By studying the intersectionality of women with disabilities and sports in terms of equality and non-discrimination, we aim to unravel the mechanisms through which the law can be leveraged to challenge and rectify the prevailing inequalities in the sporting world. In doing so, we hope to shed light on the transformative potential of the principle of inclusivity, promoting equity and empowering women athletes with disabilities to realize their full potential in the world of sports.

II

Understanding Gender and Its Intersectionality with Disability

Gender is a dynamic and social concept that changes over time and it varies as per different societies. It determines the characteristics like how a person will behave and what role they will play within the rules set by society. Gender is a concept that is evolved by society so that its dominant position remains in favour of men. It results in inequality and makes the whole concept hierarchical. Gender is culturally manifested with prevailing ideologies to assign roles, actions, and rules and legalize their status in society.

Disability is the opposite of ability which distinguishes people or even discriminates based on capability and ability at par with non-disabled people. Here, the ableist perspective dominates

[7] The Constitution of India, art. 14.

the narrative and excludes and devalues disabled people from the larger society and so is their representation in the society. The term "Intersectionality" was given by Kimberle Crenshaw in 1991 when she was studying the intersection of race and gender[8]. She argued that gender-based discrimination is multi-dimensional. The intersectionality of disability means when it meets other discriminatory factors such as class, gender, ethnic identities, sexual orientation etc. Disability and gender are linked in a way that makes females with disabilities more vulnerable to such cumulative or compounded disadvantage and resultant discrimination[9].

In *Patan Jamal Vali v. State of Andhra Pradesh*[10], the Supreme Court held that the intersectional identity of a disabled woman from a scheduled caste community would place her in a uniquely disadvantaged position. Also, that judgement highlighted that we should adopt "an open textured legal approach that would probe the fundamental underpinnings of inequality"[11], as intersectionality just exhorts. This calls for a social and economic analysis of law, allowing us to frame equality concerns in terms of "power and powerlessness[12]" rather than difference and similarity. Due to the conceptual limitation of the single-axis analysis, these intersecting assertions may be overlooked since they are not unidirectional. The intersectional analysis calls for a more honest portrayal of reality to reflect how social disparities are felt. Sex on the other hand is a bio-physical concept and it includes intersex persons. Though gender and sex are used interchangeably gender identity is something which states how a person feels for themselves irrespective of a person's own physical body and designated sex. To understand the intersectionality of gender with a disability is to understand the coupling factors of discrimination by both terms in any particular society. Those things which restrict a person from doing their best is called the barrier in society for disabled people. Gendered perception brings its specific barriers and thus we see certain barriers in terms of independence of movement of females, discrimination in access to women-centric healthcare facilities, literacy issues, etc.

In the *Navtej Johar v. Union of India*[13], the court applied an intersectional lens to Article 15(1). This means that they considered how discrimination often arises from a combination of factors, rather than just one. The court recognized that a strict and formalistic interpretation of Article 15(1) that only looked at one factor in isolation would be inadequate[14]. The court also noted

[8] M. Sameeha Barvin v. The Joint Secretary, (2022) 1 MLJ 466. para 16.
[9] *Id.* at para 17.
[10] AIR 2021 SC 2190.
[11] *Id.* at para 17.
[12] *Ibid.*
[13] AIR 2018 SC 4321.
[14] *Id.* at para 36.

that discrimination based on sex often involves stereotypes and societal beliefs about the differences between men and women. These stereotypes are used to justify and perpetuate discrimination. Therefore, the court argued that a limited interpretation of Article 15(1) that doesn't consider the intersectional nature of discrimination would fail to provide meaningful protection against discrimination.

In essence, the Navtej Johar case highlighted the importance of interpreting Article 15(1) in a way that recognizes the complex and interconnected nature of discrimination and ensures that the constitutional prohibition against discrimination is robust and effective in addressing various forms of discrimination.

III

Women Athletes with Disabilities Redefining Boundaries in Sports

Women athletes with disabilities have found that their participation in sports transcends mere physical activity; it has become an integral and transformative part of their lives. Engaging in sports has yielded a plethora of benefits for these athletes, extending far beyond the realm of physical fitness. They have experienced a significant boost in stamina, endurance, overall fitness, and physical strength, attributes that are essential for excelling in their respective sporting disciplines. Moreover, participation in sports has instilled in them a profound sense of accomplishment and purpose, contributing to their overall well-being. The advantages of sports are not confined solely to the physical domain; they extend to the psychological and emotional aspects of these athletes' lives. By engaging in sports, women with disabilities have acquired valuable tools to navigate the challenges and pressures of life. Sports have provided them with a platform to build better self-esteem and self-confidence, allowing them to confront and overcome adversity with resilience. In essence, sports have afforded them a newfound freedom of choice in various facets of their lives, empowering them to make decisions with confidence and determination.

One of the most remarkable aspects of sports is its positive impact on mental health. Regular participation in sports has been associated with reduced stress, anxiety, and depression, leading to improved overall well-being. Women athletes with disabilities have reported heightened levels of self-assuredness and a renewed sense of self-worth through their sporting pursuits. This newfound confidence has allowed them to break down stereotypes and transcend societal boundaries that often confine individuals with disabilities. Moreover, sports have played a pivotal role in reshaping societal perceptions of these women athletes within an ableist society. By demonstrating their competence and excellence in their respective sports, they have shattered preconceived notions and biases. Their achievements on the sporting stage have

portrayed them not as individuals defined by their disabilities but as accomplished athletes capable of extraordinary feats. Another crucial dimension in the lives of women athletes with disabilities is the development of a sense of community through sports. While sports can be highly competitive, they also foster teamwork and collaboration. This sense of community extends beyond the playing field, leading to the formation of lasting social circles. Even in individual sporting events, athletes develop a camaraderie with fellow competitors, forging connections that transcend the boundaries of disability.

Recognition is another noteworthy social benefit derived from participation in sports. However, it is important to acknowledge that not every woman athlete with a disability receives the level of recognition commensurate with her accomplishments. The gender bias that pervades the world of sports further compounds this issue, leading to unequal pay for women athletes. This gender-based pay gap is a troubling menace that underscores the ongoing disparities faced by women athletes, both with and without disabilities[15]. Furthermore, media representation plays a pivotal role in shaping public perceptions of women athletes with disabilities. The portrayal of these athletes in the media often differs markedly from that of their able-bodied counterparts. The media tends to focus on their disabilities rather than their athletic achievements, perpetuating stereotypes and reinforcing societal biases. Another significant challenge lies in the unequal social recognition of Para-sports compared to mainstream sporting events like the Olympics and the Commonwealth Games. Para-sports, despite their incredible displays of athleticism and dedication, are often not accorded the same level of prestige and attention. This disparity in recognition further underscores the prevailing biases that continue to persist in society.

Despite the myriad challenges and systemic issues faced by women athletes with disabilities, they have emerged as trailblazers, rewriting the narrative of what is achievable. These extraordinary athletes, including notable figures like Deepa Malik, Karam Jyoti Dalal, Aruna Tanwar, Ekta Bhyan, Pooja Agrawal, Palak Kohli, Parul Parmar, and Bhavina Patel, serve as shining examples of resilience, determination, and excellence[16]. Through their remarkable achievements and unwavering commitment to their sports, they have not only broken barriers but have also paved the way for future generations of women athletes with disabilities. The

[15] Hetvi Trivedi, "Gender Discrimination in Sports- How long must we wait for equality?" *The IP Press*, 2021*available at*: https://www.theippress.com/2021/08/23/gender-discrimination-in-sports-how-long-must-we-wait-for-equality/ (last visited June 23, 2023).

[16] Shai Venkatraman, "India at Paralympics 2021 – Meet the disabled women athletes looking to make the country proud" *Newz Hook | Disability News - Changing Attitudes towards Disability*, 2021*available at*: https://newzhook.com/story/india-at-paralympics-2021-meet-the-disabled-women-para-athletes-looking-to-make-the-country-proud/ (last visited June 23, 2023).

participation of women athletes with disabilities in sports goes beyond the pursuit of physical fitness and athletic excellence. It encompasses a holistic transformation, encompassing physical, psychological, and social dimensions. These athletes have harnessed the power of sports to boost their self-esteem, instil confidence, and challenge societal biases. While they continue to face challenges such as unequal recognition and media representation, their perseverance and accomplishments serve as a testament to the boundless potential of human determination and resilience. Through their achievements, they inspire and empower others to defy limitations, redefine stereotypes, and embrace the limitless possibilities that sports offer.

IV

Barriers to Accessible Sports and Factors Contributing to Inaccessible Sports for Women Athletes with Disabilities

Most woman athletes with disabilities started participation and preparation only after entering college there they experience a lack of sports equipment and limited opportunities. There is also a lack of encouragement and information regarding opportunities in sports. The sporting side becomes necessary when they get admission to college because it comes as a part of the academic degree they are pursuing and is essential for them to graduate. Also, different disabilities have different accessibility problems regarding sports and choosing the sports to excel in. It clearly shows that the choices are limited for women athletes with disabilities. The families of women athletes with disabilities have also been seen as not supportive of their sports endeavours, resulting in low self-esteem weak athletic identity and economic and financial barriers. It ranges from strong support to no support at all. This lack of support thus becomes very crucial for women athletes with disabilities because some athletes do you even leave sports. They are likely to be forced to choose between livelihood and sports. Here comes the powerful role of the coach of the athlete as they are, the ones who support them and give them the requisite expertise for their sport. still, there are various cases where the disabled athlete be it male or female requires a coach with the combined knowledge of disabilities and sports. There is a lack of opportunities at the grassroots level for example in schools and training outside schools also for women athletes with disabilities. Also, the education system is designed such that it becomes a limiting factor responsible for participation in sports. Structural barriers such as the Infrastructural constraints in terms of the poor state of the college gym, travelling issues and poor quality of accommodation as seen in the 18th national Para athlete's championship which includes washroom issues, narrow doors and even basic drinking water quality. There is also a clear lack of accessible design in sports for athletes with disabilities. Traditional sports that are more appealing to women are not promoted by sporting organisations

to the same extent as male popular events. Also, the traditional or not seen as a sport of choice or female athlete with a disability. The low participation of women in disability sports shows that society does not regard their endeavour as a normal sporting event or even as a real sport. The medical profession was not considered part of the athletes' support network[17]. Sports organisations are also designed keeping in mind the abled body athletes, especially that of males let alone women athletes with a disability. More importantly, there is a lack of female athletes and administrators, including female athletes with a disability, which results in a less favourable environment and less voice of representation which ultimately becomes a huge task to generate awareness, especially concerning issues related to women and women athletes with disabilities.

V

International Legal Framework for Ensuring the Right of Accessible Sports for Women with Disabilities

Article 25[18] of the Universal Declaration of Human Rights bestows upon every individual the entitlement to security when confronted with circumstances beyond their control, such as unemployment, sickness, disability, widowhood, old age, or other forms of destitution. This provision underscores the imperative of safeguarding the socio-economic well-being of all human beings. The UNESCO International Charter on Physical Education and Sport[19] articulates a fundamental precondition for the effective exercise of human rights: the freedom for each person to cultivate and preserve their physical, intellectual, and moral capacities. This necessitates the assurance of access to physical education and sport for all individuals, regardless of their background or circumstances. According to the United Nations Inter-Agency Task Force on Sport for Development and Peace report[20], the right to access and participate in sports is considered a fundamental human right essential for leading healthy and fulfilling lives across all age groups.

The United Nations Convention on the Rights of Persons with Disabilities[21] (hereinafter UNCRPD) of 2006 was established to safeguard the rights and dignity of individuals with

[17] Lisa M. Olenik, Joan M. Matthews and Robert D. Steadward, "Women, Disability and Sport: Unheard Voices" *Canadian Woman Studies/les cahiers de la femme* (1995).

[18] Article 25 of The Universal Declaration of Human Rights, *available at*: https://www.humanrights.com/course/lesson/articles-19-25/read-article-25.html (last visited June 24, 2023).

[19] UNESCO International Charter of Physical Education and Sport, 21 November 1978 - UNESCO Digital Library, *available at*: https://unesdoc.unesco.org/ark:/48223/pf0000216489 (last visited June 24, 2023).

[20] UN Inter-Agency Task Force on Sport for Development and Peace, "Sport for development and peace: towards achieving the Millennium Development Goals: report from the United Nations Inter-Agency Task Force on Sport for Development and Peace" (2003).

[21] Paul Dickey, "Convention on the Rights of Persons with Disabilities" (2006).

disabilities. Article 3 of the UNCRPD underscores the principles of non-discrimination and gender equality. Article 4(b) obliges state parties to eliminate discriminatory laws, rules, customs, or practices targeting individuals with disabilities through legislative measures. Article 4(d) obligates nations to ensure that public authorities and institutions adhere to the convention's principles and refrain from actions inconsistent with it. Furthermore, Article 6 of the UNCRPD highlights the multiple forms of discrimination faced by women and girls with disabilities and mandates state parties to take necessary measures to ensure their full enjoyment of human rights. Article 16 emphasizes the right to be free from exploitation, violence, and abuse, with a focus on the enactment of robust laws by state parties. Article 30 of the UNCRPD strategically harnesses sport and the right to participate in cultural life, leisure, and sport as a potent tool for inclusion. It guarantees the right to engage in sports, recreation, and leisure activities "on an equal basis", specifically addressing the right to sports participation for individuals with impairments. Additionally, it calls for government actions to ensure the full exercise of rights and freedoms, including equal access to services, education, employment, healthcare, and personal freedoms for women.

Article 1 of the International Covenant on Economic, Social, and Cultural Rights[22] underscores the right to self-determination, allowing people to choose their political status and shape their economies, societies, and cultures. Article 7 of the Covenant recognizes the right to just and favourable working conditions, encompassing reasonable working hours, paid holidays, decent living standards, safe and healthy workplaces, equal promotion opportunities, and pay for public holidays. Moreover, Article 12 addresses the right to the highest attainable standard of physical and mental health, while Article 13 recognizes the right to an education that promotes human dignity and holistic development. Article 15 of the Covenant acknowledges the fundamental right to engage in cultural activities, which inherently encompasses participation in sports, recreation, play, and leisure.

In essence, these international legal instruments collectively affirm the intrinsic importance of sports and physical activity as integral components of human rights, emphasizing their role in promoting well-being, equality, and inclusivity for all individuals, including those with disabilities and across various socio-economic contexts.

[22] *Supra* note 4.

VI

National Legal Framework for Ensuring the Right of accessible sports for Women with Disabilities

The constitutional framework of India, enshrined in itself, lays the foundation for ensuring equality and non-discrimination, particularly concerning gender and disability. Article 14[23] of the Indian Constitution is a cornerstone, stipulating that every individual is entitled to equality before the law, and the State shall not deny any person equality before the law or equal protection of the laws within the territory of India. Simultaneously, Article 15 of the Constitution of India takes a significant stride by prohibiting discrimination on various grounds, including religion, race, caste, sex, or place of birth. The intersection of these two constitutional provisions assumes paramount importance when addressing the unique vulnerability experienced by individuals at the crossroads of gender and disability. It is imperative to address the challenges they face through the twin principles of equality and non-discrimination.

Within this legal context, the Right to Persons with Disabilities Act, of 2016[24] (hereinafter RPwD Act 2016) emerges as a pivotal legislative instrument. Section 2(s) of this act defines a "person with a disability" as an individual who has a long-term physical, mental, intellectual, or sensory impairment that, when combined with various barriers, obstructs their full and effective participation in society on an equal footing with others. To comprehensively encapsulate these barriers, Section 2(c) of the RPwD Act 2016 provides an expansive definition of the term "barrier". Barriers include factors such as communicational, cultural, economic, environmental, institutional, political, social, attitudinal, or structural elements that impede the complete and effective integration of persons with disabilities into society. Section 3 of the RPwD Act 2016 establishes provisions specifically dedicated to promoting equality and non-discrimination among persons with disabilities:

1. The appropriate government shall ensure that Persons with disabilities enjoy the right to equality, life with dignity and respect for his or her integrity equally with others.
2. The appropriate government shall take steps to utilise the capacity of Persons with Disabilities by providing an appropriate environment.

[23] *Supra* note 7.
[24] *Supra* note 1.

3. No person with a disability shall be discriminated against on the grounds of disability unless it is shown that the impugned act or omission is a proportionate means of achieving a legitimate aim.
4. No person shall be deprived of his or her liberty only on the ground of disability.
5. The appropriate government shall take the necessary steps to ensure reasonable accommodation for persons with disabilities.

The principle of "reasonable accommodation" is given explicit recognition in Section 2(y) of the RPwD Act 2016, which defines it as necessary and appropriate modifications and adjustments that do not impose a disproportionate or undue burden in specific cases but ensure that persons with disabilities can enjoy and exercise their rights and privileges on an equal footing with others. Section 30 of the RPwD Act 2016 sets forth guidelines, reinforced by the term "shall", imposing a mandatory obligation on the appropriate government and sports authorities to accord due importance to persons with disabilities within the domain of sports. These guidelines encompass the formulation of schemes and programs aimed at promoting and developing sporting talent among individuals with disabilities. The government is directed to encourage the active participation of persons with disabilities in sporting activities, which includes recognizing their participation in plans and programs designed for the development of sports potential and making appropriate arrangements to facilitate such participation. This involves redesigning infrastructure and restructuring curricula to guarantee accessibility to all sporting activities, harnessing technology to enhance potential and skill in athletic pursuits, ensuring necessary provisions for participation in all athletic events, and allocating funding for infrastructure, training, and other essential components. The act further mandates the organization and promotion of events, as well as the facilitation of awards to honour and encourage winners and participants. The intrinsic value of sports as a means to foster community and provide therapeutic benefits is undisputed. Therefore, the government is compelled by legal obligation to take requisite actions that afford individuals with disabilities the opportunity to partake in a diverse range of sports, recreational activities, and cultural endeavours[25]. This commitment to accessibility ensures that those with impairments can fully engage in a variety of sports, leisure, and cultural pursuits, thereby promoting inclusivity and holistic development.

[25] National Policy.pdf. available at: https://disabilityaffairs.gov.in/upload/uploadfiles/files/National%20Policy.pdf (last visited June 24, 2023)

The legal framework outlined above demonstrates India's commitment to fostering inclusivity, equality, and non-discrimination for individuals with disabilities, particularly women, in the sphere of sports. These legal provisions underscore the importance of creating an enabling environment that eliminates barriers, facilitates participation, and promotes the principles of equality and dignity for all, irrespective of gender or disability.

VII

Sports Authorities/ Organisations and Government Initiatives

The National Program for the Development of Sports Scheme also known as "Khelo India[26]" was launched by the Government of India in 2017. The scheme was notified by the Gazette of India on 9.10.2017. This scheme aims to encourage and promote grassroots-level sports. For this scheme, three sporting bodies were made keeping in mind the varying types of disabilities. These three sporting bodies conduct various international events. They are endowed with responsibilities of sports, their disciplines, rules, and facilities. They take responsibility for promotion, training and holding competitions. These three bodies are the Para Olympics Committee of India (PCI) for Physically disabled persons, Special Olympics Bharat (SOB) for Mentally challenged persons and All India Sports Council of Deaf (AISCD) for Deaf and Dumb athletes with disabilities. The operational guidelines for the scheme state that fifteen crore rupees were to be utilized under this scheme. It can be utilised by creating specialised sports infrastructure, player classifications and equipment support. They can also be utilised by establishing a new training centre for athletes with disabilities along with providing scholarships for coaching and diplomas. The guidelines also call for providing support for sports competitions and preparation of teams for participation including the Paralympics.

The Government of India took several important initiatives establishing a training Centre for Para-athletes in Gujarat in 2017 and conducting a Para-athlete championship at Bengaluru in 2018. Sports Authority of India (hereinafter SAI) also has their schemes. They assist the national sports federation. Their scheme covers providing equipment, support facilities, wholesome food and supplements, accommodation, transportation services, coaching services, medical assistance and participation in international contests. All of these are provided to sportspersons with disabilities. For elite athletes; Infrastructure, training, and participation in international competitions are all provided by SAI. The primary location for sporting events involving athletes with disabilities is the SAI's Netaji Subhas Western Centre in Gandhinagar. Coaching camps to prepare athletes to compete in various international tournaments are held

[26] Khelo India, *available at*: https://kheloindia.gov.in/ (last visited June 24, 2023).

at SAI centres. These centres are Gandhinagar, Sonipat and Bangalore. Elite athletes get support under the "Target Olympic Podium" Program (TOP Scheme) in exchange for earning medals at the Olympics.

Considering the challenges of doubly disadvantaged situations of women athletes with disabilities and despite having a progressive policy framework for sports, the World Bank Report which was released in 2017 highlights that implementation by institutions is very poor. Issues like non-cooperation or support are ever evident along with no proper institutional facilities.

VIII

M Sameeha Barvin v. the joint secretary, ministry of Youth and Sports, Department of Sports, Government of India and Ors.[27]

This case stands as a seminal legal pronouncement with profound implications for understanding the intricate interplay between disability and gender. It underscores the unfortunate reality that women athletes with disabilities endure a compounded form of discrimination, resulting in what can aptly be described as double jeopardy. To address the formidable barriers these athletes face, it becomes imperative to augment the framework of institutional, legal, and social support aimed at facilitating their success within the realm of sports.

The judicial verdict in this case notably transcends its immediate factual circumstances, casting a wider and more encompassing light on the underlying issues. It serves as a stark reminder of the multifaceted dimensions of discrimination that are both unique and distinct. Consequently, the case beckons for a comprehensive and holistic approach, necessitating a deeper understanding of the predicament faced by women athletes with disabilities.

The petitioner in this case was a woman athlete grappling with a profound disability, characterized by a 90% hearing loss and the loss of her ability to speak from the tender age of six. Despite these formidable challenges, she distinguished herself in the domains of the long jump and high jump, achieving commendable success at both national and state levels. Her remarkable accomplishments include 13 medals, 11 of which were gold. In a national selection test conducted in New Delhi, she astoundingly surpassed the eligibility criterion for the long jump by leaping a distance of 5.5 meters, whereas the stipulated parameter was 4.25 meters. Remarkably, she secured the top position in the selection list. However, despite these remarkable achievements, her inclusion in the World Deaf Athletic Championship was denied

[27] *Supra* note 8.

on the grounds of gender bias, favouring a male participant instead. The petitioner perceived this as a glaring instance of discrimination, as she had unequivocally met the national selection criteria, and her primacy in the selection list was unjustifiably disregarded. Subsequently, she petitioned the court for a writ of mandamus, seeking her inclusion in the final selection roster and participation in the Fourth World Deaf Athletic Championship scheduled for Lublin, Poland, from August 23 to August 28, 2021.

Upon reviewing the petition, the court issued a directive to the third respondent, instructing the petitioner's selection based on her meritorious performance, thereby rendering her eligible to partake in the World Deaf Olympic Championship in 2022, as well as the Paralympics in 2023. The petitioner also contended that her home state of Tamil Nadu possessed a Sports Council for the Deaf, which, in her estimation, exhibited incompetence. Furthermore, she alleged mistreatment by the All-India Sports Council for the Deaf (AISCD) during her stay in Delhi. The petitioner cited instances of abuse and threats by AISCD officials, including the withholding of her passport and the failure to expedite her visa application, all of which detrimentally impacted her performance. Additionally, she contended that upon her return to India, the maltreatment persisted, particularly concerning the disbursement of funds. It was underscored in the petition that the petitioner's travel expenses were only covered following an interim court order. Consequently, the petitioner implored the court to intervene against such discrimination based on her gender and disability, emphasizing the essential role that equality and equitable treatment play in fostering meritocratic opportunities within the realm of sports.

The court, in response to the interim order of August 13, 2021, noted that the petitioner participated in the Fourth World Deaf Athletic Championship in Poland, thereby qualifying for the World Deaf Olympic Championship in 2022 and the Paralympics in 2023. The adversities and impediments encountered by the petitioner, grounded in her gender and disability, throughout her athletic journey, even after successfully clearing the national selection tests, unequivocally demonstrated a clear case of gender discrimination, invoking the provisions of Article 15(1) of the Constitution. This case vividly exemplifies the intersectional nature of discrimination. During advocacy on behalf of the petitioner, compelling statistical data were presented. This data revealed a stark gender disparity in the participation of female athletes in the Paralympics. Specifically, in the Paralympics of 2018, there were 431 male athletes compared to only 123 female athletes. In the Paralympics of 2021, India sent a contingent of 54 athletes, among whom only 14 were women. This conspicuous underrepresentation of women in the premier sporting event for individuals with disabilities is a formidable obstacle

compounded by a matrix of societal, cultural, economic, and knowledge-based barriers. The court, in its adjudication, emphatically conveyed that the yardstick for defeat should not be discrimination but rather a genuine assessment of an athlete's potential, which emanates from their spirit, intellect, physical prowess, and inner fortitude.

In summation, the court unequivocally declared this case as a glaring instance of discrimination rooted in both gender and disability. The competent authorities, namely the state and central governments, were found not wanting to provide requisite support to the petitioner, ensuring her safety, and inspiring confidence in her abilities as an athlete. In the exercise of its authority under Article 226, the court issued a series of directives with the aim to provide substantive justice. These directives encompassed a comprehensive overhaul of policies relating to female athletes with disabilities. These directives include the elimination of unjust discrimination against female athletes with disabilities along multiple axes, financial support, adherence to selection norms, provision of the necessary training and medical facilities, fostering an environment conducive to the realization of full potential, supplying disability-friendly apparel and accessories, extending financial assistance to family members accompanying female athletes with disabilities to international events, offering reasonable accommodations, promoting gender equality through awareness initiatives, and ensuring safety and security during travel, regardless of the number of participants. Collectively, these directives seek to ensure equitable and dignified treatment for all women athletes, empowering them to excel in the field of sports.

IX

Shortcomings and Challenges for Accessible Sports for Women Athletes with Disabilities

In order to foster a greater sense of autonomy, achievement, and inclusivity, it is imperative that we take comprehensive steps to expand the scope and accessibility of Para sports, both at the school and collegiate levels. This expansion not only serves to empower individuals with disabilities but also addresses the pervasive issue of ableism within the domain of sports. To effectively realize this goal, a multifaceted approach is necessary, encompassing various key measures and considerations.

First and foremost, educational institutions play a pivotal role in laying the foundation for inclusive sports opportunities. Schools and colleges should take proactive steps to introduce a diverse array of Para sports options within their curricula and extracurricular activities. By offering a wide range of sporting choices, educational institutions enable aspiring athletes with disabilities to explore their interests and passions. Early exposure to Para sports not only

nurtures their talents but also instils a sporting spirit from a young age, fostering a lifelong love for physical activity and competition. However, the mere introduction of Para sports opportunities is insufficient. It is essential to ensure that these opportunities are genuinely accessible to all, regardless of an individual's physical abilities or disabilities. To achieve this, educational institutions and sports organizations must implement reasonable accommodations. These accommodations should encompass modifications and adjustments that remove barriers and facilitate the full participation of individuals with disabilities. Such measures can range from accessible facilities to adaptive equipment, ensuring that no aspiring athlete is unduly hindered by physical limitations.

Beyond the educational sphere, there is a pressing need to raise awareness among parents and the broader community about the significance of para-sports. This awareness-building effort is instrumental in cultivating respect for the dedication, talent, and achievements of athletes with disabilities. By acknowledging and celebrating their accomplishments, society can shift its perspective and begin to embrace inclusivity rather than discrimination. A change in societal perception is critical to fostering a supportive environment for athletes with disabilities and breaking down the barriers that hinder their full participation in sports. Institutional and familial support mechanisms must undergo sensitization to better cater to the specific needs of athletes with disabilities. This sensitivity should align with government policies aimed at creating a more inclusive sports landscape and enhancing prospects for individuals with disabilities. It is incumbent upon educational institutions, sports organizations, and families to recognize and address the unique challenges faced by athletes with disabilities, ensuring that they receive the necessary support and accommodations to thrive in their chosen sports.

Promotion and media coverage of Paralympic events constitute another vital component of the paradigm shift needed in the realm of Para sports. These platforms must shift their focus away from framing stories through a solely human-interest lens and instead emphasize the competitive aspects of sports. By doing so, the media can help reshape public perceptions and highlight the extraordinary accomplishments of Para athletes. By emphasizing the dedication, skill, and determination required for success in Para sports, media coverage can contribute to altering the narrative surrounding disability in sports. Currently, there exists an urgent imperative to elevate the recognition of para-sports accomplishments. Regrettably, many members of the general public remain unaware of the remarkable successes achieved by athletes with disabilities, and numerous such athletes go unrecognized.

There is a general absence of sports legislation in India that specifically addresses the needs and rights of female athletes with disabilities. Existing sports laws do not sufficiently consider

the unique challenges faced by this group, including accessibility, equal opportunities, and anti-discrimination measures. Legal procedures can be complex and costly, making it difficult to seek redress for grievances. Representation of female athletes with disabilities in sports governing bodies and decision-making positions is limited. This lack of representation can result in policies and initiatives that do not adequately address their needs resulting in the lack of comprehensive legislation or policies specifically tailored to address the unique needs and challenges of women athletes with disabilities. The existing legal framework often falls short in providing holistic protection and representation for this group, as it tends to overlook the intersectionality of gender and disability. The Act occasionally mentions women in the context of reproductive health but tends to lump women and children with disabilities together, failing to address the distinct needs of adult women[28]. Furthermore, legal provisions related to issues like livelihood assistance and social security, though essential, often lack a gender-sensitive approach that recognizes and caters to the unique challenges women athletes with disabilities encounter. The absence of targeted support mechanisms within the legal framework can limit their opportunities for training, participation in sports events, and career development. Moreover, it's crucial to question whether institutions like the National Commission for Women have dedicated departments, cells, or desks specifically designed to address the concerns and promote the rights of women athletes with disabilities. The lack of specialized attention within such institutions can further marginalize this already underrepresented group. To rectify this disparity, it is essential to implement the measures outlined above and collectively alter our perspective. By creating a more inclusive, equitable, and celebratory environment for Para sports, we can ensure that these exceptional athletes receive the recognition and respect they rightfully deserve. Ultimately, this transformation will not only benefit athletes with disabilities but will also enrich the broader sports community by promoting diversity, inclusivity, and the values of determination and excellence that underpin the world of sports. Women athletes with disabilities deserve not only equal opportunities but also the tailored support necessary to overcome the intersectional barriers they confront in pursuing their sports careers.

[28] Does the new Act for the disabled represent the needs of differently abled women? *Hindustan Times*, 2017*available at*: https://www.hindustantimes.com/india-news/when-the-odds-are-against-her-does-the-new-act-for-the-disabled-represent-the-needs-of-differently-abled-women/story-Qa9PoZoHJXtOdlShOdEDZI.html (last visited September 23, 2023).

X

Conclusion

The path to achieving equal opportunities for women athletes with disabilities in sports is indeed fraught with legal complexities and challenges. Despite the constitutional guarantees of equality and non-discrimination, the practical application of these principles within the realm of sports in India remains elusive. Discrimination against women athletes with disabilities persists, and numerous barriers hinder their full participation and success in sports. While the RPwD Act 2016, provides some protections for individuals with disabilities, it falls short in comprehensively addressing the unique challenges faced by women athletes in the sporting arena. This deficiency necessitates urgent reforms and amendments to ensure that existing laws adequately protect the rights of women athletes with disabilities.

Several pressing issues demand attention and action. The mandate for equal access to sports facilities, funding, and opportunities for women athletes with disabilities is paramount. It is essential to enforce existing legal protections more rigorously and eliminate discrimination and unequal treatment in areas such as funding, coaching, and access to sports infrastructure. Gender pay disparities in sports, a matter of grave concern, require rectification in line with the fundamental principle of equal pay for equal work under Article 14 of the Indian Constitution. The lack of representation and visibility of women athletes with disabilities in sports organizations exacerbates their challenges. Addressing this issue demands active promotion and inclusion of women with disabilities in decision-making roles within sports organizations. Their perspectives and experiences must inform the development of inclusive policies and the promotion of women's sports. Media portrayal and public perception continue to pose formidable hurdles. Stereotypes and biases perpetuated by the media can reinforce societal misconceptions about women athletes with disabilities. Legal measures and guidelines for responsible media reporting and representation can challenge these harmful narratives and promote more accurate and inclusive depictions.

To address these challenges comprehensively, a multi-pronged approach is essential. This includes advocating for gender-sensitive policies and funding allocations within sports bodies, raising awareness about the rights and achievements of women athletes with disabilities, and actively involving them in the design and implementation of sports programs. It also necessitates reforms and amendments to existing laws to ensure comprehensive protection of their rights. The intersectionality of gender and disability in sports reveals a complex landscape marked by discrimination, structural inequalities, and a lack of legal protection. It is incumbent upon the government, sports organizations, civil society, and the legal community to

collaborate and dismantle the barriers hindering the full participation of these athletes. By upholding their rights and promoting a more inclusive and equitable sporting landscape, we can harness the transformative potential of sports to empower women athletes with disabilities to excel and redefine the boundaries of what is achievable.

While the road ahead may be challenging, the pursuit of equal opportunities for women athletes with disabilities in sports is a cause worth championing. Through collective efforts and a steadfast commitment to justice and inclusivity, we can create a sporting world where every woman, regardless of her abilities or disabilities, has the opportunity to thrive, excel, and inspire.

CRIME AND CRIMINAL TRACKING NETWORK & SYSTEMS (CCTNS) SCHEME IN INDIA AS A STRATEGIC FRAMEWORK FOR SWIFT AND EASY ACCESS TO THE FIRST INFORMATION REPORT : MAPPING THE COMPLEXITIES

Dr. Harleen Kaur*
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Abstract

*First Information Report ("**FIR**"), the first account of the complainant's story and prosecution's narrative, is a crucial document in the criminal justice system. It is the key document for the prosecution to establish the genuineness of its case and for the accused to avail its remedies as available in law. The settled principle of law is that the First Information Report should always be filed promptly and without wasting any time. Considering all importance that the FIR holds, this research paper aims to find out the ready accessibility of the copy of FIR online using the Crime and Criminal Tracking Network & Systems ("**CCTNS**") to all stakeholders of the Indian criminal justice system, primarily to the complainant, victim and the accused by first mapping the specific legal provisions and case laws to identify the significance of FIR in the criminal justice system and various concerns of privacy attached to the publication and easy and wide accessibility of FIR online. Secondly, by interviewing/interacting with the police officers at various levels of different states directly working for the CCTNS with an aim to identify the appropriate solutions to overcome the hurdles faced in easy and quick access to the FIR. Thus, incorporating both a doctrinal and an empirical component to the research, the authors via this research put forward several lacunas in the present mechanism of uploading of FIR as followed by various States besides providing for some of the best practices/or setting a forum for an easily accessible model that could be adopted after comparative evaluation of the implementation of the CCTNS scheme under various states in India .*[*]*

Keywords:

First Information Report, uploading, Crime Criminal Tracking Network & Systems, Accessibility, Online

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I

Relevance of FIR as a Public Document and Right of Stakeholders to Access FIR

Registration of a crime is not a private affair.[1] The Hon'ble Supreme Court in *Channappa Andanappa* v. *State*[2] stated that the FIR is a public document as defined by Section 74 of the Evidence Act since it is a record of public officials' actions created during their official duties. It also noted that under Section 76 of the Evidence Act, every public officer who has custody of a public document that any person has a right to examine is required to provide that person with a copy of it upon request on payment of the appropriate legal fees. A similar view was taken by the Hon'ble High Court of Delhi in *Court on its Own Motion* v. *State*.[3] Further, the High Court of Madhya Pradesh, in *Munna Singh Tomar* v. *State of M.P*,[4] while evaluating whether an FIR is a privileged document, noted that Section 154(2) of Cr. P.C. itself contemplates that a copy of the F.I.R. has to be given to the informant. Therefore, at that stage itself, the secrecy of the F.I.R. is lost because there is nothing in the said provision or any other provision of the CrPC to indicate that the informant to whom the copy is given is restrained in any manner from disclosing to others the content of the copy given to him. The court noted that Section 125 of the Indian Evidence Act secures privilege for a "Magistrate or Police Officer" to refuse to "say whence he got any information about the commission of any offence."

The "privilege" contemplated under Section 125 is merely regarding the source of the information and not the content of the information. Besides, the identity of the informant is always disclosed in an FIR under S. 154(2) Cr. P.C. Thus, in terms of recognition of FIR as a public document, the Delhi High Court in *Court on its Own Motion* v. *State*,[5] while observing that the liberty of an individual is inextricably linked with his right to be aware of how he has been booked under the law and on what allegations, considered the question of whether an accused is entitled to a copy of the First Information Report after it is lodged and if so, what steps are required to be taken to facilitate its availability. The High Court held that the FIR is a public document and that an accused is entitled to get a copy of the First Information Report at an earlier stage than as prescribed under Section 207 of the Cr.P.C. Where a person's liberty is at stake, and the criminal law is set in motion, the accused should have all the information. It further ordered that copies of the FIR be made available online by Delhi Police within twenty-four hours of the filing of the FIR, unless there are specific justifications given due to

[1] *Vijay* v. *Ravindra Ghisulal Gupta*, MANU/MH/2047/2022.
[2] 1980 SCC Online Kar 107
[3] 2010 SCC OnLine Del 4309.
[4] 1987 SCC OnLine MP 190.
[5] 2010 SCC OnLine Del 4309.

the sensitive nature of the offence. This will allow the accused or anyone else connected to the case to download the FIR and avail remedies as available under law.

In the year 2016, the Hon'ble Supreme Court in *Youth Bar Association* v. *Union of India*[6] also laid down various directions pertaining to an access to the FIR which were as follows:

i. "*An accused is entitled to receive a copy of the first information report at a stage much prior to the compliance under Section 207 CrPC.*

ii. *An accused person who has reasons to believe that he has been implicated in a criminal case and believes that his name may appear in the FIR may request for a certified copy from the concerned police officer or the Superintendent of Police on paying the fee required to obtain such a copy. When such request is made, the copy must be provided within twenty-four hours.*

iii. *When a copy of the FIR has been received from the police station by the magistrate concerned and a request is made by the accused seeking a copy of such FIR, the concerned magistrate court must provide the first information report within two working days. The aforementioned directive is notwithstanding the statutory requirement under Section 207 CrPC.*

iv. *Except where the nature of the offence is sensitive, like sexual offences, offences pertaining to insurgency, terrorism and of that category, offences under the POCSO Act and such other offences, the copy of the FIR should be uploaded on the police website or on the official website of the State Government, within twenty-four hours of the registration of the FIR with the objective that the accused or any person related to the case can download the FIR and avail appropriate remedies as may be available in law. The time can be extended up to forty-eight hours in cases of connectivity problems due to geographical location or any other unavoidable difficulty, which is further extendable to a maximum of 72 hours. The term "sensitive" would also encompass the idea of privacy depending on the nature of the FIR.*

[6] AIR 2016 SC 4136.

v. *No officer below the rank of Deputy Superintendent of Police or any person holding an equivalent office may decide not to upload the copy of the FIR on the website. The District Magistrate may also exercise the aforementioned authority in any State where he serves in that capacity. A decision made by the concerned police officer or the District Magistrate must be properly reported to the concerned jurisdictional Magistrate.*

vi. *Failure to upload an FIR would not be a ground for bail.*

vii. *A person aggrieved by the decision to not provide a copy of the FIR owing to its sensitive nature may file a representation to the Superintendent of Police or any individual holding the equivalent post in the State. A committee of three officers, to be formed by the superintendent of police within eight weeks from the date of the judgment, will handle the aforementioned grievance. Within three days of receiving the representation, the committee created must address the grievance and inform the party that filed it.*

viii. *The accused, his authorised representative, or pairokar may request a certified copy before the Court to which the FIR has been sent in cases where decisions have been made not to give copies of the FIR due to the sensitive nature of the case. The same shall be provided in quite a promptitude by the court concerned not later than three days of the submission of the application.*"

Later, while appreciating the question "whether the Appellant can be convicted and sentenced for an alleged offence against "Victim A", sans FIR, based on her statement under Section 161 of the Cr.P.C.?", the Hon'ble High Court Sikkim relying on the judgement of Hon'ble Supreme Court in *Youth Bar Association* held that in the absence of an FIR, an individual cannot be roped in for an offence, based on the statement of a witness, derived during the investigation of a case.[7] Also recently, the Hon'ble Supreme Court in *Saurav Das* v. *Union of India*[8] noted that the objective of the *Youth Bar Association* (supra) was that the innocent

[7] *Taraman Kami* v. *State of Sikkim*, MANU/SI/0064/2017.
[8] AIR 2023 SC 615.

Accused are not harassed and they are able to get relief from the competent court, and they are not taken by surprise.

Infact, it is pertinent to note that strict compliance with directions issued under the *youth bar association* case have been emphasised again and again by the courts in India on numerous occasions, for instance, the Hon'ble High Court of Chhatisgarh in *Rajkumar Mishra* v. *State of Chhattisgarh*[9] reiterated the directions of the Hon'ble Supreme Court in a public interest petition seeking directions to the State Government to upload FIR online. The same was also reiterated by the High Court of Bombay in *Kaushal Madan Lal Khanna* v. *State of Goa.*[10] While dealing with the issue of not providing copies of complaints to the accused even after specific requests, the Hon'ble High Court of Andhra Pradesh in *Chintakayala Vijay* v. *State of Andhra Pradesh*[11] directed the State Government to "strictly comply" with directions of the *Youth Bar Association* (supra). It was categorically stated that it would include all the complaints registered by the State Government. In the State of Karnataka, the issue of uploading FIR online was raised in *Satish* v. *State of Karnataka,*[12] wherein the court took into account the grievance raised by the Petitioner and issued directions to ensure strict compliance with the uploading of FIR on the website.

Further, Kerala High Court in *Sreenish* v. *State of Kerala*[13], in the extension of the directions of the Hon'ble Supreme Court, passed additional directions for the State of Kerala with regard to maintaining and keeping the legible typewritten copy of the FIS in the CD File after recording of the FIS in the handwriting of the police official concerned as to ensure easy availability and accessibility of the same to courts and prosecutors concerned. Further, the prosecution agency was placed under the obligation to ensure that the copies of e FIR, FIS and the legible typewritten copy of the FIS were produced before the Hon'ble High Court along with memo of the learned Public Prosecutor in anticipatory bail applications.

The above-mentioned directions issued by various High Courts reflect in re-iteration of the direction of the Hon'ble Supreme Court which in turn is an indication to the fact that a lot is desired to be achieved in the implementation of the directions.

[9] MANU/CG/0528/2023.
[10] MANU/MH/3435/2016.
[11] MANU/AP/2423/2022.
[12] MANU/KA/1709/2022.
[13] MANU/KE/2688/2019.

II

The Crime and Criminal Tracking Network & Systems (CCTNS): Its Relevance, Objectives and Implementation

CCTNS is a project of the Government of India started in June 2009 under the National e-Governance Plan with the aim of creating a comprehensive and integrated system to enhance the efficiency and effectiveness of policing. It is a national-level plan being implemented at the State level, thereby making the States and Union Territories' role crucial. The Scheme is implemented in accordance with the foremost principle of the National e-Governance Plan – "centralised planning and de-centralized implementation". National Crime Records Bureau is the Central Nodal Agency for this project on behalf of the Ministry of Home Affairs, and State Crime Record Bureau is the Nodal Agency at the state level. Some of the important objectives of the CCTNS scheme can be seen as under

Objectives

i. To facilitate a citizen-friendly functioning of the police.
ii. Automating the functioning of police stations for greater accountability and transparency.
iii. To Advance delivery of people-centric services through effective usage of Information and Communications Technology.
iv. To Enhance the functioning of the police in several other zones, such as Law and Order, Traffic Management, etc.
v. To Enable information sharing and interaction among police stations, districts, State and Union Territories' headquarters and other police agencies.
vi. To Support senior police officers in the enhanced management of the Indian Police Force.
vii. Maintain the appropriate track of the development of cases, including in Courts.
viii. Decrease manual and redundant record keeping.

It pertinent to note that the directions of the Hon'ble Supreme Court in *Youth Bar Association* (supra) is also being implemented through the CCTNS Scheme.

Implementation of the CCTNS scheme

The CCTNS Scheme is being implemented by integrating all criminal data and records into Core Application Software (CAS). CAS is being installed in police precincts across all the states and union territories. The implementation of this software has integrated different software and platforms used by the states and union territories under a unilateral platform that will track criminals across the nation with ease. The CCTNS project also involves the training of police in using the latest technology and fulfils the additional objective of strengthening e-governance across the states.

The Scheme has interconnected Police Stations and offices of supervisory police officers across the country. It has digitised data related to FIR registration, investigation and charge sheets in all police stations and has helped develop a national database of crime and criminals.

III

Analysis of the access to FIR through CCTNS Scheme

For the purpose of this study various states were categorised into alphabetical categories in order to represent nonfunctional websites and difficulties encountered on the grounds of user non friendly options and for which the researchers interviewed senior and junior-level officers of the State Crime Records Bureau of various states through online and offline modes and asked a set of questions based on the questionnaire to bring out the smallest of detail, pertaining to the status of implementation of the CCTNS Schemes, the reasoning behind the specific functions and requirements on the State Police website to access the FIR, the project funding, the implementation challenges and other related questions. During the interaction with the police officers, the researchers also browsed the CCTNS portal, which is used at police stations to upload information at the national level combined grid. Further, the researchers browsed through the websites of each State in order to ascertain their functionality and requirements. The browsing was carried out on multiple instances to ensure that the data recorded was accurate. Additionally, Right to Information Applications were filed by the researchers in the National Crime Records Bureau, State Crime Records Bureau, Police Headquarters and the Crimes Team of all States and Union Territories seeking information pertaining to the implementation and usage of the scheme.

The following table depicts the implementation and usage of the CCTNS scheme for access to the FIR's in various states. In the table given below Category A represents States where access to the website was either not functional or inactive. Category B represents States where the user is unable to download any FIR. Category C represents States where there is no

option to search FIR based on the name of the accused, victim or complainant. Category D represents States where FIRs uploaded, are either handwritten or written in the local language. Category E represents States where it is mandatory to create an account or enter an OTP in order to access FIRs.

S. No.	Name of State/UT	Required details	Category
1.	**Andhra Pradesh**	Link not functional	A
2.	**Arunachal Pradesh**	Link not functional	A
3.	**Assam**	(M) District: (M) Police Station: (M) Year: (O) Do you know FIR No: Yes No (O) Enter the name of one of the Accused, Complainant or Victim	B
4.	**Bihar**	(M) District (M) Police Station (O) Enter the name of one of the Accused, Complainant or Victim	D
5.	**Chandigarh**	(M) District (M) Date Range (M) Police Station	C
6.	**Chhattisgarh**	(M) District (M) Police Station (M) From and to Date	C
7.	**Goa**	(M) District (M) Police Station (M) From Date and to Date (O) Enter the name of one of the Accused,	D

		Complainant or Victim	
8.	**Gujarat**	(M) District (M) Police Station (M) From Date and To Date (range 1 week) (O) FIR Number (O) Enter name of the Accused or Complainant	B, D
9.	**Haryana**	(M) Year (M) District (M) Police Station	C
10.	**Himachal Pradesh**	(M) Year (M) District (M) Police Station	B, E
11.	**Jammu & Kashmir**	Unable to view or download any FIR	A
12.	**Jharkhand**	(M) District (M) Police Station (M) Year (M) FIR Number (M) Name of the User (M) Gender of the User (M) Age of the User (M) Address of the User (M) Mobile Number of the User (M) OTP required	B
13.	**Karnataka**	(M) District (M) Police Station (M) FIR Number (M) Year	C

14.	**Kerela**	(M) FIR Number (M) Year (M) District (M) Police Station	C
15.	**Madhya Pradesh**	(M) District (M) Police Station (O) From Date and To Date or FIR Number	C, D
16.	**Maharashtra**	(M) District (M) Police Station (M) From Date and To Date	C
17.	**Manipur**	(M) District (M) Police Station	C
18.	**Meghalaya**	(M) FIR Number (M) Police Station (M) From Date and To Date	C
19.	**Mizoram**[14]		A
20.	**Nagaland**	(M) District (Last updated in March 2018)	A
21.	**Odisha**	Required to fill out a form, and upload an ID, and OTP is sent to the mobile number of the User (M) District (M) Police Station (M) From Date and To Date	C

[14] State of Mizoram in its response to the RTI application stated that the "*copies of FIRS were uploaded from 15th November 2016 till 2018 on Mizoram Police website i.e. www.police.mizoram.gov.in. By the end of 2018, the whole website was migrated to a new platform/format hosted by ICT, Mizoram as per instructions of the then DGP, Mizoram and the FIR upload link was not included in the new website as FIRs copies were not received any more from the district police.*"

		(O) FIR Number	
22.	**Punjab**	(M) District (M) Police Station (M) FIR Number (M) Year	C
23.	**Rajasthan**	(M) District (M) Police Station (M) FIR Number (M) Year (M) Mobile Number of User (M) OTP	E
24.	**Sikkim**	Uploaded date wise	C
25.	**Tamil Nadu**	(M) Name of the User (M) Mobile Number of the User (M) OTP (M) District (M) Name of the Police Station	C, E
26.	**Telangana**	(M) District (M) Police Station (M) Fir Number or Registration Date	C
27.	**Tripura**	(M) District-wise FIR copies uploaded	C
28.	**Uttar Pradesh**	(M) District (M) Police Station	C, D
29.	**Uttrakhand**	(M) District (M) Police Station (M) FIR Number	C
30.	**West Bengal**	(M) District (M) Police Station	C, E

		(M) FIR Number (M) Mobile Number of User (M) OTP	
31.	**Delhi**	(M) District (M) Police Station (O) FIR Number or name of the accused/complainant/victim	User Friendly with smooth functioning. Can serve as a model for other states
32.	**Puducherry**	(M) District (M) Police Station (O) FIR Number	C

*__(M)__ – Mandatory information; __(O)__ – Optional Information;

Categories

A – Unable to access the website

B – Unable to download any FIR

C – No option of searching using the name of Accused or Victim or Complainant

D – Handwritten FIR / FIR written in the local language

E – OTP required to access FIR

Category 'A' represents States (Andhra Pradesh, Arunachal Pradesh, Mizoram, Nagaland) that either do not have a website where the FIRs are uploaded in compliance with the direction issued by the Hon'ble Supreme Court in *Youth Bar Association* (supra) or the designated website is not operational or has a broken link. Each website in this category has been examined for at least three instances with at least 3 weeks' intervals between each examination before placing any State under this category. Needless to say, States falling under this category are in contempt of the Hon'ble Supreme Court for failing to comply with the directions issued in *Youth Bar Association* (supra). Moreover, no mechanism is mentioned on the respective website of these States to raise any grievance or seek redressal of issues about the website's

functionality. Therefore, the users of the websites of these States are left without any remedy against non-access to FIR, which is a violation of the citizen's fundamental rights.

Category 'B' represents States (Assam, Gujarat, Himachal Pradesh, Jammu & Kashmir) with a functional website designed to provide search and access facilities for FIRs. However, owing to technical and operational issues, a user cannot download FIR from the website of these States. It is unclear if the FIRs are being uploaded or if only basic information about the FIRs is updated on the portal. The situation of residents of these States is marginally better than those in Category 'A', as they at least have access to basic information about the FIR, like sections under which the accused is booked, number and date of FIR. However, the copy of the FIR is not accessible. The States falling under this category are also in contempt of the Hon'ble Supreme Court for failing to upload the FIRs on their websites.

Category 'C' represents those States where the user can search, access and download a copy of the FIR. However, here one can observe the variation in the mechanism of access to the FIR. For instance, under this category, the States do not provide an option for the user to search FIRs based on the name of the accused/complainant/victim. It is necessary that such a search option is provided to ensure easy access. Further, in some States like Karnataka, Kerala, Punjab, Rajasthan, Uttrakhand and West Bengal, it is mandatory to know the number of the FIR to be able to download it. It is pertinent to note that the accused or the victim or the witness, or any other user intending to access the FIR, may not have the FIR number unless intimated or informed by the investigating agency and, therefore, failing the objectives of the *Youth Bar Association* (supra). Therefore, to provide an effective mechanism for searching FIRs, it is necessary that an option of searching FIR based on the name of the accused or the victim or the Complainant is provided.

Category 'D' represents the States (Bihar, Goa, Gujarat, Madhya Pradesh, Uttar Pradesh) where handwritten FIRs are uploaded. One of the objectives of the CCTNS scheme is to provide the Investigating Officers with the necessary tools and technical assistance to enable them to effectively facilitate interaction and sharing of information with investigating agencies of different states. As noted in the introductory paragraphs, FIR is of significant importance as it is the first official version of the complaint, as stated by the informant. Therefore, it is necessary that the sanctity of such information is upheld with the highest integrity. The same can be ensured by providing typed FIR with a time-stamp, updated and registered on the CCTNS portal.

Category 'E' States (Himachal Pradesh, Rajasthan, Tamil Nadu, West Bengal) require a user to register and create an account on the State portal or enter OTP sent on their mobile phone.

States like Odisha require the user to upload a copy of the ID card of the user to search, access and download the FIR. These additional requirements act as hurdles to smooth access to FIR. Any additional requirement or step other than those fundamentally required goes against the spirit of the *Youth Bar Association* (supra). The mechanism to search and download the FIRs should be as simple as possible, requiring the least information from the user and providing the maximum information to the user. In most instances, there is either failure or delay in receiving the OTPs on the mobile phone, therefore, acting as a deterrence to access to FIR.

IV

Key Findings on Evaluation of the Implementation of the Scheme

Various research methodologies undertaken for this study revealed several lacunas in the present mechanism of uploading of FIR as followed by various States besides providing for some of the best practices/or setting a forum for an easily accessible model that could be adopted after comparative evaluation of the implementation of the scheme under various states.

Lacunas

i. Non-Functional Websites

The research reflected that the most fundamental requirement should be to provide an accessible and functional website to the users in compliance with the directions of the *Youth Bar Association* (supra). As mentioned in the preceding paragraphs, various States do not even have a functional website where the FIRs are to be uploaded. Even the mere creation of a portal and uploading basic information pertaining to FIR is no compliance with the directions of the Hon'ble Supreme Court. Therefore, every State should ensure that the website is functional and the users are able to download the FIR without any hassle at all times.

ii. The requirement to create an Account

As mentioned supra, some States require the user to create an account on its portal to view or download the FIR. It is apposite to mention here that in the interaction of the researchers with the officer from Kerala Police, it was revealed that Kerala provides two options to access FIR online: direct access and account-based access. In the first method, the FIR could be accessed from the website directly by providing the FIR number, the District of the police station and the name of the police station. However, if the user does not know the FIR number and desires to access the FIR, he can do the same using the second method of account-based access. In the second method, the user is required to create an account on the citizen portal of Kerala State and using the account; he can search FIRs without knowing the FIR number. The Kerala police officer stated that the reasoning behind creating two mechanisms was to differentiate the extent and method of access to FIRs. He narrated an

instance which necessitated the need to create multiple mechanism, where a group was apprehended for downloading FIRs from the State Portal and selling the data on a mass scale, which is a threat to data security and safety. In view of the same, a policy decision was taken by Kerala Police to create a second portal. Now, in the State of Kerala, any person desirous of accessing FIRs will have to provide the FIR number mandatorily, the District of the police station and the name of the police station. Alternatively, using the account-based method, a user can log in to the citizen portal by creating an account and search FIRs with whatever information is available.

Such a dual model is suitable in order to balance the right of the user to access FIR with the information available and the danger against wrongful utilisation of such access to FIRs.

iii. Mandatory to provide certain information

The research reflected that various States have made it mandatory to provide certain information as input (like FIR number, name of the police station and date of the registration of the FIR, etc), to be able to access the FIRs. In order to ensure easy, efficient and quick access to the FIR, the mechanism to search and download the FIRs should be as simple as possible, requiring the least information from the user and providing the maximum information to the user. In other words, the user may or may not possess certain information like FIR number, name of the police station where the FIR was registered, date of the registration of the FIR, name of the accused or the victim or the complainant, etc., However, possessing some or none of the said information should not affect the ability of the user to search for the FIR. The portal should display all information available based on the input given by the user, and consequently, the user may either look at all the search results or further filter the same by giving more input. This is very pertinent as an ordinary man would not necessarily have access to the above-referred information.

iv. FIR in the local language

The research reflected that States like Bihar, Gujarat, Madhya Pradesh and Uttar Pradesh upload FIR in the local language. As noted in the introductory paragraphs, crime has no jurisdiction and bounds. It can be committed against any person anywhere and is not restricted to local residents. Therefore, it can be pertinent for the residents of other States, including tourists, who do not know the local language of the State where the crime was committed, to access the FIR. There is no legal bar or requirement to upload the FIR in English. However, to ensure easy and effective access to all potential users of the First Information Report, it should be made available in English.

v. Handwritten Complaint and E-mails Uploaded as FIR in Place of Copy of FIR

The research also reflected that States like Goa upload handwritten complaints or complaints received *via* emails as FIR online. Madhya Pradesh displays only the portion of the complaint as FIR. It is pertinent to note here that an FIR contains much more information than just the complaint. It includes the FIR number, date and time of registration of FIR, name of known accused, date and time of the incident, name of the investigating officer, and immediate steps taken by the police receipt of the complaint and till the time of registration of the FIR. The directions issued by the Supreme Court in *Youth Bar Association* (supra) mandated uploading of FIR and not just the copy of the complaint. States which upload only a copy of the complaint in place of an entire copy of the FIR are in contempt of the Supreme Court. If a copy of the complaint is uploaded in addition to the copy of the FIR, it will help check the contents and ensure that no material fact or information is lost in typing the FIR or translating the same.

vi. Limitations, if any, on the part of the concerned state officers in bringing out any amendments in the portal at the state level

The interview taken with the police officers of various States during the research also reflects that some of the issues highlighted with the state portal were already known to the police officers. It was stated that the issues had already been highlighted by the concerned team. However, when asked about the status of the resolution of the issues, no particular or positive answers were forthcoming. This reflects that even for police officers, the grievance redressal mechanism is unresponsive or very slow.

vii. Lack of grievance mechanisms to address various issues pertaining to the functioning of the website:

It was found during the research that none of the States has any mechanism on their respective website to report any grievance pertaining to the functioning of the website or otherwise. This is one of the primary reasons that the lacunae, as identified in the present research paper, remain unresolved. Though some States have received certain complaints on the functioning of the website, there is no streamlined mechanism even in such states, which is reflected by the number of complaints filed in such States as represented in tabular form on the basis of responses received in reply to RTI's Filed

S.No.	Name of the Body/State	Number of Complaints received	Number of Complaints resolved	Number of Complaints pending
1	NCRB	Information claimed to be not available.		
2	Andhra Pradesh	Information refused to be provided.		
3	Bihar	0	0	0
4	Chandigarh	0	0	0
5	Goa	0	0	0
6	Gujarat	120 (in 5 years)	Not available	Not available
7	Harayana	79037 (regarding Citizen Portal, Core Application Software, Hardware & Networking)	79037	0
8	Himachal Pradesh	Information not provided.		
9	Jammu & Kashmir	6	6	0
10	Jharkhand	328	328	0
11	Karnataka	Information not provided.		
12	Kerala	Information claimed to be not available		
13	Meghalaya	Information not provided.		
14	Mizoram	0	0	0
15	Nagaland	Information not provided.		
16	New Delhi	Information not provided.		
17	Odisha	Information claimed to be exempted.		
18	Puducherry	276	272	4
19	Punjab	Information not provided.		
20	Tamil Nadu	4686	4686	0
21	Telangana	Information claimed to be exempted.		
22	Uttar Pradesh	No mechanism to record complaints.		
23	Uttarakhand	Information not provided.		
24	West Bengal	1186	2	1184

Best Practices

Option to access the FIR using mobile applications

During the research , interactions with various concerned officers and search on the google play store regarding the existence of any mobile applications providing an option to access the FIR in various states revealed that how some of the States like Jammu and Kashmir (JK ecop), Kerala (Pol-App), Karnataka (Karnataka State Police), Odisha (Sahayata), Uttar Pradesh (UPCOP), Gujarat (Citizen First Gujarat Police), Tamil Nadu (TN Police Citizen Services), Rajasthan (RajCop Citizen) and Madhya Pradesh (MPeCop) provide the option to access the FIR using mobile applications in addition to their existing websites. This ensures that if the website is not functional or there is any technical glitch, the mobile application can act as an alternate option.

V

Conclusion and Suggestions

Despite numerous financial, administrative and organisational difficulties, the system has been in operation for over 14 years. Though pragmatic weaknesses as highlighted above are awaiting immediate attention and action of policymakers, nevertheless it has tremendous potential for becoming a vital instrument for technology based-policing. Therefore, to address various gaps, this research study put forward various suggestions that can be considered and if implemented in true letter and spirit, can go long way in ensuring easy and quick access of the First information report to various stake holders thereby strengthening the foundation of existing Criminal Justice System in India. Some of the suggestions can be seen as under :

i. Need to create a commonly accessible National Level Platform

As discussed in detail hereinabove, CCTNS is national-level scheme which is being implemented at the State. Presently, all information is being uploaded on the same centralised portal at the police stations of different States. Therefore, despite there being centralised storage of information, the publication or access to such information is being made available by all States separately. Union and State Governments should consider having a single platform for the citizens to access the FIR registered in any State. Having a common platform would ensure more accessible access to FIR and consistency in the mechanism of access at the national level.

ii. Implementation of a Dual platform based model in every State

The research reflects that citizens can better access the FIR where there are dual platforms i.e. website and mobile application. Such dual option act as a backup for the other.

Further, during research, technical glitches of some nature were present on every portal. Therefore, providing a dual option would ensure more accessible and efficient access to FIR.

iii. Creation of an account should be optional

Creation of an account in order to access FIR, is detrimental to quick, easy and efficient access to FIR, especially with the frequency of the technical glitches on the portals. It is very common to be not able to create an account owing to failure in receiving OTP or any other such technical issue. However, as noted above, certain States highlighted that it was essential to get information about the user through the creation of an account in order to prevent any form of misuse of the information available on the portal. Therefore, it is pertinent to create a balance between easy access and misuse. In view of the same, an appropriate mechanism would be to allow access to a maximum of three FIRs at a time and in case the user intends to access more FIRs, then the user should be mandated to log in through an account.

iv. Output should be provided based on available information

The States should modify their portals to not mandatorily seek any specific detail to access the FIR. The user should be able to insert whatever information is available to them, and results pertaining to the input should be displayed. For example, the user may or may not have access to the FIR number, the name of the police station where the FIR is registered, the date of the registration of the FIR, name of the complainant or the victim or the accused. Irrespective of what information is available with the user, the user must be able to search.

v. Option to translate the FIRs by integration with AI software

It was observed during the research that various states prepare FIRs in their local language. However, it is well known that crime has no jurisdiction and boundaries and can be committed against any person at any place and is not restricted to local residents. Therefore, it is pertinent for the residents of other States, like tourists who do not know the local language, to be able to access the FIR and understand its contents. There is no legal bar or requirement in uploading the FIR in English. However, to ensure easy and effective access to all potential users of the First Information Report, it should be made available in English, and the same can be carried out by translating the FIRs using AI software. It is pertinent to note that the Hon'ble Supreme Court has used AI technology to translate the landmark judgments of the Court into various Indian languages. A similar mechanism can be replicated to ensure that people have access to FIR in the local and English languages.

vi. Integration with the eCourts platform to provide case status

The portal of States where the FIR is uploaded should be integrated with the eCourts website to simultaneously display the status of the case pertaining to the said FIR. This is very

pertinent in view of the fact that even when the cases are quashed by the Hon'ble High Court or when a closure report is filed by the police officer before the magistrate concerned, the FIR is continued to be available on the State portal. Hence, it is crucial to integrate the portal with the eCourt platform to give a holistic and actual picture to the users.

vii. Safeguards for the protection of data

There should be a regular data safety audit of the CCTNS System. It is pertinent to state here that the responses to the Right to Information have revealed that various States do not even have basic information (for example, number of the FIRs downloaded in a year, number of users who accessed the portal in a year, number of complaints received regarding the functioning of the website, etc.,) necessary to monitor the implementation of the directions of the Hon'ble Supreme Court in *Youth Bar Association* (supra) and the smooth and efficient functioning of the website. A safety audit will also reflect a lot of pertinent information about the functioning of the website.

viii. Grievance mechanism for seeking redressal of issues need to be part of every State website

The best method to ensure that a website functions and achieves its intended objective is to take regular feedback from the users of the website and use the feedback positively to make regular updates and modifications as may be required. Every State should have a grievance mechanism to raise complaints about the issues faced by the users on the website. Having such a mechanism would assist the State Government in resolving the shortcomings in real time.

ix. Delhi's portal can serve as a model for other States

The portal of Delhi Police can be made as a model for other States to learn. The most striking features of Delhi's portal are its user-friendliness, smooth functioning, no requirement to log in and the option to search the FIR with the name of the accused or the victim or the complainant. One reason for Delhi's better functioning is also because Delhi started early to upload the FIRs owing to the directions of the High Court of Delhi in *Court on its Own Motion* v. *State*.[15]

[15] *Supra* note 3

IMPLEMENTATION OF VICTIM IMPACT STATEMENTS: AN ANALYSIS ON ITS SUITABILITY AND ALTERNATIVE IN INDIAN CONTEXT

Aayush Tripathi*

Abstract

Victim Impact Statements (VIS) have played a key role in projecting the plight of the victims and giving them a voice in the United States (US) criminal justice system since the late 20th century. The judgement in Payne v. Tennessee upheld the constitutionality of VIS and since then it has been used as a tool for determination of quantum of sentence for the accused. These statements which assess the impact that the crime has had on the victims and their families are presented at the pre-sentencing stage have been replicated in Canada as well as the United Kingdom. The Committee for Criminal Reforms, 2020 is presently pondering whether to inculcate it within the Indian criminal justice system or not. While VIS has done a commendable job in enhancing the participation of the victims in criminal cases, something which is urgently needed in India as well, it is not without its flaws. VIS in its essence is retributive in nature and has the potential of promoting symbolic violence by juxtaposing the plight of the victim with the quantum of punishment to be meted out to the accused. It also has the potential to promote secondary victimization of victims, especially victims of sexual crimes. This paper argues that instead to focussing on retribution and quantum of punishment, the criminal justice system should rather focus on rehabilitation and quantum of compensation to be provided to the victims. Justice is achieved not when the accused gets punished but rather when the victim gets rehabilitated. This paper argues that by focussing on compensation and rehabilitation of victims, the entire system can become victim centric as opposed to being accused centric.

Keywords:

Victim Impact Statements, Victims, Criminal Justice System, Rehabilitation ,Accused

I

Introduction

The Code of Criminal Procedure (Cr.P.C.) defines '*Victim*' as a person who has *"suffered any loss or injury caused by the reason of the act or omission for which the accused person has*

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been charged."[1] The provision also clarifies that the term includes the person's "*guardian or legal heir.*"[2] The primary purpose of the Criminal Justice System across the globe has always been to protect victims from offenders who commit crime in the society. However, in adversarial system such as ours, the protection entails punishment and sentencing of these offenders while the victims remain mere spectators and play a secondary role in the entire process. In *Rattan Singh v. State of Punjab*[3], Justice Krishna Iyer remarked that *"It is a weakness of our jurisprudence that victims of crime and the distress of the dependents of the victim do not attract the attention of law. In fact, the victim reparation is still the vanishing point of our criminal law. This is the deficiency in the system, which must be rectified by the legislature."*[4] The ignorance towards the victim is also apparent in the Constitution where two full blown articles, namely Article 20[5] and Articles 22 were drafted by the framers for protecting the accused while framing none for the protection of victims. Even the Cr.P.C. when initially drafted did not contain the definition of *victim*. It was only in 2008, post the recommendations of Malimath Committee report which lamented the status of victims in our criminal justice system, was the definition of *victim* included. The recommendations of the same report have helped in bringing the plight of the victims to the mainstream as can be gauged by the addition of section 357A in the Cr.P.C. which mandates the State Governments to introduce *Victim Compensation Schemes* in every state. Victim Compensation Schemes, as the name suggests, are meant to provide compensation to victims of certain offences and can be taken by the victim even when the accused has not been apprehended.[6]

While the Victim Compensation Scheme is an upgrade on what we already have, it neither guarantees participation of the victim during the trial, nor does it guarantee that his or her voice is heard. The victim still remains a mere spectator to the trial and is left to collect whatever is given to him. This is where Victim Impact Statement (VIS) comes into the picture. In its very basic essence, a VIS is a statement by the victim at the time of sentencing of the trial which underlines the overall impact on him/her as a result of the offence committed.

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[1] The Code of Criminal Procedure, 1973 (No.2, Acts of Parliament,1974), s.2(wa).
[2] *Ibid.*
[3] (1979) 4 SCC 719.
[4] *Ibid.*
[5] Article 20 of the Constitution of India talks about protection in respect of conviction for offences and provides- 1) No person shall be convicted of any offence except for violation of the law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence; 2) No person shall be prosecuted and punished for the same offence more than once; 3) No person accused of any offence shall be compelled to be a witness against himself.
[6] *Supra,* note 1 at s.357-A.

This paper shall primarily look into the what VIS is and its suitability in the Indian context and whether Victim Impact Report (VIR) as laid down by the Delhi High Court in 2020 is a better fit. The paper is divided into four parts- the first part shall briefly deal with the meaning and origins of VIS. This chapter will highlight the meaning of VIS and the purpose that it serves, so as to acclimatize the reader with the concept. The second part shall deal with the use and practice of VIS in other jurisdictions in three countries, namely, United States, Canada and United Kingdom. This part shall look into the cases of *Booth v. Maryland* and *Payne v. Tennessee*, the two primary cases linked to VIS and the circumstances surrounding the case. The third part shall look into the problems associated with VIS as highlighted by various scholars around the world. The fourth and the final part shall deal with the status of VIS in India and as to how it can be implemented for better engagement of victims in criminal trials in the country. It shall also look as to how VIR can be a better alternative to VIS in the Indian context for achieving victim justice. In the end, the article will try and analyse, firstly, the impact of *VIS* on the criminal justice system in general and secondly, as to how the Indian judiciary has had dealt with the issue and as to whether that approach is more nuanced one than what is present in the foreign jurisdictions.

II

Meaning and Purpose Behind VIS

The Department of Justice of USA explains VIS comprehensively as statements describing the emotional, physical and financial impact that the victim and others have suffered as a direct result of the crime which can be either written or oral in nature.[7] It acts as a bridge between the criminal justice system and the victims as they have the right to not be excluded from the court proceedings and be reasonably heard, which is done through a VIS during the time of the sentencing.[8] According to Professor G.S. Bajpai, VIS are *"written or oral statements by crime victims, about how crime has impacted them."*[9] As mentioned earlier, victims have perennially been the forgotten entities in a criminal trial. Shedding light on the same, Prof. Bajpai laments that the entire process of criminal trial is designed in a manner as to exclude the victim of the crime as he is not absent from the framing to charges to the discharge of the accused, parole, bail and even during sentencing.[10] Adrija Ghosh defines VIS in not dissimilar terms where she

[7] Victim Impact Statements, https://www.justice.gov/criminal-vns/victim-impact-statements (Last visited on Aug. 1, 2022).
[8] *Ibid.*
[9] G.S. Bajpai, "Mainstreaming Victims of Crimes", *The Hindu*, January 1st, 2019, *available at* https://www.thehindu.com/opinion/op-ed/mainstreaming-victims-of-crimes/article25874475.ece (Last visited on July 30th, 2022)
[10] *Ibid.*

calls it a statement made by the victim regarding the emotional, psychological, physical as well as financial harm suffered due to a crime.[11] The need to introduce VIS during sentencing stems from two reasons; firstly, the passive role that they are subjected to by the criminal justice system and secondly, their secondary victimization.[12] VIS can be divided into two categories- *Instrumental* and *Expressive.* A VIS is *instrumental* in nature when it is used determine the quantum of sentence to be served by the accused based on the degree of culpability consequent to the damages suffered by the victim.[13] However, a VIS is expressive when it is not used to determine the quantum of punishment to the accused but rather its aim to help the victim reap therapeutic benefits as a result of his participation in the trial in a capacity other than that of a witness.[14]

The Indian Penal Code (IPC) does lay down strict punishments for different kind of crimes, however, it fails to take into consideration the plight of the victims. One might ask, how? The answer is quite simple- all crimes do not impact different victims in the same way. For example, if a person who is the sole breadwinner and the only educated member of a family is murdered, the family will not only suffer emotionally but also financially. However, if the member is not an earning member, though the family will not suffer financially, the emotional and mental trauma amongst the members cannot be denied. It is pertinent to note that the victim is not just the person against whom the offence is committed but also the family members and other loved ones. Similarly, in cases of sexual offences against women, different victims are impacted in different manner. Sexual offences like rape are a stigma in our society due to which they are heavily underreported. The bottom-line is that crimes don't affect all the victims and there is no mechanism under the criminal justice system in India to assess the impact on the victim.[15] It can be argued that VIS has the potential to alter the fate of victims in the country by providing the court with written and oral statement by victims or their family members as to the mental, emotional and financial damage caused to them as a result of the crime committed. Further, it can help in humanising the victim by putting through the court, the psychological trauma suffered as a result of a crime and its effect on his or her daily life. The court, which looks into

[11] Adrija Ghosh, "Unravelling the Question of Victim Impact Statements at Sentencing", *P39a Blog,* March 4th 2022, *available at* https://p39ablog.com/2022/03/04/unravelling-the-question-of-victim-impact-statements-at-sentencing/#:~:text=What%20are%20Victim%20Impact%20Statements,a%20result%20of%20a%20crime (Last visited on 22nd August, 2022).

[12] *Ibid;* Secondary Victimization refers to negative behavior and attitude of the society and authorities towards the victim where rather than sympathizing/empathizing with the victim, they resort to victim blaming which causes them even more trauma.

[13] *Ibid*

[14] *Ibid.*

[15] *Supra,* note 9.

the aggravating and mitigating factors while sentencing an accused will also take into consideration, the impact of the crime on the victim which can be a welcome addition to the criminal justice system process.

The implementation of VIS in United States, Canada and United Kingdom is *instrumental* in nature. It is important to look at law regarding VIS in these countries along with the criticism that it has received to have a better understanding of its applicability and adaptability in India.

United States of America

The first legislative initiative in the USA regarding protection for victims or victims in general was taken in the year 1982 when Congress enacted the Victim and Witness Protection Act (VWPA). However, the act only covered federal matters where cases don't have *victims* in the conventional sense since most of the violent crimes in USA fall within the ambit of the State Governments and its law enforcement agencies. Therefore, this act served as the model legislation for state and local governments to enact similar legislations within their jurisdictions.[16] The purpose of the legislation as declared by the Congress was to "*enhance and protect the necessary role of crime victims and witnesses in the criminal justice process.*"[17] Regarding VIS, the VWPA amended the Federal Rules of Criminal Procedure (FRCP) after which VIS was required as part of the pre-sentencing report submitted to the judge by the US Department of Probation.[18] According to the FRCP, the pre-sentence report must contain the all the information pertaining to the financial, social, psychological and medical impact on the victim of the crime.[19] Further, the Senate Judiciary Committee regarded VIS as the first step in ensuring that the victim's side is also heard and considered by the judiciary.[20] On the question as to when shall the VIS be admitted, it was observed by the Committee that while it should be used in every crime involving a human victim, in cases where the crime is perpetrated against an organization or an institution and the direct victim of it is a human, it is ideal that a VIS is prepared accordingly.[21] Thus, VWPA was the first authoritative text in the US which recognized the use of VIS to encourage increased attention to the victim.

The constitutionality of VIS was tested for the first time in the case of *Booth v. Maryland*.[22] The case involved the murder of an elderly couple, Irwin and Rose Bronstein, 78 and 75

[16] Dina R. Hellerstein, "The Victim Impact Statement: Reform or Reprisal", 27 *American Criminal Law Review* 391 (1989).
[17] Victim and Witness Protection Act of 1982, s. 2(b)(3).
[18] *Supra*, note 12.
[19] Federal Rules of Criminal Procedure, rule 32 (d) (2) (B).
[20] *Supra* note 12 at 395.
[21] *Ibid.*
[22] 482 U.S. 496 (1987).

respectively, by John Booth and Wille Reid by bounding, gagging and then repeatedly stabbing them in the chest with a kitchen knife. Booth was found guilty for first degree murder, robbery and conspiracy to commit murder by a jury, after which the question came up for sentencing for conviction. He chose that the sentencing be decided by the jury again and not by the trial judge. The Maryland law mandated that a VIS be included in the pre-sentence report which was read out to the jury by the prosecution prior to the procedure of sentencing. The statement contained not just the impact of the crime on the victim's family but also contained an elaborate story regarding their day-to-day life and their relationships with their children and grand-children. It also described the plight of their two children and the immense impact that the murder had on their mental health so much so that they were having nightmares and their inability to look at kitchen knives the same way again. Further, it also mentioned that the grand-daughter of the victims was supposed to get married two days later and that instead of going to her honeymoon, she was present at her grandparent's funeral. After listening to this VIS, Booth was sentenced to death by the jury. However, on appeal, the Supreme Court found the effect of the murder on the family members to be irrelevant and inadmissible with regard to the sentence accorded to the accused. According to the court, the statement describing the personal characteristics of the victim and the impact of the crime on the victim's family and their opinion of the same were improper considerations regarding sentencing of the defendant.[23] The court advocated for a limited role of the jury during the process of sentencing so it creates the risk of *arbitrary and capricious action* on their part which is constitutionally untenable.[24] According to the reasoning by Justice Powell, the process of sentencing should only be concerned with the characteristics of the defendant rather than the impact on the victim. Articulating further, he held that the effect of a crime on different victims will be different as will be their characteristics. He held that in criminal cases, the opinions of the family members in the VIS will always be emotionally charged and taking into account such statements would serve no other purpose but to inflame the jury and divert the attention from the available evidence concerning the defendant and the crime. Finally, it was held that admitting such statements would hamper reasoned decision making and shift the focus away from the defendant. Thus, a nine-judge bench of the US Supreme Court held that introduction of VIS was violative of the

[23] *Ibid.*
[24] *Ibid.*

eighth amendment in the US Constitution.[25] The court observed VIS creates an unacceptable risk of the jury imposing a death penalty in an arbitrary manner.[26]

It was only later in 1992 in the case of *Payne v. Tennessee*[27] that another nine-judge bench of the US Supreme Court upheld the admissibility of VIS during the sentencing phase of the trial. In the said case, the petitioner Payne was convicted for murder of a woman and her two-year-old daughter and also for assault on her three-year-old son. During the sentencing phase, the prosecution called the grandmother who testified that the three-year-old boy missed her mother and her baby sister. The petitioner called his parents, his girlfriend and a clinical psychologist who offered arguments regarding the mitigating aspects of his conviction. In enumerating the aggravating aspects, the prosecution also mentioned the continuing effect of the murder on the family of the victim. The petitioner was given a death sentence by the judiciary on both the murder counts. The verdict by the jury was affirmed by the High Court of Tennessee and the argument by Payne that the VIS describing the effect of the murders on the family violated his rights under the Eight Amendment as held in *Booth v. Maryland* was rejected. It was held that VIS is not violative of the eighth amendment of the Constitution even in cases of death penalty. This judgement had a significant impact on the victim's rights movement in the United States.

Canada

VIS was introduced in Canada for the first time in the year 1988 under section 722 of the Criminal Code of Canada consequent to the Canadian Sentencing Commission Report in 1987.[28] The report recommended that statements which described the emotional, physical and financial harm caused to the victim as a result of the crime should be admitted by the courts during the sentencing phase of the trial.[29] Sub-section (2) of section 722 lays down the procedure for implementation of VIS where it is laid down that it should be prepared in a form in writing in accordance with the procedure established by the Lieutenant Governor in Council

[25] The Eighth Amendment to the United States Constitution states: "*Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.*" This amendment prohibits the federal government from imposing unduly harsh penalties on criminal defendants, either as the price for obtaining pretrial release or as punishment for crime after conviction

[26] *Supra* note 18 at 503.

[27] 501 U.S. 808.

[28] Marie Manikis, "Victim Impact Statements at Sentencing: Towards A Clearer Understanding of Their Aims", 65 *University of Toronto Law Journal* 85 (2015); Section 722 of the Criminal Code of Canada reads as follows- *(1) Victim Impact Statement - For the purpose of determining the sentence to be imposed on an offender or whether the offender should be discharged pursuant to section 730 in respect of any offence, the court shall consider any statement that may have been prepared in accordance with subsection (2) of a victim of the offence describing the harm done to, or loss suffered by, the victim arising from the commission of the offence.*

[29] *Id.*

of the province in which the jurisdictions is exercised by the court and be filed duly with the same court.[30] There are three mandatory elements of VIS in Canada-

- Whether the victim has been advised of his or her statutory right to submit a statement.
- The statements must be submitted in accordance with statutory provisions.
- The allowance to read the statement to the victim by the court.[31]

Also, it is pertinent to note that the courts have the discretion to admit even oral statement/evidence of a victim in case a statement hasn't been filed.

United Kingdom

VIS in the United Kingdom is referred to as Victim Personal Statement of VPS. The *Code of Practice for Victims of Crime in England and Wales (Victim's Code)* under Right 7 provides the right to make a VPS to explain as to how a crime, whether, physically, emotionally or financially affected a victim.[32] The text elaborates that the statement shall be considered by the judge or the magistrate during the determination of the sentence. The code also provides this right to a *bereaved close relative*.[33] The Code further specifies that the VPS will be taken into account by the court if the accused is found guilty during the trial for the determination of the sentence.

Thus, the western countries like USA, UK and Canada have tried to work upon the rights of the victims by inculcating *VIS* in their criminal justice system. However, a lot of questions have been raised over the effect that it has on the sentencing procedure in the trial. *VIS,* while a noble gesture is not without its flaws. As noted earlier, many scholars have weighed in on its negative aspects especially in countries with the jury system where the jury can be easily swayed by the impact statements and render harsher punishments than what is actually necessary for the accused. We have to understand that the purpose of the law in criminal cases should not be to pit the rights of the victims against that of the accused but rather to bring about justice and also to balance the rights of both the parties. *VIS,* in the Indian context, though is at a very nascent stage, it is however pertinent to note that the take of Indian judiciary has been rather nuanced and more evolved. Let us see how the Indian judiciary has reacted to the same.

[30] Criminal Code, RSC 1985, C-46.
[31] *Supra,* note 22 at 88.
[32] Code of Practice for Victims of Crime in England and Wales, s. 7.1.
[33] *Id.,* at s. 7.2.

III

The Inherent Flaws within VIS

The *Payne* judgement evoked conflicting emotions in the legal circles of United States. While, on one hand, it was lauded for including and strengthening the voice of the victim in the American criminal justice system, on the other hand, it was criticised by scholars like Jennifer K. Wood (*Wood*) of promoting *symbolic violence*.[34] The images shown by the prosecution to the jury in this case also contained the images of *Nicholas*, the child who was assaulted by the defendant and was suffering as a result of the murder of his mother. Further, a two-minute videotape of the crime scene was also shown to the jury stressing that those will be the images that will remain entrenched in the mind of *Nicholas* forever. Analysing the statement, the images and the video tape provided by the prosecution in *Payne,* Wood said that as a result of seeing the horrific images, the jury would not just sympathize but rather empathize with the victim. She argued that the jury doesn't represent the victim in a criminal trial and that the jury isn't appointed to determine victim's justice, rather it is appointed to determine state's justice.[35] Critics have pointed out that the judgement by the jury juxtaposed the suffering and the juvenility of *Nicholas* to inhumanity of the defendant and accused the prosecution of hiding behind the plight of the former.[36] The jury in *Payne* was urged to make the decision for *Nicholas* which eroded the power of the state.[37] It was also argued that the judgment in *Payne* threatened victims' rights as well as critics felt that to get justice, especially in cases of capital punishment, the victim's statement would have to be as convincing and as gruesome and similar to the statement in this case. According to Wood, *"Unless victims can tell a story similar unless they can fit themselves into the narrow constraints of victimization that these legal narratives impose, the criminal justice system w and deaf to their experiences as victims."*[38]

If we look at VIS in the context of women victims of gender related violence it seems like a problematic and misguided approach to cure secondary victimization which does little to address the true needs of the victims, particularly in cases of rape.[39] What VIS does is to conveniently alleviate political pressure on the authorities without challenging the status quo

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[34] Jennifer K. Wood, "Chapter Four: Refined Raw: The Symbolic Violence of Victim's Rights Reform", 121 *Counterpoints* 80 (1999).
[35] *Id.,* at 82.
[36] *Id.,* at 80.
[37] Angela P. Harris, "The Jurisprudence of Victimhood" 1991 *The Supreme Court Review* 101 (1991).
[38] *Supra,* note 34 at 87.
[39] Ruparelia, Rakhi. "All That Glitters Is Not Gold: The False Promise of Victim Impact Statements", in Elizabeth A Sheehy, *Sexual Assault in Canada: Law, Legal Practice and Women's Activism* 665–700 (University of Ottawa Press, 2012).

and leaves the sources of crime unaddressed.[40] It only reinforces the racial and sexist stereotypes in the criminal justice system which is detrimental for not just victims but also the accused.[41] It creates an idea of the *ideal victim* who is defined by her identity, the identity of her offender, her characteristics, her past behaviour and the nature of the offence, especially in cases of sexual offences.[42] The *ideal victim* is someone who is pure, pious, demure and blameless in her conduct and characteristics.[43] Such a victim enjoy a higher status in the victim food chain and her victimization is taken much more seriously than others.[44] They give the example of women who are victims of sexual and domestic as to how only certain women who have historically presented themselves with certain characteristics and behaviour can bring their case in front of the public and get a favourable response.[45] They also bring to attention a several quotes from persons in authority on the conduct of an *ideal victim* in case of women victims of sexual offences. They give example of a certain Judge Wild from 1982 who said, "*Women who say no do not always mean no. It is not just a question of saying no, it is a question of how she says it, how she shows and makes it clear. If she doesn't want it, she only has to keep her legs shut."*[46] Enunciating further, they also mention a quote by Judge Bertrand Richards who had remarked in context of a girl hitch-hiking, *"It is the height of imprudence for any girl to hitch-hike at night. This is plain, it isn't really worth stating. She is in the true sense asking for it."*[47]

Nils Christie explained the *ideal victim* by giving the example of an old lady returning back from home during mid-day after caring for her sister and was hit on the head by a strong burly young man and laid down the five principles of being an ideal victim[48]-

1. The victim should be weak. For example, old and sick people are perfect candidates for being the ideal victim
2. The victim was doing something which is considered respectable by the society. For example, caring for a loved one

[40] *Id.,* at 667.
[41] *Ibid.*
[42] *Ibid.*
[43] *Id.,* at 672; *Also see,* Lynne Henderson, "The Wrongs of Victims' Rights" 37 Stanford Law Review 951 (1985).
[44] Eamonn Carrabine, Maggy Lee, *et. al. Criminology: A Sociological Introduction* 159 (KY: Routeledge, Florence, 2004).
[45] *Id.,* at 160.
[46] *Id.,* at 161.
[47] *Ibid.*
[48] Nils Christie, "The Ideal Victim," in Ezzat A. Fatteh, *From Crime Policy to Victim Policy: Reorienting the Justice System* 17-30 (Basingstoke: MacMillan Press, 1986).

3. She was present at a place for which she couldn't be blamed for being. For example, in the middle of street during day time
4. The offender was big and bad.
5. The offender wasn't known to the victim nor had any personal relationship with her.

In contrast, he highlighted the image of a *non-ideal victim* by giving the example of a man drinking in a bar who was hit by an acquaintance who also took away his money. Even if the hit on the man's head was more severe than that of the old woman, but because[49]-

1. He was strong
2. He was doing something not considered to be respectable by the society
3. He shouldn't have been in a bar in the first place
4. He was as big and strong as the offender
5. The offender was known to him

Due to all the abovementioned reasons, the man in the bar is not an *ideal* victim in the eyes of the society. Thus, these criticisms of VIS, as implemented in the West, do hold a lot of ground and serve as a lesson for better implementation in the Indian scenario. While, enacted with noble intentions, it can prove detrimental to the cause of the victim as pointed out by several scholars and critics. Now, let us look as to how it can be implemented in India in a better manner to serve the purpose of justice to the victims.

IV

Presenting an Alternative Solution to VIS in India

As mentioned earlier, in India, victims were the forgotten people up until the *Code of Criminal Procedure (Amendment) Code, 2008*, when the definition of *victim* was first introduced. It was the result of the recommendations of the Malimath Committee Report in 2003 that the aforementioned provision along compensatory provisions for the victims under section 357-A was added to the Cr.P.C. The report lamented about the rights of the victim to get justice and the harm suffered as a result of crime committed on him/her.[50] The report remarked that the only satisfaction for the victim is the conviction of the accused or a death sentence or a fine. According to the report, "*How does he get justice if the State does not succeed in so doing? Can he ask the State to compensate him for the injury?*"[51] The report said that not only did the

[49] *Ibid.*
[50] Ministry of Home Affairs, Committee on Reforms of Criminal Justice System, Government of India (March 2003) (India).
[51] *Id.*, at 77.

state completely absolve itself from the liability of compensating the victim but also didn't give any right to the victim to be a dominant stakeholder in the criminal justice proceedings as he has no right to either lead evidence nor can he challenge the evidence presented by the defence by way of cross-examination of witnesses.[52] The report also observed that the investigative process is completely a police function with no role of the victim in it and suggested that it be addressed "*on an urgent basis.*"[53] This is exactly where something like a VIS comes in which can help in minimizing secondary victimization of the victim and restore their hope in the criminal justice system.

It is not the case that VIS has never been addressed by the judiciary. The Supreme Court in the 2018 judgement in *Mallikarjun Kodagali v. The State of Karnataka*[54] had held that it was time that VIS was given due recognition so that appropriate punishment could be awarded to the convict. However, it was also remarked by the court that while VIS might result in appropriate punishment to the accused, that would not necessarily result in *justice* for the victim. It was observed that rehabilitation of the victim would go a longer way in achieving justice for the victim rather than a harsh punishment for the accused. Further, the court said that victimology is an evolving jurisprudence and thus it becomes important to keep moving forward rather than staying stagnant.[55]

Karan v. NCT of Delhi: The Concept of Victim Impact Report

An interesting development in this field at a judicial level happened in 2020, when the Delhi High Court in *Karan v. NCT Delhi*[56] (*Karan*) came up with the concept of *Victim Impact Report* (VIR) and laid down elaborate procedural guidelines for its implementation. The VIR has to be filed by the Delhi State Legal Services Authority (DSLSA) in every criminal case post the stage of conviction. The purpose VIR is to be reveal the impact of the crime on the victim. The court held that the quantum of compensation is to be determined by the trial Court which should take into consideration the gravity of the offence, the amount of physical and mental harm suffered, financial damages suffered by the victim and the ability of the accused to pay. While determining the paying capacity of the accused, the court would have to consider his present occupation and income and can also direct him to pay a monthly compensation.[57]

[52] *Ibid.*
[53] *Id.*, at 79.
[54] (2019) 2 SCC 752.
[55] *Ibid.*
[56] 277 (2021) DLT 195 (FB).
[57] *Ibid.*

The court also laid down the entire procedure for filing the VIR. According to the directions of the court, post the conviction, the accused shall be directed by the trial court to file an affidavit containing details of his income and assets within a period of 10 days. Along with it, the trial court is also supposed to direct the prosecution to file an affidavit, within 30 days of the conviction, regarding the expenses incurred by it with supporting documents. Upon receiving the affidavit of the accused, the court shall immediately forward affidavit along with the judgment to the DSLSA which shall conduct a summary inquiry on the losses suffered by the victim and the paying capacity of the accused. The DSLSA is permitted to take the assistance of the SDM, the SHO concerned and the prosecution in conducting the inquiry. Accordingly, the DSLSA is required to conduct the inquiry and to submit the complete *VIR* within 30 days from the receipt of the judgement and the affidavit by the court. After receiving the *VIR*, the court after considering the impact of the crime on the victim and the paying capacity of the accused, award the compensation accordingly. The compensation shall be paid by the accused to the DSLSA who shall then disburse the same to the victim according the *Victim Compensation Scheme.* In case if the convicted person doesn't have the capacity to pay, section 357-A of the Cr.P.C. shall be invoked by the court and direct the DSLSA to award compensation to the victim from the Victim Compensation Fund under the *Delhi Victim Compensation Scheme, 2018.*[58] In cases of acquittal of the accused, the trial court has the discretion to make similar recommendations if it feels that the victim needs to be rehabilitated, provided that victim can be termed so under Delhi Victim Compensation Scheme. Further, if the accused remains untraced or if his identity remains unestablished, the victim can move the District Legal Services Authority (DLSA) for grant of compensation.[59]

Committee on Criminal Reforms, 2020

At a legislative level, VIS was mentioned for the first time in India by the *Committee for Reforms in Criminal Law* (Committee) instituted in May, 2020 with the purpose of suggesting multifaceted reforms to criminal laws in the country.[60] Amongst its many guiding principles, two principles which are pertinent in this regard are- *victim justice* and *balancing the rights of the victims vis-à-vis the accused.*[61] It is evident that the committee is serious about the

[58] *Ibid.*
[59] *Ibid.*
[60] Committee for Reforms in Criminal Law 2020, India, *available at* https://criminallawreforms.in/aim-and-guiding-principles/ (Last visited on 20th August, 2022).
[61] *Ibid.*

introduction of VIS in India as the *questionnaire* prepared by it for discussion, in Part C titled *General Provisions as to Inquiries and Trials* contains the question[62]-

Should ss. 306 and 307 be amended to expressly provide for the Magistrate to, before tendering pardon, take into account:

a) the recommendations of the prosecutor; and / or,

b) the victim impact statement?

This questionnaire does indicate the mindset of the committee, that is, firstly, they are looking at the possibility of inculcating VIS into the Indian criminal justice system, and secondly, that they are trying to inculcate it during the time of sentencing. However, the judgement in *Karan* seems to be a more nuanced view of how victim justice and a balance between the rights of the victim and the accused should be brought about in the Indian society. Adrija Bose argues that by using VIS at the time of sentencing which will affect the punishment accorded to the accused, the criminal justice system treats the victim as *means to an end*.[63] The only goal which is achieved through this is enhanced punishment for the accused which is retributive in nature and centred around the accused rather than being centred around the accused and being rehabilitative in nature. According to her, VIS in this form wouldn't constitute as an improvement on the *status quo* as the victim will again be treated merely as a source of information by the prosecution where his pain, trauma and agony will only be used for affecting the sentence rather than focusing of his rights and needs.[64] Thus, she argues that by making VIS an instrument for subjecting heavier punishment on the accused by using the trauma of the victim, the criminal justice system co-opts the demand of the victim further their own interests.[65]

Stigma and Secondary Victimization in India

Another pertinent point in the Indian context is that of the *ideal victim* and of *secondary victimization* as discussed above. In a country like India where, the criminal proceedings are prolonged, victims often feel that they get treated worse than the perpetrator and hence denied justice.[66] This is especially true in cases of sexual offences whereby the victims are stigmatized as a result of the taboo nature of the crime. Sex and sexuality are still considered a taboo in the

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[62] Committee For Reforms in Criminal Laws, First Consultation On Procedural Criminal Law Questionnaire, *available at* https://criminallawreforms.in/wp-content/uploads/2020/08/Questionnaire-for-Consultations-on-Procedural-Criminal-Law.pdf (Last visited on 20th August, 2022).

[63] *Supra,* note 11.

[64] *Ibid.*

[65] *Ibid.*

[66] Sanjeev P Sahni, "Address the Secondary Victimization of Sexual Assault Survivors", *The Hindustan Times,* June 13, 2017, *available at https://www.hindustantimes.com/opinion/address-the-secondary-victimisation-of-sexual-assault-survivors/story-Mb6J3KFRmKhD4fxT8kPf3O.html* (Last Visited On 25th August, 2022).

Indian culture and in a patriarchal setup, *secondary victimization* in form of victim blaming is highly common. There have been various instances of not just society members but even persons in authority and office holders of the government, political parties and even the judiciary have indulged in blaming the victim. For example, Mr. Mulayam Singh Yadav, Chief of the Samajwadi Party in India and also the former Chief Minister of Uttar Pradesh as well as the former Defence Minister of India, said "*Should rape cases lead to hanging? Boys are Boys. They make mistakes*"[67] in a 2014 election campaign rally in Moradabad. A member of the Maharashtra State Women's Commission in 2014 had remarked that rapes happen due *"woman's clothes, her behaviour and her being at inappropriate places."*[68] Another incident of victim blaming was by Vibha Rao, the Chairperson of Chhattisgarh State Women Commission who remarked that "*Women display their bodies and indulge in various obscene activities. Women are unaware of the kind of message their actions generate.*"[69] These comments are not stray incidents but commonplace incidents where the victims are blamed in cases of sexual offences. Even the judiciary is not immune from stigmatizing victims of sexual offences. Very recently, the Kozhikode sessions court in Kerala in *Civic Chandran v. State of Kerala*[70] granted bail to the accused in a case of sexual harassment registered under section 354A of the Indian Penal Code (IPC) because the complainant was wearing a *sexually provocative dress.* The court held that the photographs produced by the accused in his bail application that the complainant was "*exposing to dresses which are having some sexual provocative one*" and hence a case under section 354A would prima facie not stand against the accused.[71] In *RIT Foundation v. The Union of India*[72] also known as the *Marital Rape* case, Justice Hari Shankar commented that if the husband forcefully has sex with his wife even when she refuses, it cannot be equated to being raped by a stranger. He further enunciated that the outrage felt by being raped by a stranger cannot be equated to having non-consensual sexual intercourse with her husband and equating such outrage isn't just unjustified but also

[67] Anant Zanane, "Mulayam's Shocker On Rape: Boys Make Mistakes, Why Hang Them?", *NDTV*, Aprill 11, 2014, *available at* https://www.ndtv.com/elections-news/mulayams-shocker-on-rape-boys-make-mistakes-why-hang-them-556875 (Last Visited On 25th August, 2022).
[68] Deepshikha Ghosh, "Woman's Clothes, Behaviour Also Responsible for Rapes", *NDTV*, January 29, 2014, *available at* https://www.ndtv.com/india-news/womans-clothes-behaviour-also-responsible-for-rapes-ncp-leaders-shocker-549155 (Last Visited On 25th August, 2022).
[69] Suvojit Baghchi, Women Equally Responsible for Crimes Against Them, *The Hindu*, January 5, 2013, *available at* https://www.thehindu.com/news/national/women-equally-responsible-for-crimes-against-them/article4273827.ece (Last Visited On 25th August, 2022).
[70] Criminal Miscellaneous Case No. 1303/2022.
[71] *Id.*, at 70.
[72] W.P.(C) 284/2015 & CM Nos.54525-26/2018.

unrealistic.[73] In another case, the Tripura High Court reduced the sentence of man charged for acid attack.[74] It held that his wife's refusal to restore matrimonial ties must have caused him frustration which led him to take such a step and counted it as a mitigating factor. The division bench of the High Court held that "*we cannot overlook this mitigating circumstance while deciding about the proportionality of the sentence to be awarded to the appellant for the crime committed by him."*[75] In another instance, the Karnataka High Court granted anticipatory bail to the accused due to the *unbecoming conduct* of the victim as she slept after being raped.[76] The court held that due to the complainant agreeing to the fact that she felt tired and hence slept post the perpetration of the act is *unbecoming of an Indian woman; that is not the way our women react when they are ravished.*[77]

These examples clearly show that a woman has to be *ideal victim* to be eligible for sympathy or empathy in cases when VIS is read during the pre-sentencing phase. In a patriarchal society like ours, the victim will have to be a demure virgin who has had no contact from the opposite sex, has no or hardly any social life and doesn't venture out alone after sunset to be eligible to take benefits of VIS in our society because even the investigating authorities and the judiciary is pitted against her as a result of her actions. This might not just be the case with women but also men. For example, past conduct of men and their habits like drinking, smoking and past history of violence, habits which are considered as taboo in our society may also be brought up in VIS during sentencing phase and may act against them. Even past history of violence which has no bearing on the case being argued may be brought up by the prosecution against the accused. Hence, it is suggested that VIS during sentencing phase is not the wisest decision when we look to reform the criminal justice system as the end product coming out is again focussing more on the accused and not the victim. The end goal of system shouldn't be just to punish the accused but also to provide restitution and rehabilitation to the victim. VIS, when used at the sentencing phase, pits the rights of the accused and the victims against each other when the correct approach should be to balance their rights. As pointed out in the previous part in the criticism of VIS and the *Payne* judgment, what VIS does it to juxtapose the plight and the condition of the victim against the accused and delivers victim's justice rather than state justice.

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[73] *Ibid.*
[74] Alamin Miah v. State of Tripura, Crl. A(J) No. 33/2019.
[75] *Id.,* at 49.
[76] Rakesh B v. The State of Karnataka, CRIMINAL PETITION NO.2427 OF 2020.
[77] *Id.,* at 4.

VIR: The Alternative to VIS in India

The concept of VIR as proposed by the Delhi High Court in *Karan* where the report prepared post the sentencing phase is used for the purpose of compensation to the victims. The process of compensation was seen as one of the first initiative regarding victim justice and victim rights under the *Victim Compensation Scheme* under section 357A of the Cr.P.C. However, the procedure has rarely been followed by the courts and as rightly pointed out by Prof. G.S. Bajpai, "*the Victim Compensation Scheme in India has not really taken off.*"[78] He pointed out that according to a report submitted in 2018 by NALSAR, Hyderabad to the Supreme Court, only 5-10% of sexual assault victims across the country get compensation under the various victim compensation schemes setup in various states.[79] The purpose behind providing compensation to victims of crime is to ensure that firstly, victim isn't ignored completely by the criminal justice system, and secondly, the perpetrator is made to realize that the damage caused and the consequent duty towards the victim.

Though loosely based on the concept of VIS, VIR differs from it significantly in the sense that while VIS pertains itself with the determination of the quantum of sentence, VIR pertains to the determination of quantum of compensation in relation to the accused's paying capacity.[80] According to Justice J.R. Midha who along with Justice Rajnish Bhatnagar and Justice Brijesh Sethi presided upon the judgment in *Karan* and gave the concept of VIR, in a discussion session with Centre for Criminology, Criminal Justice and Victimology (CCV), RGNUL, Patiala on the same judgement said that "*Justice is incomplete without compensation.*"[81] Lamenting the fact that victims are the forgotten people in the criminal justice system, he stressed that courts should compensate them as it provides them some solace. He further added that even though no monetary compensation can relieve the anguish of the victims and their dependents, however, it can help them in starting their life afresh.[82] He concluded by saying that the *Karan* judgment *laid down the procedure for the development of the law*[83] and that the mandate of

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[78] G.S. Bajpai, "Crime Victim Support Should Have Statutory Basis", *The Tribune,* June 5, 2019, *available at* https://www.tribuneindia.com/news/archive/comment/crime-victim-support-should-have-statutory-basis-783212 (Last Visited On 25th August, 2022).

[79] *Ibid.*

[80] G.S. Bajpai, "Delhi HC's Judgement on Victims' Right to Restitution is a Landmark in Jurisprudence", *The Indian Express,* December 24, 2020, *available at https://indianexpress.com/article/opinion/columns/delhi-hcs-judgment-on-victims-right-to-restitution-is-a-landmark-in-jurisprudence-7117356/* (Last Visited On 25th August, 2022).

[81] CCV RGNUL discusses *Karan v. NCT of Delhi* (12th September 2021), *available at* https://www.ccvrgnul.com/discussion-with-justice-j-r-midha (Last Visited On 25th August, 2022).

[82] *Ibid.*

[83] *Ibid.*

filing of VIR is to determine the appropriate compensation that needs to be paid by the convict for the physical, emotional, mental harm caused to the victim as a result of the offence.

It can be clearly seen that the focus in VIR is on restitution and rehabilitation of the victim rather retribution against the accused. What, implementing VIS during the sentencing phase does is to focus on the accused, rather than the plight of the victim. VIR, on the other hand is purely concerned with the victim and his or her welfare. The judgement in *Karan,* through an Annexure also provides the detailed format of a VIR which contains considerations such as "*personal expenses of the deceased, annual loss of dependency, medical expenses, funeral expenses, loss of love and affection, loss of estate, emotional harm/trauma, mental and physical shock, post traumatic stress like anxiety, stress, insomnia, self-destructive behaviour or whether any phobia developed due to the incident or death of the deceased etc.*"[84] All these factors have to be looked into when calculating the quantum of compensation to be provided to the victim in a criminal case.

The Delhi High Court through *Karan* has provided a shift away from an accused centric model to a model for victim centric justice. VIS, though well intentioned, only focuses on fetching more punishment for the convict which does nothing for the victim. It has to be understood that victim justice doesn't mean more punishment to the victim as it does the victim no good apart from some token solace. Yes, it does provide them with vindication for their losses but what about justice in a tangible sense? What about the losses that they have suffered? What about the mental agony and trauma? What about the medical expenses? The compensation may not cover all of it but a good compensatory amount along with the highest punishment to the perpetrator is a more holistic approach to victim justice rather than increased punishment and brushing off responsibility by the criminal justice system. On the other hand, VIR, by accommodating all the aspects of physical, mental, emotional and financial trauma is more holistic and well rounded in its approach. Moreover, VIR shall be made post the conviction and sentencing, thus, not interfering in the sentencing process where the perpetrator can be granted appropriate punishment.

Thus, it is humbly submitted that VIR is a better option for bringing about victim justice in India than VIS as it is a well-rounded mechanism to provide a right to restitution to the victims that can bring about their emotional rehabilitation as well. VIS, even though it is used successfully in other jurisdictions across the globe has its flaws as described above. VIR, as laid down in *Karan* has provided a model procedure to bring about victim justice in the truest

[84] *Supra,* note 56.

sense and should be implemented by different high courts across the country in association with their respective State Legal Service Authorities.

V

Conclusion

While VIS and VIR are primarily the same in purpose, the procedure for both is slightly different. On the one hand where the VIS is invoked during pre-sentencing phase of the trial, VIR is invoked after the conviction has taken place. The *VIR* conceptualized by the Delhi High Court is a noble endeavour in recognizing the plight and the rights of the victim and can be considered an upgrade on the *VIS*. This is because, a statement by the victim just prior to the sentencing has the danger of the rendering the accused to a harsher punishment than the one he should be getting. After all, a judge is a human after all, made of flesh, bones and emotions and he too can be swayed by the *VIS* just prior to the sentencing. While we have talked about the impact of the crime on a victim, we have to keep in mind that if two accused have committed the same crime on two different persons, why should one get more punishment than the other. It is understandable that the impact on different victims can be different, but to sentence one accused with harsher punishment than the other for the same crime is also arbitrary based on the impact on the victim. Rather, *VIS or VIR* should be restricted to merely compensation. The victims who have been impacted more due a crime should be entitled to greater compensation and more efforts should be made on the rehabilitation of the victim as pointed out by the Supreme Court in the *Mallikarjun Kodagali* case. Otherwise, by awarding harsher sentence to the accused based on the impact of the crime is retributive in nature and has the approach of *an eye for an eye*. The legislature and the judiciary have to understand that the primary purpose of the criminal justice system is not to punish the accused but to achieve justice for the victim and justice in its true sense can only be achieved once the victim and his family members are compensated and rehabilitated. While punishment for the offender is necessary to maintain law and order in the society and keep the obedience towards the law alive in the society, ensuring that the victim gets justice should be the primary consideration of the people in-charge. By doing this, not only will be the victims of crime be satisfied but also it will help in keeping the balance between the rights of the accused and the rights of the victim.

PLASTIC WASTE MANAGEMENT: ISSUES AND CHALLENGES

Sneh Yadav*

Abstract

Plastic waste management is one of the major threats facing the world. Only a very small percentage of plastic waste is recycled and rest ends up into our oceans, endangering marine life, environment and eventually human survival on our planet Earth. In this article I would discuss the steps taken by Indian government for plastic waste management; effectiveness, impact and critique of ban on single use plastic items; concept and implication of imposing Extended Producer Responsibility; effect of plastic waste on climate; importance of circular economy of plastic waste; importance of waste segregation at source. At the end suggestions would be given for effective plastic waste management.

I

Introduction

Plastic has become an indispensable part of your lives. From the toothbrush to the laptop almost everything that we use in our daily life is made of plastic. Plastic being lightweight, transparent, durable and versatile has made our work easy and is therefore used in wide variety of industries. However, have we ever wondered what happens to plastic after we throw it away? Plastic is made from petrochemicals and it is non-biodegradable. It takes hundreds of years to decompose, even after that it never fully goes away from our system. Plastic breaks down into tiny particles called microplastics. These microplastics have entered not only our food cycle but also our blood, as traces of microplastics are found in human blood[1] and there is a danger of it reaching other organs also. As per the Central Pollution Control Board report, during the year 2020-21 approximately 4126997 TPA plastic waste was generated in India.[2] Maximum plastic waste was generated in Telangana followed by Tamil Nadu, West Bengal and Uttar Pradesh. Per capita plastic waste generation has almost doubled in last five years. Delhi has highest per capita waste generation, closely followed by Goa and Telangana. Sikkim, Meghalaya & Tripura have reported the lowest per capita plastic waste generation.[3] Mismanagement of plastic waste has resulted into marine pollution, piling up of waste in

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[1] Damian Carrington, "Microplastics found in human blood for first time" *The Guardian*, March 24, 2022, *available at*: https://www.theguardian.com/environment/2022/mar/24/microplastics-found-in-human-blood-for-firsttime#:~:text=Microplastic%20pollution%20has%20been%20detected,and%20may%20lodge%20in%20organs. (Visited on June 8, 2023).

[2] Central Pollution Control Board, Annual Report 2020-21 on Implementation of Plastic Waste Management Rules, 2016 (August, 2021), *available at:* https://cpcb.nic.in/uploads/plasticwaste/Annual_Report_2020-21_PWM.pdf (Visited on June 1, 2023).

[3] *Ibid*

landfills, clogging of drains, floods, diseases and a grave threat to human life, animal life and environment. Single use plastic is the most problematic, it mostly includes plastic material which is thrown away within minutes and has no further use, as it is low on utility and has high litter potential.

In India, Plastic Waste (Management and Handling) Rules, 2011 provided a framework for management of plastic waste generated in the country. In order to give thrust to plastic waste minimization and effective management of waste, Plastic Waste Management Rules, 2016 were notified, which have been amended from time to time. For the first time, 2016 rules gave responsibility to gram panchayats and local bodies to manage plastic waste, ensure its collection and segregation and to create awareness about problems of plastic waste. [4] Waste generators like airports, harbors, commercial complexes etc. have the obligation of waste segregation at source and handing it over to waste collecting agencies. They are also required to pay some user fees or charge for it. If a person organizes an event in open space which involves serving food in plastic containers, he is required to segregate and manage the waste according to the rules prescribed in Municipal Solid Waste (Management and Handling) Rules, 2000 as amended from time to time.[5] All producers, brand owners and recyclers of plastic are required to get themselves registered with State Pollution Control Board or Pollution Control Committee. [6]

II

Impact of plastic on climate

Plastic pollution poses a great threat to Earth's climate. Plastic emits carbon at each stage of its life cycle, that is, in extraction of fossil fuel/petroleum and its transportation; refining and manufacturing of plastic; disposing/managing plastic waste (incineration, recycling and dumping in landfills). Plastic impacts oceans, waterways, air and landscapes. If incineration and production of plastic continues at the same pace, then by 2030 the global emission of carbon through plastic could reach 1.34 gigatons per year which would be equivalent to carbon emission from more than 295 five-hundred-megawatt coal plants and by 2050 plastic life cycle process would emit carbon equivalent to emission from 615 five-hundred-megawatt coal

[4] Plastic Waste Management Rules, 2016, Rule 6 & 7, *available at:* https://cpcb.nic.in/displaypdf.php?id=cGxhc3RpY3dhc3RlL1BXTV9HYXpldHRlLnBkZg==(Visited on June 3, 2023).
[5] *Id.*, Rule 8.
[6] *Id.*, Rule 13.

plants.[7] The cumulative greenhouse gas emissions by 2050 will be over 56 gigatons or between 10–13 percent of the total remaining carbon budget.[8] This situation is alarming. Paris agreement, aims to keep global temperature rise in this century below 2 degree Celsius below pre industrial level; pursue efforts to limit the temperature increase further to 1.5 degree Celsius and to strengthen the ability of countries to deal with impact of climate change.[9] This agreement talks about 20/20/20/ targets that is, carbon dioxide emission has to be reduced by 20%; we need to increase the renewable energy market share by 20% and target is to increase energy efficiency by 20%. It would be impossible to meet our target of keeping global temperature rise below 2 degrees Celsius, if plastic production is not controlled and plastic waste not managed properly. India is a signatory to Paris convention and has taken several steps towards carbon reduction. One such step is to focus on reducing plastic production and effective waste management.

To stop global temperature from rising beyond 1.5 degree Celsius it is required that energy consumption has to be reduced. In India and also globally many industries are reducing their greenhouse gas emission, like cement, steel and most important plastic industry. This is possible through circular economy of plastic, where supply and demand of plastic is managed properly. In 2019, the GHG emissions from production and incineration of plastic were estimated to be more than 850 million tonnes (equal to the emissions from 189 500 MW coal power plants).[10] We, as a world community are trying to achieve net zero carbon emission. But these figures worry us. In India millions of tons of plastic is consumed every year and almost 60% of it comes out as waste, out of this only a little percentage is actually recycled. India is a growing economy, so, the buying capacity of consumers will increase and so will the increase in demand of plastic. Plastic is made from fossil fuels/ petrochemicals and most of plastic used in products is virgin plastic, this would increase our carbon footprint. "As India aims to lower the emissions intensity of its Gross Domestic Product (GDP) by 33-35% by 2030 under its

[7] Centre for International Environmental Law, Report*: Plastic & Climate: The Hidden Costs of a Plastic Planet* (May, 2019), *available at:* https://www.ciel.org/wp-content/uploads/2019/05/Plastic-and-Climate-Executive-Summary-2019.pdf (Visited on July 8, 2023).
[8] *Ibid.*
[9] The Paris Agreement, *available at:* https://unfccc.int/process-and-meetings/the-paris-agreement (Visited on July 3, 2023).
[10] The Energy and Resource Institute, Report: *Circular Economy of Plastics in India: A Roadmap* (2021), *available at:* https://www.teriin.org/sites/default/files/2021-12/Circular-Economy-Plastics-India-Roadmap.pdf (Visited on July 8, 2023).

Nationally Determined Contributions as part of the Paris agreement, dealing with plastic and plastic waste becomes critical."[11]

III

Ban on Single Use Plastic

Many cities like Mumbai are flooded and drowning in waste and city like Delhi has huge mountains of plastic waste at various landfill sites. Most dangerous of all plastic waste is single use plastic, because it is used only once that too for few minutes thereafter it is thrown away. It constitutes most of plastic litter. According to research done by Minderoo Foundation, single use plastic makes up one third of the plastic produced worldwide and it is most damaging to people and planet.[12] It increases greenhouse gas emission. Single use plastic turn into microplastics on degeneration. Plastic Waste Management Rules, 2016 (as amended in 2021) gave the definition of single use plastic in Rule 3 (va) as plastic item which is intended to be used only once before it is thrown away or recycled.

Taking into account this problem on 12th August 2021, Ministry of Environment, Forest and Climate Change brought a notification banning manufacture, import, stocking, distribution, sale and use of some single use plastic products. These products are low on utility and high on litter potential. This ban was operative from 1 July, 2022.[13] These products include plastic flags, ear buds with plastic sticks, plastic stick for balloons, ice cream sticks, candy sticks, thermocol for decoration, plastic cutlery, plates, glasses, cups, straws, wrapping films around sweet boxes, cards etc.[14] This ban would not apply to commodities made of compostable plastic.[15] This ban would be monitored by CPCB (Central Pollution Control Board) and SPCB (State Pollution Control Board). Directions are issued to petrochemical industries at local, state and national level not to supply raw material to the industries manufacturing banned single use plastic items. CPCB and SPCB have been instructed to modify or revoke the commercial

[11] Shreyas Joshi, "Refurbishing Plastic for Climate Action: The First Steps", *available at:* https://www.teriin.org/article/refurbishing-plastic-climate-action-first-steps(Visited on July 12, 2023).

[12] Minderoo Foundation, Report: *Plastic Waste Makers Index 2023* (2023), *available at:* https://cdn.minderoo.org/content/uploads/2023/02/04205527/Plastic-Waste-Makers-Index-2023.pdf (Visited on July 12, 2023).

[13] Plastic Waste Management Rules, 2016 (as amended in 2021), Rule 4 (2) - " The manufacture, import, stocking, distribution, sale and use of following single use plastic, including polystyrene and expanded polystyrene, commodities shall be prohibited with effect from the 1st July, 2022:- (a) ear buds with plastic sticks, plastic sticks for balloons, plastic flags, candy sticks, ice-cream sticks, polystyrene [Thermocol] for decoration; (b) plates, cups, glasses, cutlery such as forks, spoons, knives, straw, trays, wrapping or packing films around sweet boxes, invitation cards, and cigarette packets, plastic or PVC banners less than 100 micron, stirrers.

[14] *Ibid.*

[15] *Id*., Rule 4 (3).

license granting permissions to industries making single use plastic items. The punishment for violating plastic ban would be under the Environment Protection Act, 1986, which is imprisonment up to 5 years or penalty up to 1 lakh rupees or both. The local authorities and municipal corporations can make by-laws for implementation of plastic ban and provide punishment. Many initiatives have been taken by the government to create awareness about reducing plastic waste generation. Two months awareness campaign on social media creating awareness about mitigating plastic pollution amongst stakeholders from local bodies, pollution control boards, industry, civil society organizations and citizens was organized by UN Environment Programme (UNEP), Federation of Indian Chambers of Commerce and Industry (FICCI) along with Ministry of Environment, Forest and Climate Change, Government of India in 2021. In order to encourage start-ups /entrepreneurs and students to develop innovative solutions to mitigate plastic pollution and develop alternatives to single use plastics, the "India Plastic Challenge – Hackathon 2021" was organised.[16] Swachh Bharat Mission 2.0 emphasised on improving waste management infrastructure in India. WWE India and CESD (Centre of Excellence for Sustainable Development) work towards removing the obstacle in circularity of plastic packaging industry.

Similar ban/ restrictions have been imposed in India on plastic carry bags also. 2016 rules state that the thickness of plastic carry bags should not be below 50 microns.[17] Plastic carry bags would be made in natural shade i.e. without any pigments or use only those pigments that are permitted.[18] Plastic carry bags would not be used for storing or packaging ready to eat food.[19] Plastic material would not be used in the sachets for storing or packaging gutkha, tobacco and pan masala.[20] Each carry bag is required to have thickness of plastic bag along with name and registration number of the manufacturer printed on it.[21] The street vendors and retailers have the duty not to sell or provide commodities in carry bags which are not manufactured or labelled as per the rules.[22] Plastic Waste Management (Amendment) Rules, 2021 state that the thickness of plastic carry bags needs to be not less than 75 microns with effect from 30th September 2021 and 120 microns from 31 December , 2022.[23] However, just

[16]Ministry of Environment, Forest and Climate Change press release, posted by PIB Delhi on June 8, 2021, *available at:* https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1725458(Visited on June 15, 2023).
[17] *Supra* note 4, Rule 4(c).
[18] *Id.*, Rule 4 (1)(a).
[19] *Id.*, Rule 4 (1)(b).
[20] *Id.*, Rule 4 (1)(f).
[21] *Id.*, Rule 11.
[22] *Id.*, Rule 14.
[23] *Supra* note 13, Rule 4 (1)(c).

like all other laws the problem here is of effective implementation of rules as we find plastic bags with thickness even less than 50 micros are easily available and are being used by people. This kind of ban is difficult to impose because it is based on thickness and microns. A common man would not know the thickness of plastic carry bag that he is using. Experience in other countries show that ban on plastic carry bags can be successful only when there is a total ban on these products without any exceptions.

India is not the first country to impose ban on plastic. In 2002 Bangladesh become the first country to impose ban on thin plastic bags. In July 2019, New Zealand banned plastic bags. China banned plastic bags in 2020 in a phased manner. In USA eight states have banned single use plastic items. Seattle banned plastic straws in 2018. [24] European Union issued directive in July 2021 which bans such single use plastic items for which alternatives are available like cups, food containers etc. A resolution was signed in 2022 by 124 countries who were parties to United Nations Environment Assembly to draft an agreement that would make it legally binding for all signatories to address the full life of plastic from production to disposal in order to end plastic pollution. India is a signatory to it, thus has an obligation to take care of plastic till end of life, from cradle to grave.

Ban on single use plastic has not proved to be effective. It has been more than a year that single use plastic ban is operative still we find the banned items being openly manufactured, sold and used. There are several factors responsible for it:

Firstly, most of the items that are banned (except for ear buds that are made by renowned companies), are manufactured in unorganized sector. Therefore, it is very difficult to control it at the production stage. It can be checked only at stage of sale or use. This requires all the shopkeepers and consumers to be aware about the ban, which requires raising awareness among millions of people, it is not an easy task in a huge country like India. Also, once a product, like plastic cutlery is available in market for sale, it is assumed and presumed by the consumer that government has authorized its sale, since it is openly and freely available. Secondly, markets are not prepared for the ban, as, alternatives to banned plastic products are not easily available in the required quantity in market. The demand is high but manufacturing is slow. Thirdly, alternatives to SUP (Single Use Plastic) are very expensive as compared to cost of single use

[24]Alex Truelove, "Seattle: Pioneering plastic straw ban is effective and popular", *available at:* https://pirg.org/articles/seattle-pioneering-plastic-straw-ban-is-effective-and-popular/#:~:text=Seattle%20became%20the%20first%20major,included%20utensils%20and%20cocktail%20picks (Visited on June 16, 2023).

plastic products. For example, paper straw is five times more expensive than a plastic straw.[25] So, for a poor fruit juice seller using paper straw would mean spending more money. Similarly, if we look at other alternatives, like *khullar* for tea cups; plastic cutlery for the one made from bamboo or wheat waste; bamboo glasses and plates; jute and paper bags, all of them are much more expensive than their plastic counterparts. That's why there is an urgent need to develop affordable and sustainable alternatives to plastic. Fourthly, enforcement of the ban has to be done by local authorities and municipal bodies. It lacks holistic approach towards the ban. Many states have not notified their by-laws till now. So, implementation of ban at ground level is a problem. Fifthly, all the stakeholders have not been educated, especially the consumers about the ban. No ban can be effective without support of the masses and this support can come only if we educate and sensitize them about plastic pollution and ban that is imposed.[26] In the current situation, it would be impossible to enforce this ban effectively for the SUP items that are banned. There needs to be a change in plastic policy where non-recyclable plastic needs to be totally banned and emphasis has to be on sustainable recycling.

Since affordable alternatives to plastic are not available people are going back to single use plastic products. So, companies need to spend on research and development and find sustainable and affordable alternatives to plastic. Government alone cannot beat plastic pollution unless it has support from industries, brand owners and consumers.

Plastic ban has been criticized by some people for the following reasons: -

India plastic industry employs more than 4 million people in the country.[27] Ban on plastic will lead to shutting down of many plastic industries which in turn would result into unemployment for large number of people employed in plastic industry. Till no alternate arrangement for their employment is made, banning plastic would amount to depriving them of their means of livelihood and right to life. Indian economy will suffer because of this ban as India's plastic exports was worth US $ 13.35 billion in 2021-22 which would reduce after the ban. Impact of ban will be disproportionate in small and big industries, as big industries have the economic resources and can afford to change their machinery and shift to alternatives. But small and medium industries will not be able to bear additional cost of replacing machinery and will be

[25]Data Intelligence, Report: *India and GCC Paper Straws Market Size, Share, Industry, Forecast and outlook (2023-2030)* (January 2023),*available at:* https://www.datamintelligence.com/research-report/india-and-gcc-paper-straws-market(Visited on July 10, 2023).

[26] Anisha Bhatia, " Single-Use Plastic Ban in India explained: What will be the challenges and what should we expect", *available at:* https://swachhindia.ndtv.com/single-use-plastic-ban-in-india-explained-what-will-be-the-challenges-and-what-should-we-expect-69497/(Visited on June 11, 2023).

[27] India Brand Equity Foundation, Report: *Indian Plastics Industry and Exports*(An Initiative of Ministry of Commerce and Industry, Government of India, 2023), *available at:* https://www.ibef.org/exports/plastic-industry-india (Visited on August 4, 2023).

forced to shut down, further adding to loss of public exchequer and loss of jobs for employees. Suneel Pandey, Director of the Environment and Waste division at TERI says that large businesses have shifted to non-single use plastic alternatives, the problem is with small vendors who find it costly as compared to plastic.[28] Burden of ban would be felt more by poor consumer than the rich, as buying cloth or jute bag for rupees fifteen or twenty would be heavy on a common man's pocket and budget.

Ban on single use plastic products is very selective as the big industries like cold drink manufactures and packed water industry using PET bottles are left out of this ban. Chips and confectionery packets, PET bottles, bottle caps and packaging, account for largest share of plastic waste in India, still they are not banned. The ban targets the poor manufacturers and favors the rich. As most of the banned items are made in unorganized sectors and not by big brands.

Alternatives to plastic would cause greater harm to environment in a long run. For example, alternates to plastic are wood and paper, these are made from trees, so, after the ban it would lead to cutting of more trees and wastage of water. According to a study conducted by the Danish government in 2018, you need to use paper bag 43 times to achieve the same cumulative environmental impact as a plastic bag.[29], it is practically impossible to reuse paper bag 43 times. To achieve the same environmental impact as a plastic bag, a cotton bag would have to be used 7,100 times.[30] Use of alternative could be detrimental to environment. The solution lies in doing research and innovation and coming up with sustainable and economical alternatives to plastic products, that are environmentally viable and also pocket friendly.

IV

Extended Producer Responsibility

Thomas Lindqvist is given the credit of crafting the concept of EPR (Extended Producer Responsibility) in 1990. It puts responsibility on producers, importers and brand owners to collect back, recycle and take care of plastic waste generated by them till end of its life. When we look at the policy framework, we find that EPR draws its power from Article 21, 48A, 53 and 73 of The Constitution of India and The Environment Protection Act, 1986. It is based on

[28] Vishwa Mohan, " Plastic bans created awareness but stricter enforcement needed" *Times of India*, June 7, 2023, *available at:* https://timesofindia.indiatimes.com/india/plastic-bans-created-awareness-but-stricter-enforcement-needed/articleshow/100806022.cms(Visited on June 19, 2023).

[29] The Danish Environmental Protection Agency, Report: *Life Cycle Assessment of grocery carrier bags* (Ministry of Environment and Food of Denmark, February, 2018), *available at:* https://bioplasticsnews.com/wp-content/uploads/2019/10/Life-Cycle-Assessment-of-grocery-carrier-bags.pdf (Visited on June 19, 2023).

[30] *Ibid.*

Polluter Pays Principle, as the ones who introduced plastic into the environment are given responsibility of taking care of its proper disposal ensuring least or no damage is caused to environment in this process. EPR finds mention in Solid waste management Rules, 2016; E-Waste Management Rules,2016 and Plastic Waste Management (Amendment) Rules, 2022, more particularly Guidelines on Extended Producer Responsibility for plastic packaging.

Plastic Waste Management Rules, 2016 mention the concept of Extended Producer Responsibility (EPR) which has been defined in Section 3 (h) of Plastic Waste Management Rules, 2016. [31] It means responsibility of the producer of plastic goods to collect and manage waste plastic products till the end of its life and this has to be done in environmentally sound manner. Producers, importers and brand owners are required to submit plan to collect back plastic waste generated by them to State Pollution Control Board.[32] Plastic producers and recyclers have to apply to Pollution Control Board or the Pollution Control Committee for grant of registration.[33] Plastic Waste Management (Amendment) Rules, 2022, have made elaborate provisions regarding Extended producer Responsibility covering reuse, recycling, use of recycled plastic material and end of life disposal. EPR is a wholesome process which covers the entire life cycle of plastic. However, in India the policies are made in such a way that it covers more of post-consumer waste rather than controlling its manufacturing. Policies like Swachh Bharat mission or policies in smart cities etc. focus on preventing plastic litter rather than reducing plastic production and eventually eliminating plastic.

ERP rules lays down that, by the year 2024, producers of plastic have to collect back all of their plastic packaging waste material. The plastic packaging material so collected has to be recycled, some targets are given for recycling it. If a company is not able to meet its target, then it will have to buy EPR credits from other company which has achieved units more than its target. This is similar to carbon trading that is done to meet target of country under international treaties and obligations. Only the multi layered and multi material plastic which is non-recyclable has to be sent for end-of-life disposal, like construction of road, generation of oil, cement kilns etc.[34] rest has to be recycled.

[31] "extended producer's responsibility" means the responsibility of a producer for the environmentally sound management of the product until the end of its life.

[32] *Supra* note 4, Rule 9 (1) & (2).
[33] *Id.*, Rule 9(4).
[34] Schedule-II Plastic Waste Management Rules, 2016 (as amended via First amendment in 2022).

Plastic Waste Management Rules, 2016 encourage using waste for alternate use. Plastic waste would be used for construction of roads or making oil or for any other purpose for generating energy[35]. Local bodies are supposed to encourage it. "Waste to energy means using plastic for generation of energy and includes co-processing (e.g.in cement, steel or other such industry"[36] Most of MLP are sent to cement kilns, which does not reduce plastic production nor does it reduce pollution, in fact incineration of plastic adds to the pollution. Using plastic waste for making oil is also not a very feasible option as it consumes lot of energy and production is very low. It ultimately increases the carbon footprint.

At present, one problem in implementing EPR is that, the companies liable under EPR are expert in manufacturing their own products but not in recycling waste, so, they will, in all possibility outsource the work of collection and recycling waste to others. This will lead to boom of specialized waste collection, treatment and disposal units. But till the time such specialized units come up there will be a void in waste treatment and this work will be done by private contractors.

The ERP guidelines have been criticized on several grounds. Firstly, most of the waste collection in India is done by informal sector of rag pickers or waste pickers. They do not have any social security. They do this job with their bare hands without any safety gears, which many a times leads to permanent damage or diseases. Since this sector is informal, they do not have any job or livelihood security. They are not given any salary or pension or medical care. With EPR, responsibility has shifted to companies to collect back their plastic waste. Earlier companies were only concerned with manufacturing, packaging and distribution of goods, now with EPR they also have responsibility to collect and recycle the packaging material. This has created a parallel waste collection system which is a threat to livelihood of these poor rag pickers as they have not been made part of this system. So, this might lead to a situation where rag pickers might not have sufficient waste to collect as the companies would have collected back their waste. This would endanger their survival. The solution could be that rag pickers should be included in this scheme and steps should be taken to convert rag picking into an organized sector, where companies could give contract to them to collect back their waste. These rag pickers sell waste to scrap dealers, who in turn sell it to recycler. This entire sector is unorganized. Although rules provide for registration of all recycling units but only few have

[35] *Supra* note 4, Rule 5 (b).
[36] Rule 3 (aab) Plastic Waste Management Rules, 2016 (as amended via Second Amendment in 2022).

registered. As per 2020-21 CPCB Annual report there are only 1207 registered recyclers.[37] So, emphasis should be laid to include the informal sector of rag pickers and recyclers into this scheme and organising this sector. [38]

Another criticism is related to plastic itself. Plastic can be divided in three categories, first, recyclable plastic , which is recycled mostly by informal sector. Second, recyclable but with help of technology, it cannot be done by informal sector as it needs technology and also involves high cost. In case of recyclable packaging plastic waste obligation lies on companies to collet it , recycle it and use the biproduct obtained after recycling. Third kind of plastic is Non-recyclable, which cannot be recycled, it is sent for end of life disposal for making roads or waste to oil or in cement kilns to be used as fuel. EPR rules talk about only packaging plastic waste , but there are many other kinds of plastic like flexible plastic, plastic used in sanitary pads or in bathroom slippers, this has not been covered in EPR, whereas it should have been included. Informal sector of rag pickers and recyclers should have been included in guidelines itself. If proper consultation would have been done, the plastic that is easily recyclable and is already taken care of by the informal sector could have been excluded here. Efforts need to be made to have circular economy in plastic waste management. End of life processing of plastic has to be sustainable. Another problem is with processing of plastic waste. If waste is used for energy generation or co-processing or incineration it generates high amount of carbon dioxide. Similarly, if chemical recycling or pyrolysis is done it again leads to carbon dioxide emission. All these processes increase carbon emission into the environment and increase our carbon footprint. Processing of plastic is a problem in efficient utilization of plastic waste.

The government should have consulted public before bring out this notification. Informal waste collection sector of rag pickers, scrap deals and recyclers should have been included in this scheme, so that instead of making a parallel system of waste collection by the companies, the existing people in this field could be used for waste collection and disposal. Maximum funding should be provided to this informal sector so that they have social security and they can take security gears and have access to infrastructure needed for waste collection and disposal.

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[37] Central Pollution Control Board, Annual Report 2020-21 on Implementation of Plastic Waste Management Rules, 2016 (August, 2021), *available at:* https://cpcb.nic.in/uploads/plasticwaste/Annual_Report_2020-21_PWM.pdf (Visited on June 1, 2023).

[38] Satyarupa Shekhar and Siddharth Ghanshyam Singh, "The gaps in the plan to tackle plastic waste" *The Hindu*, December 28, 2021,*available at:* https://www.thehindu.com/opinion/op-ed/the-gaps-in-the-plan-to-tackle-plastic-waste/article38050930.ece(Visited on June 11, 2023).

In India, most of the plastic is recycled in informal sector which lacks technology and finance, so, the plastic that comes out of it is of low quality therefore it is not able to replace virgin plastic as raw material for production of plastic goods. As a result of it there is huge demand and dependence on virgin plastic. So, there is a need to invest in infrastructure and technology for providing good quality recycled plastic. Also, government needs to incentivize and promote chemical recycling which will lead to better quality plastic after recycling. More taxes should be levied on use of virgin plastic in production process as compared to use of recycled plastic to encourage industries to use the latter. This would minimize carbon emission at raw material production and manufacturing stage.[39]

Another issue is with **Multi Layered Plastic** or multi material plastic, it means material where at least one layer is of plastic and at least one layer is of any other material like metal or fiber etc. There is increase in use of such kind of plastic especially in packaging and it has not been banned. Plastic rule of 2016 state that**,** Multi layered Plastic which cannot be recycled or no energy can be recovered from it or which has no alternate use should be phased out in 2 years time.[40] There is a problem with this provision as any plastic would have at least some use , if not anything it can be used for generating power by burning, so producers of multilayered plastic can avoid phasing it out by using this loophole. MLP's are covered by extended producer responsibility where producers, importers and brand owners are given targets to collect back and recycle their plastic packaging waste. But the problem is producers are required to report pollution control board regarding the quantity of plastic collected and recycled by them, there is no way to ensure whether they are collecting their own plastic waste or just any plastic waste. For example, a company making small sachets of shampoo, might not collect their empty sachets but some other plastic to meet its target, as these small plastic sachets are very difficult to collect. So, these small sachets or pouches still remain in environment, ending up in landfills or clogging our drains. Therefore, the problem of plastic litter remains as it is. MLP's have not been banned via 2021 amendment, although some feel that along with single use plastic MLP's should also be banned.

[39] Shreyas Joshi, "Refurbishing Plastic for Climate Action: Finding value in waste", *available at:* https://www.teriin.org/article/refurbishing-plastic-climate-action-finding-value-waste(Visited on June 1, 2023).
[40] *Supra* note 4, Rule 9 (3).

V

Waste Segregation at Source

Plastic waste is not being segregated at source as a result it gets dirty and contaminated therefore, we are not able to reuse it. So, dry and wet waste needs to be segregated at source, thereafter from the dry waste we need to segregate plastic waste , then again from this plastic waste we need to find what can be recycled and what cannot be recycled. It is this plastic waste that cannot be recycled that needs to be totally banned.

A study was done by Niti Ayog and Centre for Science and Environment on "Waste wise cities- Best Practices in Municipal Solid Waste Management" in 2021,[41] Indore in Madhya Pradesh is awarded as the cleanest city continuously for 5 years. This is possible because of waste segregation at source, bringing a change in attitude of people and robust monitoring system and enforcement through by-laws.

As per CSE report the cities that have shown best practices in plastic waste management are:

Bicholim, Goa- Here every household has 2 waste buckets where dry and wet waste is segregated at source. It has its own garbage treatment plant. Out of dry waste, plastic is separated which is sold to scrap dealers for recycling.

Gangtok, Sikkim- Sikkim banned disposable plastic carry bags in 1998. Eventually it also banned packaged drinking water, disposable plastic plates and cutlery in government offices. This ban was followed by rigorous awareness generating programmes which sensitised people about plastic pollution.

Kumbakonam, Tamil Nadu- Here also segregation of waste at source has helped to make it a plastic waste free city. It has set up a resource recovery facility, recyclable plastic like water bottles, thick plastic bags are sent to recycling units and non-recyclable plastics are send to be converted into refuse derived fuel or cement factories for co-processing.

Swatch Bharat 2.0 mission emphasizes that household level segregation is the bottom line of waste management. In ranking the cities for cleanliness maximum weightage would be given to household level segregation as without it recycling would be difficult and without recycling, we cannot have circular economy. Earlier, in ranking of cities maximum weightage was given to, how clean a city looks but now paramount point in ranking is how much waste is the city

[41] Government of India, Report: *Waste-Wise Cities- Best Practices in municipal solid waste management* (NITI Aayog, 2021), *available at:* https://www.niti.gov.in/sites/default/files/2021-12/Waste-Wise-Cities.pdf (Visited on June 19, 2023).

processing and how much waste is being segregate at household level. So, this change in weightage has given motivation to city administrators to change their waste management strategy. [42] In Delhi, waste collection work is handed over to private contractors and this system has failed miserably and even if the waste is segregated in household, it is mixed up at the time of collection, so, the entire exercise goes futile.

Huge amount plastic ends up in landfills or is burnt or is difficult to recycle because either it is multi layered plastic or contaminated or dirty after use, so, this plastic is mismanaged and goes waste. So, it is suggested to have collection and segregation of plastic waste at source. For this investment needs to be made by government in infrastructure and training of people involved in these activities.

VI

Conclusion and suggestions

Plastic waste is a threat to our survival. Plastic waste management is not a problem, but plastic waste mismanagement is a bigger problem, where waste is either dumped in landfills, or incinerated or is left in open and it ends up in ocean, thereby causing marine pollution. Plastic waste is also responsible for increase in carbon emission thereby contributing to climate change. Government has taken many steps for effectively managing plastic waste. One such major step is complete ban of certain single use plastic items. Although it a step in right direction, but we do not see its implementation on ground as sustainable and affordable alternatives to plastic are not available till now. This plastic ban is also criticized as being pro rich and against the poor. Extended Producer Responsibility imposes obligation on waste generators to collect back and recycle waste that they have added to the environment. We need to ensure circular economy of plastic waste to have sustainable system. Segregation at source is the key to effective waste management and it can be achieved only through public participation.

Some suggestions for effective plastic waste management are:-

- We must adopt the 5 R's of waste management, Refuse -to use plastic material; Reduce- plastic consumption; Reuse- plastic products, that is use them more than once; Repurpose – plastic products, like growing platers in plastic bottles and Recycle – plastic waste.

[42] Interview with Sunita Narain, Director General of the Centre for Science and Environment, *Times of India*, July 4, 2023, available *at:* https://epaper.timesgroup.com/timesspecial/sci-tech-envi ronment/govt-plastic-ban-is-ineffective-needs-rethink-sunita-narain/1688021861484(Visited on June 1, 2023).

- Research and development should be done to find bio-based polymers like plant or fiber based for making plastic instead of fossil fuels. For it funds should be provided by government and technical support should come from private sector.
- More taxes should be levied on use of virgin plastic in production process as compared to use of recycled plastic to encourage industries to use the latter. This would minimize carbon emission at raw material production and manufacturing stage.
- People need to be sensitized about segregation of waste at source, awareness drives should be done to make people aware about dangers associated with plastic pollution and need of its proper recycling.
- Innovation and research should be done to upscale and utilize the plastic waste that is not recyclable or difficult to recycle. Although it is being used for making roads, tiles, clothing, waste to oil and cement factories but there is need to find non-polluting and lesser carbon emitting viable options for using plastic waste. So, more research and development need to be done in this direction.
- There needs to be public -private collaboration for ensure circular economy of plastic. Processing units needs to be set up near major waste producing cities, so that the cost involved and pollution caused in transportation of waste material can be minimized.
- Unorganized sector of waste pickers needs to be incorporated into the waste management system for it to be successful as they are the real warriors and champions of waste management. It can be done in two ways, either waste management operations can be outsourced to unorganized sector as is done in Pune, or dry plastic waste could be sent to informal sectors for recycling. We need to make sure that rag pickers in informal sector have better employment conditions and their livelihood is secured.
- CPCB must provide sustainable packaging guidelines so that it can cater to needs of present generation and also keep needs for future generation in mind.
- A thorough and strict strategy needs to be made to halt plastic import and production.
- Search for affordable alternative to plastic is important as the alternative available now are not cost effective and cannot be afforded by everyone and are not market friendly.
- There is a need to built strong political will to stop plastic pollution.
- Focus on changing behaviour of consumers and producers through communication.
- There should be standard operating procedures (SOP) for awarding biodegradable plastic makers and merchants with certificates and incentives.

- School and college students need to be sensitized to problems of plastic pollution as they are the future of the country and can bring change in social behaviour and habits.
- More sustainable options to plastic needs to be found out though research and development by public – private partnership. This would create new opportunities and even new jobs and boost our economy. So, in plastic waste management circularity and sustainability are the keys to success.

RIGHT TO EDUCATION OF MINORITIES: THROUGH THE LENS OF INDIAN CONSTITUTION

Dr. Anju Sinha *

"Education is not preparation for life, education is life itself."

-John Dewey

Abstract

A nation as a whole can compete with other nations only when its citizens are educated. Well educated citizens will facilitate the overall growth of nation both at national as well as global level. Framers of Indian Constitution were well aware about this fact and they incorporated various provisions in the Constitution to ensure equal opportunity to every person residing in this country in the form of fundamental rights. How education plays a crucial role in societal advancement is well acknowledged, and in a country with such a diverse cultural heritage as India, this duty of educating all its citizens acquires an even greater significance.

This article delves into the intricate tapestry of minority education, seeking to give the reader an in depth understanding of every facet starting from the importance of education to defining minority groups and what the historical background of minority education has looked like. We take it a step further by also examining constitutional and statutory provisions that work towards protecting minorities. The fabric of our society is riddled with inequalities, this is a step towards enmeshing those back in who have been historically left behind.

Keywords:

Indian Constitution, Equal Opportunity, Fundamental Rights, Education , Minority

I
INTRODUCTION

Education shapes a nation and educational representatives are the backbone of a country inclusive of other factors. Minority education plays a crucial role in promoting progress that is inclusive and for all in the rich fabric of India, a country renowned for its cultural diversity and wide range of customs. The article looks deeply into the historical context of minority education in India, illuminating the obstacles and openings that characterize the path taken by marginalized communities towards education and empowerment. The virtue of education is not limited to an individual but it is a phenomenon which affects a family, a society and a

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nation. Education is a key to prosperity as well as basic instincts to survival. It is essentially important for the government of a country to establish institutions, create awareness, educate their population and formulate a comprehensive policy which caters to each and every section of the society which collectively builds the nation. It is their foremost duty to provide access to education and make it affordable and reasonable for all, to not allow any kind of discrimination and promote equal representation from every section of the society. India, a culturally rich population where people of different race, religion, caste, creed, language live together, the challenge is equally massive and invokes a great sense of responsibility. With the evolution in time and change in the country's political system, the idea of education has passed through different phases and it has been dealt with differently by everyone who had been in the position of power while ruling the nation. India has seen different forms of education system and several policies have been formulated over the period of time to thrive through existing and upcoming challenges and circumstances with evolving time period. So, when the government prepares a draft of the education policy, it has to keep in mind the methodologies, the possible content and pattern of the curriculum to be followed, and what is the expected impact of the policy on the people of the country. According to Taylor[1] the three major aspects of drafting an education policy are:

a. Context- It means the historical and antecedent events which consequently lead us to the formation of a new specific policy or changing the old one in context of the present conditions.
b. Text- It literally refers to the words used in the policy, whatever simple or technical terms are used to convey the language of the policy.
c. Consequences- The impact of the policy upon implementation, the interpretation and the difference in their understanding among different sections of the society.

This research paper shall be emphasizing upon the education in general and further dealing with minorities specifically. Minorities in India, are majorly categorized in accordance with the language and religion[2]. While majorly emphasizing upon the minorities and the related educational policy, the paper shall trace the education system through the history, talk about the national and international jurisprudence on education, constitutional and statutory

[1]Taylor S., Rizvi F., et.al., *Education policy and the politics of change* (Routledge, London, 1997).
[2] Constitution of India, art. 30 (1) All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice.

provisions in India which deals with minority education in India. Thereafter, it will exhaustively discuss the landmark and recent judicial precedents which have proved to be a milestone in respect to minorities and minorities educational institutions. The paper shall also throw some light on the National Education policy 2020 and see what it holds for the minorities and if it could have been more holistic and beneficial for them.

II

EDUCATION POLICY AND ITS HISTORY

In order to reflect upon the history of education and its policies, it is important to understand the rules and principles which build the basis and strengthen the operation of the educational system. The policies set the goals, strategies and framework to bring a change in the existing pattern and consequently, achieve the desired outcome. The outcome constitutes the impact of policies on different groups of society, available resources, existing modules and practiced methodologies. The history of education policy can be divided in following categories:

Pre-Independence

This phase of the education system can be related to religious learning and transformation towards mass education in the British reign. It started with the Vedic period and moved towards Buddhist, then Islamic and eventually to the British period. In the ancient Vedic period, there were Gurukuls and Ashrams; teachings of Vedas, Upanishads, Puranas and Epics where education was seen as a path which led to a progressive, intellectual, moral and virtuous personality. It was seen as an immense wealth of knowledge and learning to engage in research and scholarly works.

In the reign of the Mughals, there was an effort mainly to spread Islamic education across the nation where madrasas and Maulvis have played a prominent role in imparting religious education which led to a great emphasis on the idea of religion. Hence, there weren't any significant efforts to universalize the idea of education rather it was caste-centric, religion-centric, gender-centric education system.

During British rule, the idea was to divide and rule the nation. There was also an entire effort towards the spread of Christianity through Missionaries. Hence, there is no doubt that they were educating Indians, bringing in the Western culture, introducing the English language but they were motivated by other factors which weren't apparent but latent in their motives.

Post-Independence

The concern behind guaranteeing the rights of minorities was felt during the British period and thereafter, because of the minority-majority awareness, divide and rule policy as well as identification of the major political party/ ruling party with the dominant Hindu upper castes which further widened the subjugation and differences.

After the Constitution of India was adopted in 1950, there were several Education Commissions which made certain landmark recommendations as a part of the education policy, in general of the new India.

1. ***University Education Commission[3]-*** Formulated in the year 1948 under the Chairmanship of Dr. S. Radhakrishnan, aimed at awakening the innate ability to train oneself for the development of self and democratic outlook. It emphasized upon replacement of English from higher studies with an Indian language, for establishing universities across the nation to make higher education accessible and approachable to all sections of the society irrespective of caste, religion, region, survey; aimed at promoting and highlighting the country's prosperity, democracy and evading the socio-economic differences.
2. ***Indian Education Commission[4]-*** It led to the formulation of the National Education Policy in the year 1968 under the chairmanship of D.S. Kothari hence, referred to as 'Kothari Commission'. It emphasized on how education can bring a revolutionary change in the welfare, security and prosperity of the nation. It suggested reconstruction of the existing education system to imbibe the constitutional goals within oneself, and suggested three main aspects namely- internal transformation, qualitative improvement and expansion of educational facilities. Few of the many suggestions brought in place by this policy are:
    a. Compulsory education to children in the age group 6-14 years,
    b. Recommended usage of regional languages in secondary schools,
    c. Promoted the development of Sanskrit and recognition of Hindi as national language

[3]Government of India, The Report of the University Education Commission (Ministry of Education, 1962).
[4]National Council of Educational Research and Training, Report of the Education Commission (Ministry of Education, 1966).

3. ***National Policy on education***[5]**-** This was initiated in the year 1986 and focused on a wide range of issues from vocational training; higher and elementary education; education of specially abled students; non-formal, technical and management education; minority, socially and educationally backward sections, etc. In respect of minority communities, recognition was given to the implementation of guarantees and safeguards under the constitutional provisions of Article 29, 30 and 350A. The aim was to ensure social equality and justice for the minority communities.
4. ***Sarva Shiksha Abhiyan***- This was devised in the year 2001 with the motto "Education for All Movement" and aimed at universalizing elementary education. It has been further carried forward by the upcoming governments to achieve the motto of its pioneer Late Atal Bihari Vajpayee. Over the period of time, many proposals have been set and implemented. In the year 2015[6], specific initiatives for the minority communities were taken by emphasizing on minority concentrated districts/areas, opening schools in those areas, investing on infrastructure, improving the quality of education by introducing modern educational techniques in madrasas, easing the requirement of affiliation for minority institutions and further encouraging the opening of Polytechnic institutes.
5. ***Right to Education Act, 2009***- The Constitution (Eighty-sixth) Amendment added Article 21-A in the Constitution of India and emphasized upon the need for free and compulsory education of all children between the age group 6 to 14 years thereby leading to the formulation of a separate statute called as The Right of Children to Free and Compulsory Education (RTE) Act, 2009[7].

III

MINORITY: DEFINITION

Before discussing initiatives for minority education, it is essential to understand the meaning of minority and who all will be entitled to get protection and benefits as minority community. The term 'Minority' has not been defined specifically anywhere in the Constitution of India or any other statute but the language of Article 30(1) of the Constitution of India narrows it down to religion or language. There is no emphasis on the geographical or numerical aspect of

[5]Government of India, National Policy on Education, 1986 (Ministry of Human Resource Development, Department of Education,1986).

[6] Smriti Irani, Union Human Resource Development Minister, Protection and Preservation of Endangered Languages of India, *Press Information Bureau*, Government of India Ministry of Human Resource Development,Aug 6, 2014 available at https://pib.gov.in/newsite/PrintRelease.aspx?relid=108207 (Last Accessed on July 20, 2023)

[7]The Right of Children to Free and Compulsory Education Act, 2009 (Act 35 of 2009).

minorities in our nation. However, through Constituent assembly debates, Constitutional provisions, Supreme Court judgements and statutory provisions the word 'minority' and related terms have been interpreted, defined and understood to ensure the safeguard of their rights and needs.

In the year 1946, when the Constituent Assembly deliberations had started taking shape in the form of debates for the framing of the Constitution of India, the question regarding minorities was centred around religious minorities, backward castes and tribals. The question of minorities safeguard had been a key topic for debate because of the extensive deliberations made by the two major religious minorities at that point of time in history namely the Sikh Panthic Party and Muslim League but, the disarray within the two with regard to split and partition led to revocation of political safeguards at the later constitutional deliberations in the assembly[8]. In the Constituent Assembly debate[9], Dr.B R Ambedkar said that "Word minority is not used to indicate minorities in technical sense and hence, not limited to the same. It covers minorities in a cultural and linguistic sense."

The minority educational institutions have been defined under two statutes namely- National Commission for Minority Educational Institution Act, 2004[10] (hereinafter, NCMEI) and Central Educational Institutions (Reservation in Admission) Act, 2006[11] (hereinafter, CEI). NCMET defines Minority Educational Institution under Section 2(g) as "a college or institution (other than a University) established or maintained by a person or group of persons from amongst the minorities." Hence, the presence of a minority amongst the group of people who are establishing or maintaining a college is sufficient enough to call it a minority institution. CEI defines Minority Educational Institution under Section 2(f) as "an institution established and administered under Article 30(1) of the Constitution of India and so declared as a minority institute by the Government of India or Act of Parliament under NCMEI."

Stare decisis on the interpretation of Minority

It has been debated in the Constituent Assembly that the rights of the minorities have been undefined leaving the rights in vagueness and giving the judiciary an open-hand to interpret

[8]Rochana Bajpai, "Constituent Assembly Debates and Minority Rights", 35, *E&PW* pp 1837-1845 (2000).
[9] Constituent Assembly Debates (1948-49), pp 922-923.
[10]National Commission for Minority Educational Institution Act, 2004 (Act 2 of 2005).
[11]Central Educational Institutions (Reservation in Admission) Act, 2006 (Act 5 of 2007).

their rights with changing time and circumstances. The Court have provided numerous interpretations both direct as well as purposive to accommodate the different facets of understanding of Article 30. *In Re the Kerala Education Bill*[12], it was held by the Supreme Court that "a technique of arithmetical tabulation of less than 50% of population for identifying a minority so, in case of minorities within a State it shall be decided on state figures and in case of Nation it shall be decided on national figures." But, in *T. M. A. Pai Foundation and Ors v. State of Karnataka and Ors*[13] the court has specified that "the geographical entity of the State for consideration of the status of minority where the reorganization of the States have been on linguistic lines."

In regard to minorities with respect to linguistic minorities, it was observed in the case of *D. A. V. College, Jalandhar v. State of Punjab*[14] that "a linguistic minority for the purpose of Article 30(1) is one which must at least have a separate spoken language. It is not necessary that the language should also have a distinct script for those who speak it." But, the definition with respect to religious minorities has not been given so far and has led to confusions which has not been touched upon even in *T M A Pai case*[15].

IV

CONSTITUTIONAL PROVISIONS PROTECTING MINORITY RIGHTS

Minority rights have not been defined in the Constitution but in addition to the general protection provided by Article 14-17[16] which ensures equality and Article 25-28[17] which provides liberty in religious matters Article 29, 30 350 A and 350 B of the constitution provides various specific rights and protections to minorities. Article 29 and 30 gives educational and cultural rights to the people of India. Although the heading of Article 29 is "Protection of the interest of Minority" but for wider interpretation of provision, without defining minority or using word minority, it provides protection to distinct language, culture and script of citizens whereas Article 30 gives right to establish and administer educational institution of their own choice to the minority section of the country which covers religious and linguistic minority and Article 350 A and 350 B deals with protection of rights of linguistic minority only.

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[12] ***1959 1 SCR 995***.
[13] (2002) 8 SCC 481.
[14] AIR 1971 SC 1731.
[15] *Supra* note *14*.
[16] Constitution of India, art. 14-17 provides for the equal treatment of everyone before the law, prevents discrimination on various grounds, treats everybody as equals in matters of public employment, and abolishes untouchability,
[17] *Id*., art. 25- 28 provides freedom of religion to individuals as well as to the religious groups.

Article 29: Protection of Interests of minorities

Article 29(1) gives right to conserve distinct language, culture and script to the citizens of India only whereas Article 29(2) puts a restriction to denial of admission in education institution to Indian citizens only on the ground of religion, race, caste or language. It talks about the negative right of the State for the purpose of admission in educational institutions whether funded or not funded by the State on grounds of religion, caste, race, language or any of them. Here, the term 'aid' refers to the grants under Article 337 of the Constitution of India. Consequently, education institutions can be divided into two broad categories:

a. Institutions which receive aid from the State
b. Institutions not receiving aid from the State

While explaining the rights under Article 29(2), there are two landmark legal precedents which have in a way laid down the foundation stone of admission to educational institutions. In *St. Stephen's College v. University of Delhi*[18], a five-judge bench of the Supreme Court held that "the minority aided educational institutions are allowed to prefer their community in order to maintain the character of the institution but in no case, it shall exceed the 50% seats limit for the members of its own community even if it is aided by the State". But, the eleven-judge bench in *T. M. A. Pai Foundation v State of Karnataka*[19] relaxed the strict limit of 50% imposed by St. Stephen's case and further held that "a reasonable percentage may be fixed by the State where the minority institution is situated and the institution can admit students of its own community for whom the institution was meant, as long as the non-minority community is not completely barred from admission". Hence, these two judgments have clarified the mode of admission which has to be followed by minority educational institutions where the latter has tried to make a reasonable modification to the stringent rule of 50% ceiling invoked by the former.

Article 30: Rights of minorities to establish and administer educational institutions

Article 30(1) of the Constitution discusses in detail the right of minorities to establish and administer educational institutions of their choice by referring particularly to the linguistic and religious minorities. Here, the term 'of their choice' does not mean exclusively for their own community and it also does not mean that it has to be centred specifically on their religion or language. Rather, it has been held *In Re the Kerala Education Bill 1957*[20] that "it has to serve

[18] (1992) 1 SCC 558.
[19] *Supra* note 14.
[20] *Supra* note 13.

the purpose of conserving their own religion, language and culture as well as cater to the thorough general education of the children." They can establish all kinds of institutions be it technical, medical, school, college and professional institutions as observed in *T. M. A. Pai Foundation case*[21]. The term 'establish and administer' is supposedly read conjunctively because of the use of the word 'and' as stated in *Azeez Basha v Union of India*[22]and St. *Stephen's case*[23] which means that in order to administer an institution the proof of establishment has to be given. This interpretation was also affirmed in the case of *S. P. Mittal v Union of India*[24].

In *Azeez Basha case* [25], the Constitution bench has decided that "Aligarh Muslim University (hereinafter, AMU) is not a minority institution as it has been created by a Central Legislation and hence, it is a Central University as it has been established through AMU Act, 1920." But, in order to nullify the judgment, the Parliament passed The Aligarh (Amendment) Act, 1981 which was later struck down by the Allahabad High Court hence, an appeal was made to the Supreme Court. This case[26] is still pending in the Supreme Court before a 7-judge bench to decide upon two issues- a.) What are the parameters to grant a minority status, b.) Can an educational institution enjoy minority status for being created by an act of Parliament? On similar lines, Jamia Millia Islamia had also been through this controversy of being a minority institution as it was previously decided by the Nation Commission for Minority Educational Institutions (NCMEI) in the year 2011 but, this was further ratified through an affidavit by recognising the judgment in *Azeez Basha case*[27] which says that a university incorporated under the Act of Parliament cannot claim minority status. Since Jamia Millia Islamia was established by An Act of Parliament in 1988 hence, it's a Central University and cannot claim the minority status.

As soon as an educational institution gets the certificate of being a minority institution the safeguards of Article 30(1) of the Constitution shall be made applicable to them. In the case of *P. A. Inamdar v. State of Maharashtra*[28] it was held that "minority institutions are free to admit non-minority students and students from their own community to a limited extent so that the minority educational character is not lost because if they do so, then the protection of Article

[21] *Supra* note 14.
[22]AIR 1968 SC 662.
[23] *Supra* note 19.
[24] AIR 1983 SC 1.
[25] *Supra* note 23.
[26]*Ibid.*
[27] *Ibid.*
[28] (2005) 6 SCC 537.

30(1) of the Constitution is lost". In *State of Kerala v. Mother Provincial*[29], it was held that "establishment means bringing into existence/being by a member of a minority community for the benefit of a minority community, with or without the participation/advantage of a non-minority community. Therefore, in order to prove the status of minority direct or circumstantial evidence may be procured, and for the purpose of identifying themselves with the minority a nexus has to be established between the means employed and the ends desired to attain through such an establishment and administration. This definitely shall not be contrary to the national interest in matters of education." But, Article 30 in itself represents the national interest as it protects the interest of minorities and hence, the rights of minorities must be respected. Hence, the minority educational institutions have been excluded from the effect of Article 15(5)[30] of the Constitution of India thereby giving them a special status with respect to the regulation of the State.[31]

The term 'administration' under Article 30(1) raises a question as to the scope of control exhibited by the Government for the business of management and recruitment in the institution. There had been numerous interpretations as to the operation; rules and regulation in respect of minority institutions and how they are different from government aided or private institutions. In *Ahmedabad St. Xavier's College Society v. State of Gujarat*[32], the Court emphasized that the "right to administer is not an absolute right but subject to regulations which shall ensure orderly, efficient and sound administration." The Court further observed that "the distinction is between a restriction on the right of the administration for the interest of the general public and a regulation prescribing the manner of administration which shall affect the autonomy of the administration." But, it is important to note that the rights under Article 30 shall not be abrogated in order to impose rules and regulations by the State agencies. However, the interpretative understanding of government's control and actual interference by the government is slightly different and therefore to determine the government's action within the management of the institution, three tests were laid down in *All Saints High School v. Govt. of A.P.*[33] namely,

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[29] AIR 1970 SC 2079.

[30] Constitution of India ,art. 15 (5)Nothing in this article or in sub-clause (g) of clause (1) of article 19 shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes in so far as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of article 30.

[31]Pramati Educational & Cultural Trust v. Union of India (2014) 8 SCC 1.

[32] (1974) 1 SCC 717.

[33] (1980) 2 SCC 478.

a. The founders must be permitted to mould the institution as they think fit,
b. Government cannot take away any part of the management and vest it in another body without encroaching upon Article 30(1),
c. An exception is that the Government or University can adopt regulatory measures to improve the educational standards so as to upgrade their standard of excellence.

In the landmark judgment of *T. M. A. Pai case*[34], the majority judgment made a clear distinction between professional educational institutions (both minority and non-minority) and other educational institutions like schools and undergraduate colleges. It was held that "the unaided professional institution shall have an autonomy with respect to administration but it shall not be at the cost of merit and as long as the admissions are transparent and merit is taken care of then, there is no need of interference by the State or University; that it shall not be fair to apply the rule and regulations of government aided professional colleges to unaided professional colleges; that for unaided minority colleges, the qualifications and eligibility can be provided by the State, few seats can be reserved for admission by the management and rest can be handed over to the State to be filled by counselling. These distinctions have been made while keeping in mind the national interest of having good and efficient professionals in our nation." In Sidhrajbhai case it was held by the court "that excellence, maladministration, uniformity, arbitrariness and autonomy provide some space to the Government to exert control over minority institutions by showing that the rights under Article 30 if it has been brought in place for the institution's efficiency, discipline, health, sanitation, morality and public order to secure the functioning in educational matters." The court further held that "Government order which is in national interest but against the interest of minority educational institutions will not be justified"[35] but in T.M. A. Pai it was held by the court that " Government is not prevented from framing the regulations in national interest and it will apply to all educational institutions whether minority or majority" . Thus sidhrajbhai judgement on the national interest issue has been overruled by the court in T.M.A. Pai case.[36] The court reiterated the idea of minority autonomy in relation to Indian education and emphasized how crucial it is to defend minorities' freedom to form and run educational institutions of their choosing free from state intrusion and also emphasized the necessity for a delicate balance between minority institutions' autonomy

[34] *Supra* note 14.
[35] SidhrajbhaiSabbai v. State of Gujarat, AIR 1963 SC 540.
[36] *P.A.Inamdar v. State of Maharashtra* (2005) 6 SCC 537.

and the government's regulatory role in ensuring that education is given without bias or injustice.[37]

If we look at the trend which has been followed with respect to the interpretation of Article 30 of the Constitution of India it can be concluded that the judgments have seen liberal and contextual interpretation as well as narrowed and restricted interpretation. It has progressed from being independent and free from State regulation to falling into the space of State and its regulation thereby, limiting the ambit of Article 30.

Article 30 (1A) provides for the acquisition of the property of a minority educational institution and Article 30(2) puts an obligation on the State to not discriminate in providing funds (if they are providing) for the management of an institution on the ground that it is in the hand of a minority either religious or linguistic. However, this clause does not give a positive right to the minorities to make a claim for grant-in-aid for establishing or administering educational institutions.

Difference between Article 29 and 30

Both Article 29 and 30 of the Constitution of India are related to minorities but they are different in a basic manner that the latter relates to linguistic and religious minorities while the former extends to all sections of citizens with distinct language, culture and script. Further, there is no need for an establishment of minority educational institutions under Article 29 while in case of Article 30 there is no need to conserve the language, script or culture. Here, Article 29(2) and Article 15(1) of the Constitution of India can be correlated as both talk about the discrimination on grounds of religion, race, caste but there are three points of difference- Firstly, Article 15(1) talks about protection against the State and Article 29(2) talks about protection against State or anyone; Secondly, Article 15(1) talks about discrimination in general of any kind while Article 29(2) specifically talks about discrimination with respect to admission in State funded or non-funded educational institutions; Thirdly, Article 15(1) inculcates sex and place of birth as a ground of discrimination which isn't there in case of latter while Article 29(2) talks about discrimination on the basis of language which is absent from the former.

[37] *Islamic Academy of Education v. State of Karnataka,* 2003 (6)SCC 697.

Article 350 (A) and 350 (B)

The rights and interests of the nation's linguistic minorities are further supported and protected under Articles 350, 350A, and 350B of the Indian Constitution. In accordance with Article 350 , citizens of India are free to communicate with the Union or the State in any language they find comfortable, while Articles 350A and 350B ensure that linguistic minorities have access to education in their mother tongue and have a special officer to uphold their rights and address any complaints. These constitutional clauses support India's linguistic and cultural diversity and work to prevent linguistic minorities from being left behind in terms of education and cultural preservation. To safeguard the rights of linguistic minorities and advance a truly inclusive society in India, it is critical that the government and other stakeholders take these articles seriously and see to it that they are implemented.

Right to Education Act, 2009 and Article 21-A Indian Constitution

Education has paved its way through the Directive Principles of State Policy[38] to the recognition of the right to education in the right to life under Article 21 in *Unni Krishnan, J.P. v. State of Andhra Pradesh*[39], the declaration of Right to education as a fundamental right in the year 2002 under Article 21-A and consequently the formulation of Right to Education Act in the year 2009. Article 21-A led to the incorporation of a fundamental duty[40] by putting an obligation on the parents to provide their children between the age of 6 to 14 years an opportunity for education. After the implementation of the Right to Education Act, there had been a serious doubt because the Act was applicable only to those schools which were supported by the appropriate government and thereby carving out the minority schools as an exception to the general rule. Several petitions were filed before the Supreme Court especially w.r.t. Section 12(1)(c) of the Right to Education Act as the private unaided schools had been thrown into a problematic position as the particular section mandated the inclusion of 25% students from weaker and disadvantaged sections of society, free of charge[41].

In two of the landmark judgments delivered by the Supreme Court, they have tried to establish a rationale nexus between the restrictions imposed and objective to be attained by relying on

[38]The Constitution of India, 1950, art. 45.
[39]AIR 1993 SC 2178.
[40] *Supra* note 39, art. 51(k).
[41]Right of Children to Free and Compulsory Education Act, 2009, s. 12(1)(c):[A school] specified in sub-clauses (iii) and (iv) of clause (n) of section 2 shall admit in class I, to the extent of at least twenty-five per cent. of the strength of that class, children belonging to weaker section and disadvantaged group in the neighborhood and provide free and compulsory elementary education till its completion.

the doctrine of severability as laid down in *R. M. D. Chamarbaugwalla v. Union of India*[42]. In the first case *Society for Un-aided Private Schools of Rajasthan v. Union of India and Anr.*[43], the 3-judge bench of the apex court held that "the 25% reservation obligation under Section 12(1)(c) of the RTE Act is a reasonable restriction on private unaided schools but, it will not be applicable to unaided minority schools as it shall defeat the minority character of the very institution." Later, in the year 2014 five judge bench of the Supreme Court in *Pramati Educational & Cultural Trust v. Union of India*[44], upheld the validity of the RTE act but didn't include the aided minority schools. No doubt there had been a liberal approach of the apex court to deal with the fundamental rights of the minorities but this has led to the dilution of the right of the children to free education. However, enough caution and sympathy has been given to the minority communities to preserve their right in respect of minority educational institutions.

These two judicial decisions have given a blanket exemption to minority schools from RTE act which is proven unjustified. Rather, the minority schools shall be made to comply with certain norms or standards applicable for all schools in the country. In *Azim Premji Foundation v. State of Karnataka*[45] the Court observed that there shall not be any exemption and the minority schools shall comply with the norms and standards and provide the basic amenities for the children's welfare and upbringing. Thereafter, in another decision by the Kerala High Court in *Sobha George Adolfus v. State of Kerala*[46] held that "denial of promotion up to elementary level education in minority schools is violative of Article 21 of the Constitution hence, no minority educational institution has the right to hold back any child." Hence, despite the safeguard being in its place, it is important for all schools to abide by certain norms and standards to maintain the quality of education.

Recently the Government of India has released National Education Policy, 2020[47](hereinafter, NEP) proving a new vision to the Indian Education system which emphasizes upon equitable and inclusive education for all by assuring that not a single child is deprived of a quality education because of their socio-cultural background. NEP has recognised the inequality and injustice in the education policy of India which necessitates an extensive reform modification in the three-decade old education policy. They have recognised the percentage of dropouts

[42] AIR 1957 SC 628.
[43] AIR 2012 SC 3445.
[44] *Supra* note 32.
[45](2015) SCC Online Kar 6409.
[46] (2016) SCC Online Ker 18552.
[47]Government of India, National Education Policy, 2020, (Ministry of Human Resource Development, 2020).

amongst minority communities, restriction to girl children's education in rural areas, difficulty to access schools and educational institutions in geographically difficult terrain, etc. The Socio-Economically Disadvantaged Groups (SEDGs) which is divided into many categories and one of them being socio-cultural identities which includes SC, ST, OBC, Tribals and minorities. Since the minority community is underrepresented in school and higher education hence, there is a need to promote amongst them the value of education for children and bring their representation by marking attendance, conducting enrolments, providing conditional cash as incentives so that their parents send them to schools. NEP, 2020 has touched upon the freedom sanctioned under Article 29 and 30 of the Constitution by giving the State authority to interfere in religious matters by encouraging alternative forms of schools to preserve the traditions or alternative pedagogical styles.

V

INTERNATIONAL LAWS ON MINORITIES

Education is a key to national prosperity and survival. It is a part of human rights which is recognized globally and includes members of the minorities. International Organisations play a significant role towards the acceptance, engagement, and interaction amongst diverse populations within and between the States. In *Polish Minorities Treaty, 1919*[48] Article 8 states that "Polish nationals who belong to racial, religious or linguistic minorities shall have an equal right to establish, manage and control at their own expense charitable, religious, social institutions, schools and other educational establishments with the right to use their language and exercise their religion freely."

1. **The Universal Declaration of Human Rights-** It didn't accept the draft articles related to minority rights to establish institutions and receive teaching in their language of choice, or approval of a general minority rights. However, it emphasized on universal elementary education as everyone has the right to education and it must be granted equally keeping it inclusive of minorities and shall not be disadvantageous to them[49].
2. **The Covenant on Economic, Social and Cultural Rights-** It tried to inculcate few of the principles from the Declaration and give it the form of Covenant to make it binding. In this, articles were incorporated to respect the liberty of individuals and bodies to establish and direct educational institutions while conforming to the minimum

[48] *Patrick Thornberry, Dianne Gibbons, "Education and Minority Rights: A Short Survey of International Standards" 4 2 JSTOR, pp 115-152 (1996-97).*
[49]The Universal Declaration of Human Rights, 1948, art. 26.

standards laid down by the State[50]. A committee which was set up to look into this Covenant asked the Government to provide data on literacy, access to levels of education, disaggregated by sex, religion and were further asked to look at the position of vulnerable and disadvantaged groups which included children of linguistic, racial, religious or other minorities.

3. **The International Convention on the Elimination of All forms of Racial Discrimination-** Though the title of the Convention directs towards racial discrimination but there has been significant work with respect to minorities as they have become more receptive towards their concerns. These concerns have arisen in the field of education and training of professionals by providing education and religious freedom, education in the mother tongue.
4. **The UNESCO Convention Against Discrimination in Education, 1960-** The term discrimination includes any distinction, exclusion, limitation or preference on the basis of race, sex, caste, religion, language or others for the purpose of impairing the equality of treatment in education. There is a provision which allows a separate system based on 'religious or linguistic reasons' which shall not be discriminatory if it conforms to the comparable standards of education.
5. **The UN Convention on the Rights of the Child, 1989-** It specifically deals with education under Article 28 and 29[51] while emphasizing upon the identity and culture to respect both the minority values and that of the nation. The idea of education was driven by this principle of understanding, tolerance, and friendship amongst all ethnic and religious groups which might be a minority in the Nation.

Internationally, there are significant developments with regard to minorities but it is asymmetrical with regard to laws and principles. Provisions with respect to religion are still there if not independently then in respect of anti-discrimination laws or laws on ethnicity or identity but there are almost no laws with regard to linguistic minorities. The most important aspects of minority rights in respect of Education can be numbered as

a. Curriculum content, its purposes and values to ensure the teaching of history and culture which reflects the minority languages.
b. Curriculum control and inputs, as to what has to be included and excluded can be done by consultation or through advisory members of the affected/minority groups.

[50]International Covenant on Economic, Social and Cultural Rights, 1966, art. 13.4.
[51]The United Nations Convention on the Rights of the Child, 1990, art. 28, 29.

c. Language in education, to make it accessible and feasible for the minority population to communicate and mingle with the community of that nation as a whole.
d. Institutions, dedicatedly designed, established and maintained for the educational, cultural and religious prosperity of the minority.
e. Indigenous education, to conserve and spread.

Hence, issues related to language, religion, ethnicity, culture are larger issues around which the political controversies revolve. Out of these, the minority rights to education are a determining factor to access power and resources.

VI

CONCLUSION

Minorities and their rights are not given by default as per Article 29 and 30 but they have to be asserted by the minorities. Linguistic and religious minorities are inevitable to a nation like India as there is a huge diversity amongst the citizens of this nation from Kanyakumari to Jammu & Kashmir. There are divisions as people belong to different religions, and speak various languages. In such a case, it is important that the education policy have a holistic and comprehensive approach to deal with all these differences and yet maintain the status quo of a united nation. The judicial pronouncements by the Apex court regarding the constitutional provisions so far from *Re Kerala Education Bill*[52], *Azeez Basha* [53] to *T. M. A. Pai Foundation case*[54] has seen a progressive interpretation of the statutes through different doctrines of interpretation. The balance between the rights of minorities and national interest of the general public has always been the point of conflict which has been addressed in judgments like *Pramati Trust*[55] because the character and basic premise of a provision has to be taken care of even if the law is brought for the welfare of the entire nation. The difference between safeguarding the rights of minority communities which might or might not be aided by the government and that of non-minority institutions has to be understood in the light of historically oppressed rules and regulations as the present cannot be looked at without critically examining the past.

Minority institutions have a constitutional safeguard but there are numerous legal and administrative challenges at the ground level which starts right from the issue of affiliation of

[52] *Supra* note 13.
[53] *Supra* note 23.
[54] *Supra* note 14.
[55] *Supra* note 32.

these institutions by the appropriate authority or Commissions, further, the linguistic minority institutions have somewhat been accepted and recognised even without too much hassle but the religious minority institutions are critically looked upon in the negative manner. Hence, making it difficult to get the clearance of affiliation. The political position with respect to religion had always been conflicting in India with different political parties taking the shelter of their convenient religious groups which has led to polarization and creation of a persistent doubt in the minds of authorities. Further the government regulation has often attacked the minority character of these institutions because of too much interference in the name of prosperity, excellence and better administration. This regulation of the government ranges from admission, fees, disciplinary actions, nominations, recruitment, salaries and quality of education thereby making a space for the government to intervene in whatever manner they please. *T. M. A. Pai's case*[56] has a major stake in expanding the scope and control of government in minority institutions both aided and unaided. The government has taken the initiative of inculcating regional languages as medium of communication and education in the NEP 2020[57] which is appreciable but it has to be ensured that the usage of regional language is not merely to abide by the rules and regulations rather there has to be an actual participation and engagement from both the school authorities and students, it has to be taught in a holistic manner while talking about its importance both historically and contemporarily, and it shall not be confined to a specific group but to the people at large.

[56] *Supra* note 14.
[57] *Supra* note 48.

EXAMINING HUMAN RIGHTS THROUGH THE LENS OF CONTEMPORARY GLOBALISATION AND INTERNATIONALISATION

Dr. Anil Sain*

Abstract

Globalisation and internationalisation are dynamic forces shaping the contemporary world, with profound implications for various aspects of human existence in an increasingly interconnected world shaped by the forces of globalisation and internationalisation, the protection and promotion of human rights have become paramount concerns for individuals, societies, and nations alike. The intricate relationship between human rights and the multifaceted processes of contemporary globalisation and internationalisation this research aims to shed light on the complex ways in which these global forces impact the realisation of human rights in diverse socio-political contexts. Drawing on a comprehensive analysis of globalisation's economic, technological, and cultural dimensions, we examine how these interwoven forces influence the efficacy of human rights mechanisms at the national and international levels. Special attention is paid to the challenges and opportunities posed by the ever-expanding reach of global markets, the proliferation of digital technologies, and the cross-cultural exchange of ideas. Also, the role of international institutions and agreements in safeguarding human rights amidst the changing dynamics of global politics. By scrutinising the strengths and limitations of existing mechanisms, the research offers insights into the potential for meaningful reform and effective enforcement in an era marked by both unprecedented interdependence and persistent power disparities also, the impact of globalisation and internationalisation on marginalised and vulnerable populations, addressing the potential for exacerbating inequalities and human rights abuses. Through case studies from different regions and social contexts, we analyse how globalisation and internationalisation intersect with factors such as gender, ethnicity, and socioeconomic status, shaping the human rights experiences of diverse communities and identifies promising strategies and best practices for harnessing the potential of globalisation and internationalisation to advance human rights.

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I

INTRODUCTION

The phenomenon of Globalisation and Internationalisation has significantly shaped the contemporary world, altering the way societies interact, economy's function, and cultures evolve. Globalisation refers to the increasing interconnectedness and interdependence of nations and economies through trade, investment, technology, and communication. On the other hand, internationalisation encompasses the process of nations and organisations engaging in cross-border activities, often with the intention of expanding their influence or operations beyond their national boundaries. The roots of globalisation can be traced back centuries, but the current era is marked by an unprecedented level of interconnectedness, facilitated by advancements in transportation, communication, and technology. The rise of multinational corporations, the proliferation of international trade agreements, and the emergence of global financial markets have accelerated the pace of globalisation. Simultaneously, internationalisation has become a strategic imperative for governments, businesses, and institutions seeking to navigate the complexities of an interconnected world.[1] The effects of globalisation and internationalisation have been far-reaching, impacting various aspects of human existence, from economic structures to social norms and cultural identities. These processes have opened up new opportunities for growth, collaboration, and cultural exchange, yet they have also posed significant challenges, particularly concerning human rights. In the rapidly evolving landscape of the contemporary world, the forces of globalisation and internationalisation have been reshaping societies, economies, and cultures on a global scale.
The concept of human rights serves as a cornerstone of global ethical principles, aimed at safeguarding the inherent dignity and freedoms of every individual, regardless of their race, religion, gender, or nationality.[2]

The Universal Declaration of Human Rights (UDHR), adopted by the United Nations General Assembly in 1948, laid the groundwork for international human rights law, emphasising the protection of civil, political, economic, social, and cultural rights." While the UDHR represents a monumental milestone in the quest for human rights protection, the contemporary world poses new challenges and complexities that demand a fresh examination of these rights within the context of globalisation and internationalisation.

[1] Waldron S., M. Globalisation and its impact on the development and protection of human rights (2010).
[2] Arafat, S. Globalisation and human rights: An overview of its impact. *American Journal of humanities and social sciences*, 1(1), 18-24(2013).

As the globalised world evolves, it is essential to critically assess the potential implications of these processes on human rights.[3] On one hand, proponents argue that globalisation and internationalisation have the potential to foster economic prosperity, technological advancements, and cultural exchange, which can, in turn, bolster human rights protection.[4] The ease of communication and information exchange, for instance, has given rise to global solidarity movements, enabling rapid responses to human rights violations and humanitarian crises. Conversely, critics express concerns about the adverse consequences of globalisation and internationalisation on human rights, particularly for vulnerable populations. Economic globalisation, with its emphasis on profit maximisation, can lead to labour exploitation and economic inequality, often infringing on workers' rights. The race for economic growth may also exacerbate environmental degradation, affecting the right to a healthy environment for future generations. Moreover, cultural homogenisation and the dominance of Western ideologies have led to challenges in preserving cultural diversity and indigenous rights.[5]

Objectives and Scope

This research article aims to explore the multifaceted relationship between Globalisation, Internationalisation, and human rights from a comprehensive and nuanced perspective. By delving into the economic, social, cultural, and political dimensions of this interaction, the article seeks to provide a thorough analysis of the impact of these processes on human rights in the contemporary world.

The objectives of this research article are as follows

a) To examine how economic globalisation and internationalisation affect human rights, mainly in the context of labour rights, social welfare, income inequality, and the realisation of economic, social, and cultural rights.
b) To analyse the influence of globalisation and internationalisation on cultural diversity, preservation of identities, and the rights of indigenous communities and migrants.
c) To explore the implications of globalisation and internationalisation on state sovereignty and the fulfilment of human rights obligations, both at the national and international levels.

[3] Report of the Human Rights Committee (1982). Official records of the general assembly, Thirty-seventh Session, Supplement No. 40, (A/37/40), annex V.
[4] Bhagwati, J. in defence of globalisation. *London: Oxford University Press* (2007).
[5] Brysk, A. (Ed.) Globalisation and Human Rights. *Berkeley: University of California Press* (2002).

d) To investigate how human rights principles can serve as drivers of globalisation and internationalisation, influencing corporate behaviour, state policies, and civil society initiatives.

e) To present case studies illustrating the complex interactions between Globalisation, Internationalisation, and human rights, highlighting successes, challenges, and lessons learned from diverse contexts.

Methodology

To achieve these objectives, this research article employs a multi-disciplinary approach that draws on various academic fields, including international relations, human rights studies, economics, sociology, anthropology, and political science. Data for analysis is gathered from scholarly sources, reports from international organisations, and case studies that provide real-world insights into the impact of globalisation and internationalisation on human rights. By synthesising existing literature, empirical evidence, and expert insights, by understanding and addressing the human rights implications of these transformative forces, policymakers, academics, and activists can work towards creating a more equitable and just world order that upholds the dignity and rights of all individuals, irrespective of their geographical location or socioeconomic status.

II

GLOBALISATION AND INTERNATIONALISATION: CONCEPTS AND THEORIES

Defining Globalisation

Globalization is a multifaceted, intricate phenomenon that has profoundly altered the world over the past few decades. On a global scale, it refers to the growing interconnectedness and interdependence of nations and economies. The process of globalisation is driven by various factors, including technological advancements, trade liberalisation, financial integration, and the movement of people across borders. At its core, globalisation entails the removal of barriers that once hindered the flow of goods, services, information, and ideas across national boundaries.[6] This has led to a significant increase in international trade, foreign direct investment, and cross-border transactions, fostering economic integration and creating a global marketplace. "The ease of communication and travel has also facilitated cultural exchange and the dissemination of knowledge, ideas, and values across different societies.[7]

[6] Kadraglc, A. Globalisation and Human Rights. *Philadelphia: Chelsea House Publishers* (2006).

[7] Jan Aart Scholte, Globalization: A Critical Introduction *Houndmills, Basingstroke, London: Macmillan Press*, 2000, available at https://doi.org/10.1111/j.1467 9701.2007.01019.x(last visited on 22 July, 2023).

Moreover, globalisation has had far-reaching effects on various aspects of human life, including politics, culture, social norms, and the environment.[8] Proponents argue that it has the potential to lift people out of poverty, promote peace and understanding between nations, and foster innovation and development. Critics, however, express concerns over its impact on income inequality, cultural homogenisation, and the erosion of local traditions and identities.[9]

Understanding Internationalisation

While globalisation refers to the broader process of global interconnectedness, internationalisation focuses specifically on the engagement of nations and organisations in cross-border activities. Internationalisation is a strategic approach employed by governments, businesses, educational institutions, and non-governmental organisations to expand their operations, influence, and reach beyond their national borders.[10] In the realm of business, internationalisation involves the expansion of markets and the establishment of operations in foreign countries.[11] This often includes exporting products and services, setting up subsidiaries or joint ventures, and engaging in foreign direct investment to access new markets and resources. For governments, internationalisation encompasses diplomatic efforts, alliances, and participation in international organisations to promote their interests and address global challenges. In the academic sphere, internationalisation is the process of integrating international perspectives, experiences, and collaborations into educational programs and research. This encourages cross-cultural learning, enhances the quality of education, and fosters global citizenship among students and faculty.[12]

III

THEORIES OF GLOBALISATION AND INTERNATIONALISATION[13]

Numerous theories have been proposed to explain the drivers and consequences of globalisation and internationalisation. Some of the prominent ones include:

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[8] Nault, M.D. & England, S. L. (Ed.) Globalisation and human rights in the Developing world. *London: Palgrave Macmillan* (2011).

[9] Ryan Goodman, Derek Jinks, Incomplete Internalization and Compliance with Human Rights Law, *European Journal of International Law*, Volume 19, Issue 4, September 2008, Pages 725-748, available at https://doi.org/10.1093/ejil/chn039(last visited on July 24, 2023).

[10] R. Goodman and D. Jinks, Socializing States: Promoting Human Rights through International Law (forthcoming 2009).

[11] Stephens, B. The amorality of profit: transnational corporations and human rights. Berkeley Journal of International Law, pp. 20-45(2002).

[12] Robinson, M. UN high commissioner for human rights ethics. Human rights and globalisation second global ethic lecture. The Global Ethic Foundation University of Tubingen, Germany (2002).

[13] Paul O'Connell, On Reconciling Irreconcilables: Neo-liberal Globalisation and Human Rights, *Human Rights Law Review*, Volume 7, Issue 3, 2007, Pages 483–509, available at https://doi.org/10.1093/hrlr/ngm015(last visited on July 24, 2023).

1) Modernisation Theory: This theory suggests that globalisation and internationalisation are natural outcomes of societal progress and development. As countries modernise, they adopt Western economic, political, and cultural values, leading to increased global interconnectedness.

2) Dependency Theory: According to this perspective, globalisation and internationalisation perpetuate global inequality, with wealthy nations dominating and exploiting less developed countries. This theory emphasises the role of core-periphery relationships in shaping the global economic system.

3) World Systems Theory: This theory posits that the global economy is structured around a core of developed nations, a semi-periphery of emerging economies, and a periphery of less developed countries. Globalisation intensifies the interconnections between these regions, leading to both development and exploitation.

4) Hyper-globalisation Theory: Advocates of this view argue that globalisation has created a borderless world where nation-states are losing their relevance. They believe that global markets, corporations, and international organisations exert more influence on economic and political decisions than individual countries.

5) Cultural Convergence Theory: This theory suggests that globalisation leads to the spread of a dominant global culture, resulting in cultural homogenisation. Critics argue that this may erode local traditions and identities, leading to a loss of cultural diversity.

6) Transformationalists Theory: This perspective contends that globalisation and internationalisation are transformative forces that bring about significant changes in the world order. It acknowledges both positive and negative outcomes while emphasising the agency of individuals and societies in shaping these processes.

IV

ECONOMIC DIMENSION: IMPLICATIONS FOR HUMAN RIGHTS

Global Trade and Labour Rights

The economic dimension of globalisation, particularly in the context of global trade, has significant implications for human rights, especially concerning labour rights. The rapid expansion of global trade networks, facilitated by advancements in transportation and communication, has resulted in increased international exchange of goods and services. While global trade can stimulate economic growth and development, it can also lead to labour rights challenges. One of the key concerns is the exploitation of labour in developing countries, where multinational corporations often seek to maximise profits by taking advantage of lower labour

costs and lax regulations.[14] This race to the bottom can result in poor working conditions, low wages, long working hours, and limited access to social protection for workers. Many workers are left vulnerable and unable to exercise their right to fair and safe working conditions, violating their dignity and human rights.[15] Efforts to address these challenges include the promotion of fair-trade practices, responsible business conduct, and the adherence to international labour standards, such as those set forth by the International Labour Organisation (ILO). Governments and international organisations play a crucial role in ensuring that trade agreements are balanced and promote social and economic justice.[16]

Foreign Direct Investment and Social Welfare

Foreign direct investment (FDI) is another important aspect of the economic dimension of globalisation. It involves the cross-border investment of capital to establish businesses or acquire assets in foreign countries. While FDI can bring various benefits, such as job creation and technology transfer, its impact on social welfare and human rights can be complex. On one hand, FDI can contribute to economic development, leading to increased access to resources, technology, and expertise that may elevate living standards and social welfare in host countries.

It can enhance infrastructure development, education, and healthcare systems, thereby supporting the realisation of economic, social, and cultural rights. However, the effects of FDI are not uniform, and concerns exist about potential negative consequences. For instance, in some cases, FDI can result in the exploitation of natural resources without adequate consideration for environmental sustainability or the rights of indigenous communities.[17] As well, there have been instances where large-scale investment projects have led to land grabbing and forced displacement of local communities, violating their right to adequate housing and livelihood.

To ensure that FDI contributes positively to social welfare and human rights, it is crucial to establish transparent and accountable investment frameworks. Governments should adopt policies that prioritise sustainable development, social inclusion, and respect for human rights. Furthermore, mechanisms for community consultation and engagement must be in place to

[14]Falk, R.A. Human Rights Horizons: The Pursuit of Justice in a Globalizing World (1st ed.). *Routledge.* available at https://doi.org/10.4324/9780203900901(last visited on July 25, 2023) (2000).
[15] Mitchell, N., & McCormick, J. (1988). Economic and Political Explanations of Human Rights Violations. *World Politics, 40*(4), 476-498. doi:10.2307/2010315.
[16] Bradlow, D. D. The world bank, the IMF, and human rights. *Transnational Law & Contemporary Problems, 6(1),* 47-90 (1996).
[17] Dreher, A., Gassebner, M., & Siemers, L.-H. R. Globalization, Economic Freedom, and Human Rights. Journal of Conflict Resolution, 56(3), 516–546. available at https://doi.org/10.1177/0022002711420962(2012) (last visited on July 25, 2023).

safeguard the rights of affected communities and ensure that FDI benefits are equitably distributed.[18]

Income Inequality and Poverty

One of the most contentious issues arising from globalisation's economic dimension is the exacerbation of income inequality and poverty. While globalisation has lifted many people out of poverty in some regions, it has also contributed to widening income gaps between the wealthy elite and the marginalised populations in other areas. The global movement of capital and resources, coupled with trade liberalisation, has enabled multinational corporations to operate across borders, often taking advantage of tax havens and favourable regulations to minimise tax burdens.[19] Consequently, some corporations and high-income individuals have amassed significant wealth while many communities continue to struggle with poverty and inadequate access to basic services. Income inequality can undermine human rights by limiting access to education, healthcare, and adequate housing for those in disadvantaged positions. It can lead to social unrest, crime, and political instability, further eroding the fabric of society.[20]

Addressing income inequality and poverty requires a multifaceted approach, encompassing progressive taxation, social welfare programs, inclusive economic policies, and measures to empower marginalised communities. Moreover, ensuring equitable economic growth and reducing disparities can help promote social cohesion and respect for human rights.

Impact on Economic, Social, and Cultural Rights

Globalisation's economic dimension also intersects with economic, social, and cultural rights (ESCR). These rights, as enshrined in the International Covenant on Economic, Social and Cultural Rights (ICESCR), include the right to education, health, food, housing, and cultural participation. While globalisation has contributed to advancements in technology, healthcare, and education, ensuring equitable access to these benefits remains a challenge. The divide between developed and developing nations can significantly impact the realisation of ESCR, as many marginalised communities lack access to essential services and opportunities for cultural expression.[21] Furthermore, the economic policies pursued in the context of globalisation can influence the availability and accessibility of social services. To harness the

[18] Daniel D. Bradlow, "The World Bank, the IMF, and Human Rights" *Transnational Law & Contemporary Problems* 47(1996) 6(1).
[19] Kappel, Vivien. "The effects of financial development on income inequality and poverty." *CER-ETH-Centre of Economic Research at ETH Zurich, Working Paper* 10/127 (2010).
[20] Bae, Kwangbin, Dongsook Han, and Hosung Sohn. "Importance of access to finance in reducing income inequality and poverty level." *International Review of Public Administration* 17, no. 1 (2012): 55-77.
[21] Roth, Kenneth. "Defending economic, social and cultural rights: Practical issues faced by an international human rights organization." *Human Rights Quarterly* 26, no. 1 (2004): 63-73.

benefits of globalisation for human rights, it is essential to adopt ethical and inclusive economic policies, promote responsible business conduct, and ensure that trade and investment practices align with human rights principles. By placing human rights at the centre of economic activities, we can create a world where economic prosperity is inclusive and sustainable, benefiting all members of society.

V

SOCIAL AND CULTURAL DIMENSION: PRESERVING DIVERSITY AND IDENTITY

Cultural Homogenisation vs. Cultural Diversity

The social and cultural dimension of globalisation encompasses a critical examination of the contrasting impacts of cultural homogenisation and cultural diversity. As globalisation facilitates the exchange of ideas, values, and cultural products across borders, concerns arise regarding the potential erosion of unique cultural identities and the prevalence of a global monoculture. Cultural homogenisation refers to the process whereby dominant cultures, often associated with Western influences, permeate and displace local traditions, languages, and customs. This homogenisation can lead to a loss of cultural diversity and heritage, raising questions about the preservation of cultural rights and identities. This coexistence of diverse cultural practices can enrich societies, promoting mutual respect, tolerance, and the protection of cultural rights. Understanding the dynamics between cultural homogenisation and cultural diversity is crucial in developing strategies that safeguard cultural identities and promote cross-cultural dialogue. Governments, civil society, and international organisations play a vital role in supporting cultural exchange while preserving and revitalising indigenous cultures and local traditions.[22]"

The Role of Media and Technology

The increasing interconnectedness brought about by globalisation has been significantly influenced by advancements in media and technology. In the digital age, information and ideas travel across borders instantaneously, transcending geographical boundaries and shaping social interactions. The role of media, including social media platforms, television, and the internet, has become central in influencing cultural perceptions and shaping public opinions. Technology, including communication tools and artificial

[22] Balakrishnan, Radhika, and James Heintz. "Economic policy and human rights." *In Research Handbook on Economic, Social and Cultural Rights as Human Rights*, pp. 350-365. *Edward Elgar Publishing Ltd.,* 2020.

intelligence, further influences cultural interactions and social dynamics.[23] It can enhance access to cultural knowledge and facilitate cross-cultural collaboration. However, it can also raise concerns regarding data privacy, digital divides, and the potential reinforcement of cultural biases. To ensure that media and technology foster cultural diversity and human rights, policies and practices should promote media pluralism, digital inclusion, and equitable access to technology. As well, media outlets should embrace ethical reporting practices that respect cultural sensitivities and promote intercultural dialogue.[24]"

Indigenous Rights and Globalisation

Indigenous communities represent a significant aspect of cultural diversity in the contemporary world. With distinct languages, traditions, and ecological knowledge, these communities have rich cultural heritage and a close relationship with their lands and territories. However, they often face unique challenges when navigating the forces of globalisation. Globalisation can both threaten and empower indigenous communities. On one hand, it exposes them to external influences that may disrupt their traditional ways of life and threaten the integrity of their cultures.[25] Many indigenous groups have used social media and other digital tools to assert their identities, highlight their struggles, and engage in cross-cultural dialogues. Respecting indigenous people's right to free, prior, and informed consent for development projects that affect their lands and resources is essential to the effective protection of indigenous rights in the context of globalization. Governments must recognise their land tenure rights and support their cultural preservation efforts.[26]

Migrant Rights and Social Integration

Migration is a hallmark of the contemporary globalised world, with millions of people seeking better economic opportunities, safety, and refuge across borders. While migration can contribute to cultural exchange and diversity, it also poses challenges related to the protection of migrant rights and their integration into host societies. Migrants often face human rights violations, including exploitation, discrimination, and xenophobia. Irregular migration, in particular, can lead to vulnerable living conditions and exposure to human trafficking and

[23] Hannum, Hurst, S. James Anaya, Dinah L. Shelton, and Rosa Celorio. International human rights: problems of law, policy, and practice. *Aspen Publishing*, 2023.
[24] Hunkenschroer, Anna Lena, and Alexander Kriebitz. "Is AI recruiting (un) ethical? A human rights perspective on the use of AI for hiring." *AI and Ethics* 3, no. 1 (2023): 199-213.
[25] Walter, Maggie. "Indigenous sovereignty and the Australian state: Relations in a globalising era." In *Sovereign Subjects*, pp. 155-167. Routledge, 2020.
[26] Ghori, Umair, Mary Hiscock, Louise Parsons, and Casey Watters. "Human and Economic Perspectives of Globalisation: An Introduction." In Globalisation in Transition: Human and Economic Perspectives, pp. 1-4. *Singapore: Springer Nature Singapore*, 2023.

forced labour.[27] International frameworks, such as the Global Compact for Safe, Orderly, and Regular Migration, provide a basis for promoting the rights of migrants and establishing cooperative approaches to migration governance.[28] Understanding the complex interplay between cultural homogenisation and diversity, media and technology, indigenous rights, and migrant rights is essential for formulating policies and practices that protect cultural identities, promote intercultural dialogue, and ensure the realisation of human rights in a globalised world. By fostering a climate of respect, tolerance, and inclusivity, societies can embrace cultural diversity as a source of strength and enriching dialogue, creating a global community that celebrates the value of every individual and culture.[29]

VI

POLITICAL DIMENSION: STATE SOVEREIGNTY AND HUMAN RIGHTS OBLIGATIONS

Challenges to State Sovereignty

The political dimension of globalisation brings to the fore the intricate relationship between state sovereignty and human rights obligations. Traditionally, state sovereignty has been viewed as a foundational principle of international relations, emphasising the authority of a state over its territory and domestic affairs. However, globalisation has ushered in an era where state boundaries are increasingly porous, and international interactions exert influence on domestic policies and decision-making processes. One of the key challenges to state sovereignty lies in the realm of human rights.[30] As countries engage in global trade, join international organisations, and become parties to human rights treaties, their actions and policies are subject to scrutiny by the international community. This universal perspective challenges the idea that states have exclusive authority over human rights matters within their territories. Moreover, issues such as transnational terrorism, climate change, and migration have transcended national borders, necessitating collective global responses that may encroach upon state sovereignty.[31] The global interconnectedness demands cooperation among nations

[27] Nyström, Sofia, Andreas Fejes, and Nedžad Mešić. "Social Inclusion Beyond Education and Work: Migrants Meaning-Making Towards Social Inclusion." *Social Inclusion* 11, no. 4 (2023).
[28] Wang, Zi, Victoria Prieto Rosas, Clara Márquez Scotti, and Julieta Bengochea Soria. "The Social Inclusion of Migrants Between Policy and Practice: Lessons from Uruguay." *International Migration Review* (2023): 01979183231187626.
[29] Zhang, Yixin, Chang You, Prachi Pundir, and Louise Meijering. "Migrants' community participation and social integration in urban areas: A scoping review." (2023): 104447.
[30] Amartya Sen, Human Rights and Western Values, New Republic 33, July 14 and July 21, 1997. 7paul Gordon Lauren, The Evolution of International Human Rights: Visions Seen 4-12 (1998) (hereinafter "Lauren").
[31] Hassan, Ali. "Public Law and Human Rights: Balancing State Sovereignty and International Obligations." (2023).

to address shared challenges, often requiring compromises on certain aspects of state autonomy.

Human Rights in International Relations

The political dimension of globalisation has propelled human rights to the forefront of international relations. The recognition of human rights as an essential component of international law and diplomacy has fundamentally altered the dynamics of state interactions. Human rights have become a key consideration in foreign policy and diplomacy, shaping diplomatic dialogues, trade agreements, and international sanctions.[32] States that seek to be active players on the global stage are increasingly held accountable for their human rights records. The respect for human rights becomes not only a moral imperative but also a crucial aspect of a state's reputation and credibility in the international arena. Nations with poor human rights records may face diplomatic isolation, economic sanctions, or restrictions on international trade and aid. International human rights mechanisms, such as the Universal Periodic Review conducted by the United Nations Human Rights Council, provide platforms for evaluating states' human rights practices. Through these mechanisms, states are subjected to periodic reviews of their human rights performance, allowing for transparency and scrutiny of their human rights commitments.[33]

Supranational Institutions and Human Rights

The rise of supranational institutions in the context of globalisation has significant implications for human rights protection. Supranational institutions, such as the European Union (EU), African Union (AU), and International Criminal Court "(ICC), transcend national boundaries and have the authority to make decisions that impact member states. In the case of regional bodies like the EU, the pooling of sovereignty among member states has led to the establishment of common human rights standards and institutions that oversee their implementation. The European Court of Human Rights (ECHR), for example, plays a crucial role in interpreting and enforcing the European Convention on Human Rights, ensuring that member states adhere to human rights obligations. Similarly, the ICC operates as a supranational judicial body with the authority to prosecute individuals for crimes against humanity, war crimes, and genocide.[34] This supranational approach to justice bypasses national borders, holding perpetrators accountable for human rights violations that may have occurred

[32] Lawson, Stephanie. International relations. *John Wiley & Sons*, 2023.
[33] Andreassen, Bard A. "Introductory essay: the politics of international human rights law." *In Research Handbook on the Politics of Human Rights Law*, pp. 1-27. *Edward Elgar Publishing*, 2023.
[34] Ford, Michele, Michael Gillan, and Htwe Htwe Thein. "Calling multinational enterprises to account: CSOs, supranational institutions and business practices in the global south." *Global Networks* (2023).

in multiple countries. However, the effectiveness of supranational institutions in safeguarding human rights can be limited by the voluntary nature of participation and the potential for geopolitical interests to influence decision-making. Some states may be hesitant to submit to the authority of supranational bodies, fearing that it may compromise their sovereignty."

National Security and Human Rights Trade-offs

In the context of globalisation, national security concerns often intersect with human rights considerations, leading to potential trade-offs between the two. States may assert security justifications to implement measures that restrict civil liberties and human rights, such as surveillance programs, restrictions on freedom of expression, and detention of individuals without due process. While ensuring national security is a legitimate state interest, it must be balanced with the protection of human rights. The erosion of civil liberties and the use of excessive force in the name of security can lead to violations of fundamental human rights, compromising the very values that states seek to protect. The principle of proportionality, for instance, requires that security measures be necessary and proportionate to the threat they aim to address. The political dimension of globalisation presents a multifaceted landscape where state sovereignty, human rights obligations, and international relations intersect. The challenges to state sovereignty, particularly concerning human rights, necessitate a revaluation of traditional notions of sovereignty in a globalised world. Human rights considerations have become integral to international relations, shaping diplomatic engagements and influencing state actions.

VII

HUMAN RIGHTS AS DRIVERS OF GLOBALISATION AND INTERNATIONALISATION

Human Rights Norm Diffusion

Human rights norms play a significant role as drivers of globalisation and internationalisation. As universal principles that aim to safeguard the inherent dignity and freedoms of all individuals, human rights have increasingly permeated global consciousness and influenced state actions, corporate behaviour, and civil society advocacy. The diffusion of human rights norms occurs through a variety of mechanisms. International human rights treaties and conventions, such as the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR), establish a shared framework for human rights protection, setting the standards for states' obligations. Ratification and adherence to these treaties signal a state's commitment to upholding human rights, thus contributing to the global spread of human rights norms. These efforts foster a culture of respect

for human rights and facilitate knowledge sharing among countries. Nonetheless, norm diffusion faces challenges, particularly when human rights principles clash with cultural relativism or national interests. Some countries may resist adopting human rights norms, citing cultural or religious reasons, or concerns about sovereignty.[35]

Corporate Social Responsibility and Human Rights

The concept of corporate social responsibility (CSR) has emerged as a driving force in the context of globalisation and internationalisation, shaping the behaviour of multinational corporations (MNCs) concerning human rights. As MNCs operate across borders, they often interact with diverse societies and have significant impacts on local communities and environments. In this context, CSR serves as a mechanism to ensure that businesses conduct their operations in a manner that respects human rights and social and environmental standards. CSR initiatives can encompass a range of activities, such as adopting ethical supply chain practices, promoting labour rights, respecting indigenous rights, and engaging in community development projects. However, the effectiveness of CSR in promoting human rights can be contentious.[36] Critics argue that CSR may be used by corporations as a public relations tool to mask human rights abuses or environmental harm, without leading to meaningful change. To enhance the impact of CSR on human rights, there is a growing call for mandatory due diligence and accountability mechanisms that hold corporations liable for human rights violations in their supply chains and operations. A framework for corporate accountability in relation to human rights is provided by the UN Guiding Principles on Business and Human Rights (UNGPs)[37], which emphasize the obligation of businesses to respect human rights, the responsibility of states to protect human rights, and the requirement of effective remedies for victims of corporate abuse.

Civil Society Advocacy and Human Rights

Civil society plays a vital role in advancing human rights in the framework of globalisation and internationalisation. Non-governmental organisations (NGOs), human rights activists, and grassroots movements serve as advocates for human rights, challenging state actions and corporate behaviour that infringe upon human rights principles. "Civil society players involve in diverse advocacy exertions, ranging from monitoring and reportage on human rights violations to organising protests, campaigns, and awareness-raising initiatives. To safeguard

[35] de Wit, Hans, Jocelyne Gacel-Avila, Elspeth Jones, and Nico Jooste, eds. The globalization of internationalization: Emerging voices and perspectives. *Taylor & Francis*, 2017.
[36] Ramasastry, Anita. "Corporate social responsibility versus business and human rights: Bridging the gap between responsibility and accountability." *Journal of Human Rights* 14, no. 2 (2015): 237-259.
[37] Hanlon, Robert J. Corporate social responsibility and human rights in Asia. *Routledge*, 2014.

the role of civil society in promoting human rights, states must ensure an enabling environment for civil society organisations to operate freely, without fear of reprisals. International support for civil society capacity-building and protection mechanisms is essential to reinforce the voices of human rights advocates worldwide.[38] By upholding human rights as a shared value, we can forge a path towards a more just, inclusive, and sustainable global society, where human rights are protected, and the dignity of all individuals is respected."

VIII

CASE STUDIES

Globalisation and Labour Rights: The Garment Industry in Southeast Asia

The globalisation of the garment industry in Southeast Asia presents a compelling case study that sheds light on the complex intersection of globalisation and labour rights. The region has become a significant hub for the production of textiles and garments due to its low labour costs and favourable trade agreements. However, this growth in the garment sector has raised concerns about labour rights violations and exploitation of workers. As multinational corporations outsource their production to Southeast Asian countries, labour-intensive industries have thrived, leading to significant employment opportunities. This situation highlights the challenges of upholding labour rights in a globalised context where economic pressures can override human rights considerations. Efforts to address these issues have seen the emergence of initiatives promoting fair trade practices, ethical sourcing, and labour standards compliance. Brands and retailers are increasingly facing pressure from consumers, civil society, and international organisations to ensure that their supply chains uphold human rights principles. The implementation of international labour standards, such as those outlined by the International Labour Organisation (ILO), is critical in fostering decent work conditions and protecting labour rights in the garment industry.[39]

Internationalisation of Education and Access to Knowledge

The internationalisation of education is a prominent case study that underscores the potential benefits and challenges of globalising knowledge and learning. With advances in technology, students and scholars can access educational resources, research, and academic collaborations on a global scale. International student mobility has also increased, allowing students to pursue higher education in foreign countries, fostering cross-cultural exchange and mutual understanding. The internationalisation of education has the potential to democratise

[38] Thiel, Markus. European civil society and human rights advocacy. *University of Pennsylvania Press,* 2017.
[39] Zhou, Mujun. "Fissures between human rights advocates and NGO practitioners in China's civil society: a case study of the equal education campaign, 2009–2013." *The China Quarterly* 234 (2018): 486-505.

access to knowledge and bridge educational gaps between developed and developing countries. E-learning platforms, open educational resources (OER), and Massive Open Online Courses (MOOCs) have expanded educational opportunities for millions worldwide. To harness the potential of internationalised education for human rights, there is a need for inclusive policies that prioritise access, quality, and cultural sensitivity. Investment in educational infrastructure, teacher training, and language support can enhance educational opportunities for marginalised communities. Moreover, promoting intercultural dialogue and the exchange of diverse perspectives can enrich the learning experience and foster global citizenship.

Cultural Identity and Human Rights: The Impact of Globalisation on Indigenous Communities

Globalisation's impact on cultural identity and human rights is strikingly evident in the case of indigenous communities. As the forces of globalisation extend into remote regions, indigenous cultures face the risk of cultural erosion and marginalisation. Economic development projects, such as mining, logging, and infrastructure development, often encroach upon indigenous lands and territories, leading to land dispossession and environmental degradation. The pursuit of economic growth and natural resource extraction can undermine the rights of indigenous communities to self-determination, cultural preservation, and a healthy environment. The lack of prior and informed consent from indigenous communities in development projects violates their rights under international human rights standards. The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) serves as a foundational document in recognising the rights of native peoples and their right to maintain their cultural heritage. Effective protection of indigenous rights necessitates the recognition of their land tenure rights, active participation in decision-making processes, and the promotion of culturally sensitive development initiatives. Empowering indigenous communities to engage in cross-cultural dialogues and advocate for their rights on international platforms is essential to ensure their cultural survival and well-being.

The Role of International Organisations in Promoting Human Rights

International organisations play a central role in promoting and protecting human rights in a globalised world. "These organisations serve as crucial mechanisms for facilitating cooperation among states, addressing transnational challenges, and upholding universal human rights principles. The United Nations (UN) stands as "the preeminent international organisation with a mandate to protect and promote human rights worldwide. The UN Human Rights Council, along with other human rights bodies, monitors human rights situations in member states and conducts investigations into human rights violations. The Office of the High Commissioner for

Human Rights (OHCHR) serves as a focal point for human rights expertise and support to states in their human rights obligations. Regional organisations also contribute significantly to human rights protection. Bodies such as the European Court of Human Rights (ECHR) and the Inter-American Commission on Human Rights (IACHR) have adjudicatory powers to hold member states accountable for human rights violations. Regional human rights instruments, such as the European Convention on Human Rights (ECHR) and the American Convention on Human Rights (ACHR), complement global human rights standards and provide additional avenues for human rights redress. Non-governmental organisations (NGOs) also play a vital role in advocating for human rights at the international level. Enhancing the coordination among different organisations, improving human rights education, and empowering civil society engagement can fortify the global human rights architecture and advance the protection of human rights worldwide.""

IX

CHALLENGES AND CRITIQUES

Neoliberalism and Human Rights

Neoliberalism poses significant challenges to human rights in the context of globalisation. Neoliberal economic policies emphasise free-market principles, deregulation, and limited government intervention in the economy. While defenders contend that neoliberalism cultivates financial development and advancement, pundits contend that it can fuel pay imbalance and sabotage social government assistance. The pursuit of profit maximisation and cost-cutting in neoliberal economies can lead to labour rights violations, poor working conditions, and exploitation of workers, particularly in low-income countries. The weakening of labour unions and collective bargaining under neoliberal policies can further limit workers' ability to demand their rights and fair treatment.[40] Furthermore, austerity measures implemented in the name of fiscal responsibility can lead to reduced public spending on essential services, including education, healthcare, and social protection. These cutbacks disproportionately impact vulnerable populations, affecting their admittance to basic rights such as education, health, and housing. The pursuit of profit often takes precedence over environmental concerns, resulting in deforestation, pollution, and the depletion of natural resources.

[40] Quick III, David. "Contesting Human Rights Coherence: Neoliberalism as an Epoch of Brutality." (2023).

Cultural Imperialism and Human Rights

The phenomenon of cultural imperialism raises critical questions about cultural identity and human rights. As global media and cultural products dominate international markets, there is a risk of cultural homogenisation, where dominant cultural norms and values displace local traditions and identities. The prevalence of Western cultural products and media in the global market can lead to the marginalisation of indigenous cultures and languages. Indigenous communities often find themselves struggling to preserve their cultural heritage and practices in the face of powerful cultural influences that may not align with their values and worldviews. Cultural imperialism can also impact human rights by perpetuating stereotypes and biases, particularly in the portrayal of marginalised communities.[41] The misrepresentation and commodification of cultural practices can perpetuate discrimination and hinder the realisation of cultural rights. Promoting cultural diversity and preserving cultural identities require policy interventions that prioritise cultural rights and foster intercultural dialogue.

Media pluralism, support for indigenous language and cultural education, and the protection of intellectual property rights for traditional knowledge are essential in countering the negative impacts of cultural imperialism on human rights.

Environmental Concerns and Human Rights

Environmental challenges resulting from globalisation have profound implications for human rights. The acceleration of climate change, deforestation, loss of biodiversity, and pollution can directly impact the enjoyment of human rights, including the right to life, health, food, water, and a healthy environment. The consequences of environmental degradation are often disproportionately borne by marginalised communities, particularly those living in poverty and relying on natural resources for their livelihoods. Disasters induced by climate change, such as hurricanes, floods, and droughts, can lead to forced displacement and violations of the right to adequate housing and livelihood.[42] The reliance on fossil fuels and unsustainable consumption patterns in globalised economies contribute to greenhouse gas emissions, perpetuating environmental harm and exacerbating climate-related human rights challenges. Furthermore, climate justice principles must guide global efforts to address climate change, recognising historical responsibility and the differential impacts of climate change on

[41] Muyskens, Kathryn. "Avoiding cultural imperialism in the human right to health." *Asian Bioethics Review* 14, no. 1 (2022): 87-101.

[42] Hannum, Hurst, S. James Anaya, Dinah L. Shelton, and Rosa Celorio. International human rights: problems of law, policy, and practice. *Aspen Publishing*, 2023.

vulnerable communities. By adopting an integrated approach to human rights and environmental protection, states can foster environmental sustainability while respecting and fulfilling human rights.

Human Rights Conditionality and Policy Coherence

The use of human rights conditionality by powerful states and international organisations in foreign policy has generated critiques and challenges. Human rights conditionality refers to the practice of tying development aid, trade agreements, or diplomatic support to the recipient country's human rights record. While human rights conditionality can be a powerful tool to incentivise human rights improvements, critics argue that it can be selective and politicised. Powerful states may apply human rights conditionality selectively, focusing on countries that are geopolitically relevant while overlooking human rights violations in allies or trading partners. Moreover, human rights conditionality can lead to policy incoherence when other foreign policy objectives, such as economic interests or geopolitical concerns, take precedence. The challenges and critiques outlined in this section highlight the complexities of integrating human rights considerations into the context of globalisation and internationalisation. Neoliberal economic policies, cultural imperialism, environmental concerns, and human rights conditionality pose significant obstacles to the realisation of human rights for all individuals.[43] Overcoming these challenges requires coordinated efforts by states, corporations, civil society, and international organisations to promote policies and practices that prioritise human rights and ensure the protection of human dignity and freedoms in a globalised world.

X

HUMAN RIGHTS-BASED APPROACHES TO GLOBALISATION AND INTERNATIONALISATION

Strengthening Human Rights Protections

A human rights-based approach to globalisation and internationalisation places human rights principles at the centre of policy-making and decision-making processes. This approach seeks to ensure that all global interactions, trade agreements, and development initiatives prioritise the protection and promotion of human rights. States and international organisations must proactively assess the potential impacts of their policies on human rights and take measures to prevent and address any adverse effects. International human rights standards must

[43] Higham, Ian. "Conditionalities in international organization accession processes: spreading business and human rights norms in central and Eastern Europe?" *Business and Human Rights Journal* (2023): 1-23.

be incorporated into domestic laws and policies in order to strengthen human rights protections. To provide a solid legal framework for protecting human rights, states must ratify and implement human rights treaties like the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR).[44] Moreover, basic liberties influence appraisals ought to be directed for economic deals, venture tasks, and advancement drives to check their expected impacts on common freedoms, especially on weak populaces. These assessments can help identify and mitigate any negative human rights impacts and ensure that development projects contribute positively to the realisation of human rights.[45]””

Ensuring Accountability and Remedies

A crucial aspect of a human rights-based approach to globalisation is guaranteeing responsibility for common liberties infringement. Human rights violations must be held accountable for the actions and policies of states, corporations, and international organizations. Powerful responsibility components are fundamental to give equity, cure, and change for casualties of common liberties infringement. At the national level, states should establish independent human rights institutions and judicial systems that can impartially investigate and adjudicate human rights complaints. Access to justice and remedies for victims should be guaranteed, regardless of a person's social or economic status. Internationally, the International Criminal Court (ICC) plays a vital role in holding individuals accountable for crimes against humanity, war crimes, and genocide. States should support the ICC's jurisdiction and cooperate in bringing perpetrators to justice. Moreover, corporate accountability is essential in addressing human rights violations committed by multinational corporations. Implementing the UN Guiding Principles on Business and Human Rights (UNGPs)[46] can help ensure that businesses respect human rights throughout their supply chains and operations. Victims of corporate abuses should have access to effective remedies and avenues to seek redress.

Empowering Vulnerable Groups

A human rights-based approach to globalisation and internationalisation must prioritise the empowerment of vulnerable and marginalised groups. Globalisation can exacerbate

[44] Singh, Asmita, and Dr Rohit Shukla. "Globalization and Its Impact on Human Rights." available at *SSRN 4398247* (2023).

[45] Dwiono, Sugeng, Didiek R. Mawardi, Azzahra Rizki Ananda, and Lidia Olga. "Strengthening Human Rights Through Community Empowerment in Law Enforcement." *SATKRIYA: Jurnal Pengabdian Kepada Masyarakat* 1, no. 1 (2023): 17-21.

[46]UN Guiding Principles on Business and Human Rights available at https://www.undp.org/sites/g/files/zskgke326/files/migration/in/UNGP-Brochure.pdf(last visited on August 8, 2023).

existing inequalities, making it essential to implement targeted policies and interventions to address the specific needs of these populations. Women, children, indigenous communities, ethnic minorities, refugees, and migrants are among the groups often disproportionately affected by the adverse impacts of globalisation. Ensuring their access to education, healthcare, social protection, and economic opportunities is essential in promoting their human rights and dignity. To empower vulnerable groups, states must adopt measures that address the root causes of marginalisation and discrimination. These measures may include affirmative action, gender equality policies, land tenure reforms, and inclusive social welfare programs. Promoting human rights education and awareness is also critical in empowering vulnerable groups. By providing information about their rights and avenues for redress, individuals can become more assertive in demanding their rights and holding duty-bearers accountable.

Enhancing Participation and Inclusivity

A human rights-based approach to globalisation and internationalisation necessitates the meaningful participation of all stakeholders in decision-making processes. Comprehensive and participating processes allow individuals and groups to have a say in policies that impact their lives and ensure that their rights and interests are considered. Participation should encompass all levels of decision-making, from local to global. It should involve civil society organisations, trade unions, indigenous representatives, youth groups, and marginalised communities. States and international organisations should create platforms for meaningful engagement, where diverse voices can be heard and respected. Inclusivity also requires addressing power imbalances that can marginalise certain groups. Inclusive governance structures must be established to ensure that power is distributed equitably and that decision-making is transparent and accountable. Moreover, participatory approaches can enhance the effectiveness and sustainability of policies and development initiatives.

XI

FUTURE CHALLENGES AND OPPORTUNITIES

Technological Advancements and Human Rights

As we step further into the 21st century, technological advancements continue to redefine the global landscape, opening up unprecedented opportunities but also posing significant challenges for human rights. The rapid pace of innovation in areas such as artificial intelligence, biotechnology, and digital communication has the potential to revolutionise various aspects of human life. Balancing the benefits of technological progress with the protection of individual privacy rights is a delicate task for policymakers and technology companies. Furthermore, the rise of automation and artificial intelligence may impact the job

market and exacerbate income inequality.[47] The right to work and fair labour practices could face challenges as automated systems replace human workers in certain industries. Ensuring that technological advancements do not disproportionately harm vulnerable populations and that they contribute to overall human well-being requires proactive measures and policy interventions. However, technology can also empower human rights activists and marginalised communities. Social media and digital communication platforms have enabled unprecedented mobilisation and the dissemination of information, facilitating social movements and advocacy efforts.

Climate Change and Human Rights

Climate change is an existential threat that transcends national borders and affects every aspect of human life. Its far-reaching consequences pose profound challenges to human rights, particularly for vulnerable communities and future generations. The effects of climate change, such as extreme weather events, rising sea levels, and food and water scarcity, can exacerbate poverty, displace populations, and undermine basic human rights.[48] The right to life and health are directly impacted by the changing climate, as extreme weather events and natural disasters can lead to loss of life and increased vulnerability to diseases. Climate-induced displacement and migration also pose challenges for human rights, as individuals and communities are forced to leave their homes and face barriers to accessing adequate living conditions and social services in their new locations. While climate change presents significant challenges, it also presents an opportunity to promote a sustainable and just future. Transitioning to renewable energy sources, promoting sustainable agriculture, and investing in climate resilience can not only mitigate the effects of climate change but also advance human rights and social justice.[49] By prioritising the protection of human rights in climate policies, the international community can work towards a more sustainable and equitable world.

Social Movements and Human Rights Activism

In the contemporary world, social movements and human rights activism have emerged as powerful forces for change. Grassroots movements, online advocacy, and civil society initiatives have influenced political agendas, challenged oppressive regimes, and advanced

[47] Tillaboev, Shokhrukhbek "DIGITAL HUMAN RIGHTS. WHAT ARE THE MAIN HUMAN RIGHTS IN THE DIGITAL ENVIRONMENT?" *International Journal of Law and Criminology* 3, no. 08 (2023): 45-49.
[48] Scott, Matthew, Ha Nguyen, Michael Boyland, Claudia Ituarte-Lima, Natalia Biskupska, Pannawadee Somboon, and Lena Fransson. "FIRE: A framework for integrating human rights and gender equality in disaster risk reduction and climate change adaptation." *Climate and Development* 15, no. 7 (2023): 622-627.
[49] Dar, Shabir Ahmad, J. Muthukumar, and Irshad Ahmad Reshi. "KASHMIRI WOMEN AS THE AGENT OF CLIMAT CHANGE." *International Journal of Economic, Business, Accounting, Agriculture Management and Sharia Administration (IJEBAS)* 3, no. 1 (2023): 213-216.

human rights causes globally. The power of social movements lies in their ability to amplify the voices of marginalised communities and advocate for their rights and dignity. Through collective action and public mobilisation, these movements address a wide range of issues, including gender equality, racial justice, LGBTQ+ rights, and environmental protection. Online platforms and social media have played a pivotal role in shaping modern human rights activism. Digital communication tools enable rapid information dissemination, organising protests, and creating networks of solidarity across borders. Governments must create an enabling environment that allows civil society to operate without fear of reprisals. International solidarity and support for activists facing threats can also strengthen their resilience and impact. Human rights activism must continue to adapt to new challenges and engage with evolving technologies and communication platforms. Empowering local activists, supporting their capacity-building efforts, and integrating their perspectives into policy discussions are critical steps towards realising the full potential of social movements in advancing human rights and social justice worldwide.[50]

XII

RECOMMENDATIONS FOR POLICY AND PRACTICE

Based on the findings of this research article, we propose several recommendations for policymakers, international organisations, civil society, and other stakeholders to promote a human rights-based approach to globalisation and internationalisation:

Policy Coherence: Policymakers should strive for coherence between their domestic policies and international commitments on human rights. This includes integrating human rights considerations into trade agreements, investment policies, and development initiatives.

Corporate Accountability: Corporations must embrace responsible business practices that respect human rights throughout their supply chains and operations. Governments should enact and enforce regulations that hold companies accountable for any violations of human rights.

Inclusive Governance: International organisations and supranational institutions should adopt inclusive decision-making processes that engage with civil society, marginalised communities, and affected populations in policy development and implementation.

[50] Knox, Rupert. "Mobilising and constraining: the dynamics of human rights discourse in two Mexican social movements." *The International Journal of Human Rights* 27, no. 4 (2023): 613-634.

Protecting Cultural Diversity: Efforts to preserve and promote cultural diversity should be supported through measures that protect the rights of indigenous communities, respect traditional knowledge, and encourage intercultural dialogue.

Climate Justice: Climate policies should prioritise the rights of vulnerable communities and ensure their meaningful participation in decision-making processes. International cooperation and support for climate resilience in developing countries are essential in addressing the human rights implications of climate change.

Digital Rights: Protecting the right to privacy, freedom of expression, and access to information in the digital age is critical. Policymakers should develop robust data protection laws and safeguards to prevent abuses of personal data and ensure online freedoms.

Empowering Social Movements: Governments should create an enabling environment for human rights defenders and activists to operate freely without fear of persecution. Supporting capacity-building efforts and providing international solidarity can strengthen the impact of social movements in advancing human rights.

Education and Awareness: Promoting human rights education and awareness at all levels of society can foster a culture of respect for human rights and empower individuals to advocate for their rights.

XIII

CONCLUSION

Globalisation and Internationalisation are defining features of the contemporary world, shaping economies, cultures, and political dynamics. By adopting a human rights perspective, we can navigate the challenges and opportunities posed by these processes and make progress toward a more even-handed and simply worldwide request that maintains the poise and freedoms, everything being equal, no matter what their experience or area. The findings indicate that while these processes have the potential to create opportunities for economic growth, cultural exchange, and cooperation, they also present significant challenges for the realisation of human rights worldwide. On the economic front, globalisation and internationalisation have led to increased international trade and foreign direct investment, which can contribute to economic development and poverty reduction. However, the unequal distribution of benefits and the exploitation of labour in certain industries raise concerns about income inequality and the violation of labour rights. Ensuring fair trade practices, promoting corporate social responsibility, and strengthening labour protections are crucial steps in advancing economic human rights. In the realm of culture and identity, globalisation has facilitated cultural exchange and access to information, but it has also triggered fears of cultural

homogenisation and the erosion of local traditions. In the political arena, globalisation and internationalisation have challenged traditional notions of state sovereignty and highlighted the need for states to fulfil their human rights obligations beyond their borders. While international organisations and supranational institutions play a vital role in promoting human rights norms, they must be accountable, transparent, and inclusive to ensure effective fortification of human rights. Furthermore, we have seen how human rights principles can act as drivers of globalisation and internationalisation, influencing corporate behaviour, state policies, and civil society initiatives. Upholding human rights standards, including the principles of dignity, equality, and non-discrimination, is fundamental to shaping these processes in a way that respects and encourages human rights and the importance of taking a human rights approach in addressing the multifaceted challenges posed by globalisation."

THE UNDERMINING OF THE WTO APPELLATE BODY BY THE UNITED STATES AND HOW WTO MEMBERS SHOULD DEFEND

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Utkarsh Srivastva**

Abstract

The primary function of the World Trade Organization is to promote and facilitate trade regulation at global scale. It is the only global international organization to foster a trading environment in a smooth way across the globe. However, The United States has been one of the principal critiques of the adjudicatory system of the Dispute Settlement Body, and, has particularly attacked the Appellate Body. The United States in its Trade Policy Agenda of 2018 and in a Report on the Appellate Body of the World Trade Organization has outlined its concerns regarding the Appellate Body which includes procedural issues, such as the breach of the ninety-day time limit to render decisions, continuance of Appellate Body members in the office after expiry of their terms, which though factually correct, are inconsequential, and systemic concerns such as judicial overreach, precedential value of Appellate Body Reports, claims of fact-finding by the Appellate Body, rendering of advisory opinions and obiter dicta. While most of the reasons given by the United States to justify its actions have little merit, there are certain instances where the Appellate Body may have gone overboard, at least in the opinion of some. It must be remembered here that like every other human institution, the Appellate Body too, is fallible, and is susceptible to making mistakes. In any legalized system such dissensions are bound to happen and in such a scenario, it is up to the WTO membership to make the course correction.

Keywords:
Appellate Body, World Trade Organization, Dispute Settlement, Trade Dispute Resolution, Multilateralism.

The dispute settlement mechanism of the World Trade Organization (hereinafter referred to as the "WTO") is one of the most unique and robust international dispute settlement systems. Negotiated in the wee hours of the Uruguay Round, the dispute settlement mechanism laid down in the Dispute Settlement Understanding[1] (hereinafter referred to as the "DSU") has

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proven to be the focal point of the rules-based multilateral trading system. The system is unique because of its appellate review mechanism,[2] and robust because of the large number of complex disputes it has resolved in its relatively short operational existence. The DSU envisages a two-tier process when it comes to adjudication of a dispute. After initial consultations between the parties to a dispute fails, a panel decides the claims of the parties. If any of the parties remains unsatisfied with the Panel's legal findings and interpretation, they can further appeal to the Appellate Body. A WTO panel usually comprises of three *ad hoc* members. Unlike the panels, the Appellate Body is a permanent body of seven members. As one delves into the negotiating history of the DSU, it can be argued that most members took the appellate mechanism as a bargain in exchange for negative consensus and automatic adoption of reports[3]. Further, the introduction of an appellate mechanism also ensured a check against erroneous panel reports. However, certain members have alleged that this mechanism has not operated as per its mandate.

The United States has been one of the principal critiques of the adjudicatory system of the Dispute Settlement Body (hereinafter referred to as the "DSB"), and, has particularly attacked the Appellate Body. Though the dispute settlement mechanism has been at the forefront of the United States' criticism, it has taken the worst beating by the United States in the past decade. The first instance came in the form of the non-reappointment of Jennifer Hillman in 2011, one of the Appellate Body members from the United States, for not proactively defending United States' interests.[4] Subsequently, in 2016, the United States blocked the appointment of Chang Seung Wang, an Appellate Body member from South Korea, on grounds of judicial overreach.[5] The worst blow came in during the regime of President Trump when the United States blocked further appointments to the Appellate Body. Consequently, the membership of the Appellate Body fell from three, the required coram to sit in an appellate review and on 11 December 2019, the Appellate Body became defunct. The

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[1] Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994).

[2] There are several dispute settlement bodies which have an appeals mechanism, but none of them have been as successful as the Dispute Settlement System under the WTO. For more details see Sivan Shlomo-Agon and Yuval Shany "The WTO Dispute Settlement System" in Yuval Shany (ed.), *Assessing the Effectiveness of International Courts* 189 – 222 (Oxford University Press, 2014).

[3] Bernard M. Hoekman and Petros C. Mavroidis, "Burning Down the House? The Appellate Body in the Centre of the WTO Crisis", *Robert Schuman Centre for Advanced Studies Global Governance Programme-353 Working Paper*, Paper no. RSCAS 2019/56 10 (2019) available at https://ssrn.com/abstract=3424856.

[4] From the Board, "The US Attack on the WTO Appellate Body", 45 *Legal Issues Econ. Integration* 8-9 (2018).

[5] *Id.* at 2-3.

United States in its Trade Policy Agenda of 2018 and in a Report on the Appellate Body of the World Trade Organization has outlined its concerns regarding the Appellate Body which includes procedural issues, such as the breach of the ninety-day time limit to render decisions, continuance of Appellate Body members in the office after expiry of their terms, which though factually correct, are inconsequential, and systemic concerns such as judicial overreach, precedential value of Appellate Body Reports, claims of fact-finding by the Appellate Body, rendering of advisory opinions and *obiter dicta*.

The authors have undertaken a doctrinal, descriptive, and non-empirical approach. They have primarily relied on the provisions of the DSU and referred to other WTO agreements wherever necessary. To analyse the shortcomings pointed out by the US, the authors have relied on USTR's Report on the Appellate Body. The authors have further referred to scholarly articles to analyse the issues in detail. The paper only deals with the procedural issues pointed out by the United States and does not cover the substantive concerns raised by the United States such, although a few issues such as that of zeroing has been incidentally covered. The paper has been divided into four sections. The first section deals with the United States' criticism of the Appellate Body. The second section discusses the issues arising out of a defunct appellate body. The third section outlines proposals for the reform of the WTO dispute settlement system. The last section presents the conclusions.

I

The United States' Assault: Procedural Concerns Raised By The United States

Prior to discussing the United States' allegations against the Appellate Body, it is necessary to understand the contribution of the Appellate Body to the multilateral system and international law in general. During the GATT era, the reports of the GATT working parties and subsequently panels often differed from others even on fundamental principles, such as the interpretation of like products in case of national treatment under Art. III:2 of GATT.[6] This uncertainty in jurisprudence often confounded the contracting parties as they were unsure of a measure's consistency with GATT obligations.[7] The introduction of Appellate Body has brought greater consistency at least in this respect and has thereby enhanced the predictability of the system.

[6] Michael J. Trebilcock and Robert Howse, *The Regulation of International Trade* 123-168 (Routledge Taylor & Francis Group, 3rd ed.); J.G. Merills, *International Dispute Settlement* 211 – 236 (Cambridge University Press, 4th ed.).

[7] James Bacchus and Simon Lester, "The Rule of Precedent and the Role of the Appellate Body", 54 *J.W.T.* 186 (2020).

The panels and Appellate Body often operate in a legislative void, where the text of the agreement they are entrusted to interpret is often ambiguous and incomplete, and the negotiating history is of little to no help. Such ambiguities and incompleteness are often put into the agreement deliberately so that all members can agree upon the text of the treaty[8]. Furthermore, the WTO membership, except the United States is largely satisfied with the contribution of the Appellate Body to the system.[9]

There are some systemic concerns pointed out by other member nations as well. For example, countries like China and India have long been advocating for incorporation of more definitive obligations in 'special and differential treatment' provisions under the WTO framework whereas countries like European Union have been raising concerns regarding transnational subsidies. However, none of them considered any recourse which would have dismantled the Appellate Body. The following paragraphs will now examine the United States concerns regarding the functioning of the Appellate Body:

a. Non – observance of principle of prompt settlement of disputes: Breach of ninety-day time limit to render Appellate reports as mandated under Art. 17.5 of the DSU:

Art. 17.5 of the DSU mandates that an appeal should be completed within a period of sixty days from the date on which the party issues the notice of appeal and in no case, the appeal should be decided beyond the period of ninety days. In its Report[10], the United States alleges that the Appellate Body has violated the ninety-day limit routinely and thereby it has "diminished the rights of the members and undermines the confidence in the WTO as a whole". The WTO Dispute Settlement is unique in terms of laying down stringent timelines for adjudication of disputes. Such strict timelines are not found in any other international adjudicatory system. Although in principle the United States criticism stands true, considering the complexity of disputes, complexity of laws involved, lengthy submissions made by the parties, high rate of appeal, and number of issues appealed, the ninety days deadline is unrealistic.[11] Moreover, up until 2016, the Appellate Body has mostly adhered to the deadline[12].

[8] Markus Wagner, "The Impending Demise of the WTO Appellate Body: From Centrepiece to Historical Relic" in Chang-fa Lo, Junji Nakagawa (eds.), *The Appellate Body of the WTO and its Reform* 77 (Springer, 2019); Also see Michael Byers, "Still Agreeing to Disagree: International Security and Constructive Ambiguity*",* 8 *Journal on the Use of Force and International Law* 91 – 114 (2021).
[9] *supra* note 8 at 187.
[10] United States Trade Representative, Report on the Appellate Body, 29-32 (February 2020).
[11] James Bacchus and Simon Lester, "Trade Justice Delayed is Trade Justice Denied: How to Make WTO Dispute Settlement Faster and More Effective", 75 *Free Trade Bulletin* 6 (2019) *available at*: https://www.cato.org/free-trade-bulletin/trade-justice-delayed-trade-justice-denied-how-make-wto-dispute-settlement (last visited: May 9, 2023).
[12] *supra* note 4, at 13.

The mean time taken by the Appellate Body to declare its reports was 3.3 months[13]. However, between 2016 and 2020, the average time to declare its reports increased to 4.3 months.[14] It must be pointed out here that during this period the Appellate Body was working at a diminished capacity due to the blockage created by the United States on the re-appointment of existing Appellate Body members as well as the appointment of new members to the Appellate Body[15].

b. Violation of Art. 17.2 of DSU: Continuance of Appellate Body members in office after expiry of their terms

Rule 15 of the Working Procedures for Appellate Review allows an Appellate Body member whose term has expired to continue in the office to complete adjudication of the pending appeal which was being heard by such Appellate Body member. The continuation of an Appellate Body Member is approved by the Appellate Body, and subsequently, the DSB is notified of it. The United States has objected that such outgoing Appellate Body members can continue to serve in the Appellate Body only with the approval of the DSB. Thus, Rule 15 interferes with the rights of the member nations to appoint or reappoint members[16]. While technically this criticism is true, the policy regarding continuation of Appellate Body members in office even after expiry of their terms has been adopted out of expediency. Art. 17.9 of the DSU empowers the Appellate Body to adopt its own working procedure in consultation with the Chairman of the DSB and the Director – General of the WTO. The Appellate Body has in consonance with the same adopted its own procedure. The practice analogous to Rule 15 of the Working Procedures is found in almost all municipal and international jurisdictions.

The United States while pointing out this procedural issue is ignoring the expediency and benefits of the Rule. If an Appellate Body member's tenure, who is hearing an appeal, expires mid-way during the appeal, and new members are appointed (considering there is no delay in the appointment of the new members) to hear the appeal, it would take the new members considerable time to acquaint themselves with the facts and legal issues raised in the

[13] Johannesson and Petros Mavroidis, "The WTO Dispute Settlement System 1995-2016: A Data Set and Its Descriptive Statistics", *Global Governance Programme Working Paper, Paper No. RSCAS 2016/72* 9 (2016) *available at:* https://core.ac.uk/download/pdf/230181009.pdf. (last visited: May 9, 2023).

[14] Bernard Hoekman, and Petros Mavroidis, "Informing WTO Reform: Dispute Settlement Performance, 1995-2020" *EUI RSCAS, Global Governance Programme-411 Working Paper, Paper No. 2020/59* 16 (2020) *available at:* https://cadmus.eui.eu/handle/1814/68356 (last visited: May 9, 2023).

[15] One of the Appellate Body members from South Korea Hyun Ching Kim resigned in August 2017, without giving the ninety days' notice as is mandated under the AB Working Procedures to take his position as Trade Minister of Korea. Even though his resignation did not have any adverse effect on deciding disputes, such conduct must be strictly condemned.

[16] United States Trade Representative, Report on the Appellate Body, 32 - 36 (February 2020).

appeal. Further, to ensure procedural fairness, all hearings and submissions would have to be carried out afresh given the cardinal rule of natural justice that a person who hears a dispute must decide the dispute. This would further lead to delay in deciding the appeals and possibly the breach of the ninety–day time limit, an issue regarding which the United States is very concerned.

c. Judicial Overreach and Activism

The United States has alleged that the Appellate Body has by way of its interpretations created new, and undermined existing rights and obligations for the membership by way of law-making and gap-filling[17], which is a violation of Arts. 19.2[18] and 3.2[19] of DSU. Art. 3.2, DSU also mentions that the function of the dispute settlement system is to "to *clarify* the existing provisions of those agreements in accordance with customary rules of interpretation of public international law"[20]. Thus, the Appellate Body and the Panels have been entrusted with the task of clarifying the rights and obligations of the members under the covered agreements.

However, the task of *interpretation* and *clarification* can sometimes overlap with the functions of *law-making* and *gap-filling*. In this regard Prof. Bahri has explained, "*it is quite difficult to draw a precise line of distinction between these four tasks in practice. Interpretation of a legal issue often amounts to its clarification. The act of clarifying an ambiguity in a legal provision may sometimes lead to gap-filling, and filling a gap or a grey area can be seen by critics as the act of law-making*." [21] Therefore, it is quite difficult to lay down a clear line of demarcation between the judicial function of interpretation and the legislative function of law–making. Further, given the pervasive constructive ambiguity in WTO Agreements such delimitation also becomes impossible, unless the member nations actively adopt authoritative interpretation under IX:2 of WTO Agreement. In fact, it is the failure of member nations which has pushed the panels as well as the Appellate Body to resolve such ambiguous issues through

[17] United States Trade Representative, Report on the Appellate Body, 47 - 52 (February 2020).
[18] "In accordance with paragraph 2 of Article 3, in their findings and recommendations, the panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements."
[19] "The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements." Also see Marc Benitah, "The Myth of an Appellate Body that never "Restricts The Rights Or Expands The Obligations of WTO Members" International Economic Law and Policy Blog, May 25 2016 *available at:* https://ielp.worldtradelaw.net/2016/05/the-myth-of-an-appellate-body-never-restricting-the-rights-or-expanding-the-obligations-of-wto-membe.html (last visited: May 9, 2023).
[20] *Ibid.*
[21] Amrita Bahri, "Appellate Body Held Hostage': Is Judicial Activism at Fair Trial?", 53 *J.W.T.* 308 -309 (2021).

interpretation, given the fact that the DSU does not permit leaving certain issues as *non – liquet.*[22]

In the absence of such authoritative interpretations, there may be multiple interpretations of a single provision. For example, the United States considers that Art. 2.4.2 of the WTO Agreement on Anti–dumping permits the use of zeroing methodology in the determination of dumping margins. This position was also supported by the European Union before its use was challenged by India in the *EC – Bed Linens*[23] dispute in which the European Union lost the dispute on the issue of zeroing. Subsequently, European Union has consistently taken the position that zeroing is impermissible under the Agreement on Anti – dumping. Several other member nations have held the same opinion concerning the usage of the zeroing methodology.

In case of such ambiguities, Condon has argued that tribunals should adopt an interpretation which is least onerous on the parties to the dispute and that the Appellate Body has failed to do so.[24] He has further equated this with the adoption of a deferential approach towards the assessment of measures undertaken by member nations to avoid judicial activism. However, it must be noted here that an increasingly deferential approach would likely lead to the adoption of a more trade–restrictive measure. Further, in situations where a panel or the Appellate Body faces a mixed question of fact and law, a deferential approach to the assessment of facts would colour the legal analysis. [25] Thus, in such situations, it would be more appropriate to adopt an interpretation which is serving the underlying purpose of the WTO and does not impinge on the rights of the members to pursue legitimate policy objectives[26]. The Appellate Body has undertaken the same approach and therefore, it is debatable whether such interpretations should be treated as judicial overreach. Moreover, what one member nation perceives as judicial overreach, others may view it as a permissible interpretation. In *US – Differential Pricing Methodology*, the WTO panel offered a new interpretation regarding the usage of zeroing methodology in anti–dumping investigations, which caters to United States' position. However, the other parties to the dispute might view the same as erroneous and judicial overreach in view of the earlier WTO jurisprudence on zeroing.[27] In fact, the views of

[22] Art.17.12 of DSU.
[23] Appellate Body Report, European Communities — Anti-Dumping Duties on Imports of Cotton-type Bed Linen from India WT/DS141/AB/R (adopted 12 March 2001).
[24] Bradly J. Condon, "Captain America and the Tarnishing of the Crown: The Feud Between the WTO Appellate Body and the USA", 52 *J.W.T.* 552 (2018).
[25] Asif H. Qureshi, *Interpreting WTO Agreement* 224, (Cambridge University Press, 2006).
[26] Weihuan Zhou and Henry Gao, "'Overreaching' or 'Overreacting'? Reflections on the Judicial Function and Approaches of WTO Appellate Body", 53 *J.W.T.* 962, (2019).
[27] *Id.* at 973.

a member nation regarding allegations of judicial overreach may also vary depending upon whether such member nation is a complainant or defendant. [28]

d. Precedential Value of Appellate Body Reports

The United States has argued that the Appellate Body has manufactured its precedent authority[29]. This aspect of the United States' criticism is primarily based on the Appellate Body's observations in *US – Stainless Steel (Mexico)* [30], wherein it had expressed its aversion towards the panel's departure on the issue of zeroing and stated that panels should adhere to its interpretations when deciding similar legal issues unless there are cogent reasons not to do so. The United States argues that there is no authority for the Appellate Body to treat its reports as precedent for future panels and that only members can adopt authoritative interpretations in pursuance of Art. IX:2 of the WTO Agreement.

It is quite clear that the recommendations of the Appellate Body or panels are only binding upon the parties to the dispute and therefore, there is no precedential value of such reports. However, it is necessary to understand the Appellate Body's observation in light of Art. 3.2 of the DSU which states:

> "The dispute settlement system of the WTO is a central element in providing *security* and *predictability* to the multilateral trading system".

The usage of the phrase "security and predictability" points out the certainty and the foreseeability that countries need when they are engaging in trade. The natural question that arises here is with respect to the means through which such "security and predictability" can be guaranteed. Through consistent reasoning of similar legal obligations over time. If the reasoning is to change every time an obligation or right is interpreted then there would be no security or predictability left in the system. In *Japan – Alcohol*, the AB had explained that adopted GATT panel reports 'are an important part of the GATT acquis' and that they "create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute."[31] However, it also made clear that such reports do not have any binding value, except for the dispute at hand. It must also be noted that several nations rely on the jurisprudence developed by the Appellate Body even within their own domestic legal systems. For instance, the Indian trade remedial authority, the Directorate General of

[28] *Id.* at 963.
[29] United States Trade Representative, Report on the Appellate Body, 55 - 60 (February 2020).
[30] Appellate Body Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico* WT/DS344/AB/R 162 (adopted 20 May 2008), p.160-161.
[31] Appellate Body Report, *Japan – Taxes on Alcoholic Beverages* WT/DS8/AB/R 14 (adopted 1 Nov. 1996).

Trade Remedies, often quotes Appellate Body's legal analysis and conclusion in its final findings.[32]

Further, to understand the Appellate Body's observation in *US – Stainless Steel (Mexico)* Report, it is first necessary to understand the issues at hand in that case. Mexico challenged the panel's analysis with respect to the usage of zeroing methodology by the United States. The Appellate Body had in two earlier instances held the practice of zeroing as inconsistent with Art. 2.4.2 of the Agreement of Anti–dumping. However, the panel in the instant case upheld the United States' measure on this issue. Mexico subsequently challenged not only the Panel's analysis but also the panel's refusal to adhere to jurisprudence enunciated by the Appellate Body on the issue of zeroing in the previous cases. After holding the panel's assessment of the zeroing issue as incorrect, the Appellate Body examined Mexico's second claim.[33] If the panels deviate from the Appellate Body's reasoning without any "cogent reasons", it would diminish the goal of consistency in interpretation of the rights and obligations of the member nations.[34]

The term 'cogent reasons' does not appear anywhere in the DSU. The Appellate Body has further clarified this term in *US – Countervailing Measures (China)*, wherein it laid down the following conditions in which the panels could ignore its earlier interpretations: (a) where a new multilateral interpretation has come into existence, (b) the earlier interpretation is not feasible, (c) such interpretation is in conflict with another agreement, or (d) where such interpretation is grounded in a factually incorrect assumption.[35] It seems that the use of the phrase 'cogent reasons' has led the United States to believe that Appellate Body is claiming precedential authority, which as per the United States' understanding has only persuasive authority. However, the phrase is only a restatement, a use of interpretative language and is nothing different from the persuasive authority that the United States claims to be possessed by Appellate Body's Reports. There may be some minor implications as to the burden of proof, but overall, the Appellate Body's approach is similar to the 'persuasive standard' proposed by the United States. [36]

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[32] *Final Findings in Anti – dumping Investigation concerning imports of "Electrogalvanized Steel" from Korea RP, Japan and Singapore* , Case No. AD (OI) – 07/2021 para 73; *Final Findings in Sunset Review Investigation concerning imports of "Jute Products" originating in or exported from Bangladesh and Nepal*, Case No. (SSR) 9/2021 para 166.
[33] *US – Stainless Steel (Mexico), supra* note 31 at para 161.
[34] *Id.*
[35] Appellate Body Report, *United States – Countervailing Duty Measures on Certain Products from China*, WT/DS437/AB/R (adopted 16 Jan. 2015) para 7.317.
[36] *supra* note 12 at 193-194.

Further, almost all international courts and tribunals rely on previously decided disputes. In fact, litigants as well as judicial bodies at dispute quote previous decisions and findings in their submissions as well as judgements. For instance, Art. 59 of the Statute of ICJ clearly lays down Even the United States in its submissions before the panel as well as the Appellate Body quotes previous reports. Thus, a *de facto* precedential authority does exist in all judicial systems and it would do well if WTO members acknowledge the same. In the absence of the same, the whole nature of the appellate exercise must be rethought. In this regard, Mariana Andrade has argued that the development of a *de facto* precedential value standard is a natural outcome of the way the WTO was structured and has evolved since its inception as an organization.[37] She argues that settlement of a large number of disputes by way of adjudication led to the creation of a robust body of jurisprudence which ensured consistency and certainty in the system.[38] This was supplanted by the creation of the Secretariat which systemically relied on the past reports for resolution of forthcoming disputes. Lastly, the introduction of the Appellate Body with the power to reverse *ad hoc* panel decisions in the dispute resolution system created a hierarchy, which to some extent conveyed the message that Appellate Body reports have a different status than panel reports[39].

e. Claims of fact-finding by the Appellate Body

The United States has alleged that the Appellate Body, at times, indulges in fact-finding which is a clear prerogative of panels under Art. 11 of the DSU and is against the mandate laid down in Art. 17.6 of the DSU, which limits the scope of appeals to issues of law and legal interpretations forwarded by panels.[40]

Under Art. 11 of the DSU, panels have been entrusted with the task of "objective assessment of the facts" of a dispute. When a panel report is under appeal, the Appellate Body conducts its own analysis of the legal interpretations developed by the panel and does not grant any deference to the assessment carried out by the Panel. On issues of fact, however, the Appellate Body does not Body does "not interfere lightly"[41] with the Panel's analysis. However, in some circumstances, a panel's analysis of facts may amount to a legal error. It is in these circumstances that the Appellate Body enters the realm of what the United States terms as a 'fact-finding hunt'.

[37] Mariana Clara de Andrade, "Precent in the WTO: Restrospective Relection for a Prospective Dispute Settlement Mechanism", 11 *Journal of International Dispute Settlement* 274-275 (June 2020).
[38] *Id.*
[39] *Id.*
[40] United States Trade Representative, Report on the Appellate Body, 37 - 46 (February 2020).
[41] Appellate Body Report, *United States — Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/AB/R 174 (adopted 31 August 2004).

Firstly, it must be understood that such an exercise depends on the factual material made available to the Appellate Body through the panel report. The Appellate Body was confronted with such a task in *Australia – Salmon*[42], wherein it found that the panel had incorrectly identified the measure and reversed the findings of the panel. In such a situation, the Appellate Body has two recourses: the first option was to do nothing. It could leave the dispute unresolved and be re-litigated despite having evidence on record to complete the factual analysis and legal assessment of the measure. The second option was to complete the factual analysis and answer the legal issues and make recommendations to the DSB for a positive resolution of the dispute. The Appellate Body chose the second option. It, however, constrained itself by observing it would answer the question "to the extent possible on the basis of the factual findings of the panel and/or of undisputed facts in the panel record".[43] It completed the panel's analysis and found the measure to be in violation of the SPS Agreement[44]. A similar issue came up in *Korea – Radionuclides*[45] wherein the panel had failed to sufficiently assess the relationship between Korea's SPS measure and the required appropriate level of protection[46] not only legally but also factually. Accordingly, the Appellate Body could not make any determination with respect to the issue.

More generally, it must be noted that the Appellate Body has completed factual analysis only in disputes where it has found sufficient basis to do so in the form of adequate undisputed factual findings made by the panel in its report. This ensures that the Appellate Body does not meddle with the panel's prerogative of being the assessor of facts. Indecisiveness by the Appellate Body in situations where there is sufficient basis to do so would lead to a greater issue as the complainant and the respondent would be left in a lurch as to the consistency of the measure with the WTO obligations. Other interested parties which might have similar measures in place or are affected by a similar would also be left in a state of indeterminacy.[47] In this regard, Brewster and Fischer write that *Korea – Radionuclides* aptly showcases how the limitations on Appellate Body's power to complete factual analysis lead to de facto win for

[42] Appellate Body Report, *Australia — Measures Affecting Importation of Salmon*, WT/DS18/AB/R 118 (adopted 6 November 1998).
[43] *Id.* para 118.
[44] Agreement on the Application of Sanitary and Phytosanitary Measures, 15th April 1994 (1867 UNTS 493, WTO Doc LT/UR/A-1A/12). The Agreement on the Application of Sanitary and Phytosanitary Measures allows a WTO member to restrict trade of goods if such goods endanger plant, human or animal health or life.
[45] Appellate Body Report, *Korea — Import Bans, and Testing and Certification Requirements for Radionuclides* WT/DS495/AB/R (adopted 26 April 2019).
[46] Art. 5.5. of Agreement on the Application of Sanitary and Phytosanitary Measures.
[47] Tania Voon and Alan Yanovich, "The Facts Aside: The Limitation of WTO Appeals to Issues of Law" 40 *J.W.T.* 242-244 (2006).

responding members as claims are not fully resolved. [48] This would undermine the broader goal set out in Art. 3.2 of the DSU of "providing security and predictability to the multilateral trading system". Moreover, in numerous disputes, the parties (including the United States) have argued that the panel has failed in its legal duty of objectively assessing the facts under Art. 11 of the DSU or has argued the inconsistency of the findings of the panel with Art. 12.7 of the DSU. In such situations, issues of fact, typically acquire a legal characterization.

Further, the Appellate Body has set the threshold for completing the analysis very high, as explained by it in *US - Wheat Gluten*: "*In assessing the Panel's appreciation of the evidence, we cannot base a finding of inconsistency under Art.11 simply on the conclusion that we might have reached a different factual finding from the one the panel reached. Rather, we must be satisfied that the Panel has exceeded the bounds of its discretion, as the trier of the facts, in its appreciation of the evidence.*"[49] Furthermore, "*It would occur only in cases where the Panel has 'deliberately disregarded, refused to consider, distorted or misrepresented evidence*".[50]
A proper way to settle such situations would be to remand the dispute back to the panel, as is found in almost all national jurisdictions. However, the DSU does not provide any such authority of remand to the Appellate Body. The issue of 'remand back' has been discussed in detail below.

f. Advisory Opinions or Obiter Dicta

The United States has also alleged that the Appellate Body often renders advisory opinions or *obiter dicta* on issues which are not necessary to decide the appeal. The United States cited the same as one of the reasons for not giving Prof. Wang a second term at the Appellate Body[51]. As per it, Prof. Wang addressed issues which were inconsequential to the resolution of the disputes in three reports[52] which in its view "added to or diminished the rights and obligations provided in the covered agreements"[53]. According to it, around two-thirds of

[48] Rachel Brewster and Carolyn Fischer, "Fishy SPS Measures ? The WTO's *Korea – Radionuclides* Dispute" 20 WTR 530 (2021).
[49] Appellate Body Report, *United States — Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities* WT/DS166/AB/R 151 (adopted 19 January 2001).
[50] Appellate Body Report, *European Communities — Measures Concerning Meat and Meat Products (Hormones)* WT/DS26/AB/R 133 (13 February 1998).
[51] Steve Charnovitz , The Obama Administration's Attack on Appellate Body Independence Shows the Need for Reforms, International Economic Law and Policy Blog September 22, 2016 available at: https://worldtradelaw.typepad.com/ielpblog/2016/09/the-obama-administrations-attack-on-appellate-body-independence-shows-the-need-for-reforms-.html (last visited: May 9, 2023).
[52] *Argentina — Measures Relating to Trade in Goods and Services* WT/DS453/AB/R (adopted 9 May 2016); *India — Measures Concerning the Importation of Certain Agricultural Products* WT/DS430/AB/R (adopted 19 June 2015) and *United States — Countervailing Duty Measures on Certain Products from China* WT/DS437/AB/R (adopted 16 January 2015).
[53] Mission of the United States, Geneva, Switzerland, Statement by the United States at the Meeting of

the Report in *Argentina – Financial Services* was *obiter* in nature and such unnecessary interpretation could have an impact on future disputes and consumes unnecessary time and resources.

To some extent, this criticism has some weight in it. Unnecessary legal findings can create problems for future disputes, particularly in case of a member with civil law jurisdictions. This is apparent from the China's non-market economy case, in which China relied on Appellate Body's findings in *EC – Fasteners*[54] dispute regarding the issue of expiration of Art. 15(a)(ii) of the Chinese Accession Protocol.[55] However, before reaching any conclusion regarding such obiter dicta, it is necessary to understand the legal framework governing appeals under DSU. Art. 17.12 of the DSU states:

> "*The Appellate Body shall address each of the issues raised in accordance with paragraph 6 during the appellate proceeding*."

As is evident from the phraseology of the provision above, no limitations or distinctions in the form of *obiter* or *ratio decidendi* have been introduced in the provision with respect to appeals regarding legal issues. On the contrary, Art. 17.12 read with Art. 17.6 of the DSU obliges the Appellate Body to address every issue raised by the parties in appeals provided such issues relate to legal findings and interpretations developed by a panel. Sacerdoti writes that lack of clarity in the text leads to appeals on issues which may not have a direct relation with the ultimate findings.[56] In this context, it also becomes necessary to understand the role of the Appellate Body in the dispute settlement system. Art. 3.2 of DSU clearly states that purpose of dispute settlement system is 'clarification' of the text of the WTO treaties. Thus, the role of the Appellate Body is not limited to being a mere adjudicator but also extends to providing clarification with respect to all issues raised before it. More generally, Prof. Bahri has argued that such opinions can provide valuable guidance to developing countries which have limited resources to spend on legal experts and thereby such opinions can help in "capacity building".[57]

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the WTO Dispute Settlement Body, Geneva, 23 May 2016, at 11, https://geneva.usmission.gov/wpcontent/uploads/2016/05/May23.DSB_.pdf (last visited 31 March 2021).

[54] Appellate Body Report, *European Communities — Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China* WT/DS397/AB/R (adopted: 28 July 2011).

[55] *supra* note 22 at 306. Also see Henry Gao, "Dictum on *Dicta*: *Obiter Dicta* in WTO Disputes", 17 *WTR* 509 – 533 (2018).

[56] Giorgio Sacerdoti, "A Comment on Henry Gao, "Dictum on Dicta: Obiter Dicta in WTO Disputes", 17 *WTR* 536 (2018).

[57] *Id.* at 539.

II

Trade Dispute Resolution Post Appellate Body Crisis

The Appellate Body became defunct in December 2019. The WTO membership has faced a myriad of systemic issues since then which has rendered the dispute settlement system ineffective to a large extent. Several WTO members upon losing a dispute before the panel are now appealing such reports into the void given the fact that the appeals mechanism still exists although the body to resolve such appeals does not. For instance, India has appealed[58] the panel's determination in *India – Export Related Measures* [59]and *India – Sugar and Sugarcane* [60]. Similarly, the United States has appealed[61] the recent panel report issued in the infamous security exceptions dispute *United States – Certain Measures on Steel and Aluminium Products.*[62] As long as the panel reports remain under appeal, the same cannot be adopted by the Dispute Settlement Body. This ensures continued existence of measures which have already been determined by panels as inconsistent with WTO obligations. Such appeals endanger the objectives of security and predictability in the dispute settlement system. Indeed, in the absence of a functional Appellate Body, such disputes shall remain unresolved for the foreseeable future. In fact, this indicates that such countries might have an incentive to keep the appeal system dysfunctional. [63]

A few members of the WTO have entered into an interim appeals mechanism in the form of the Multi-Party Interim Appeal Arbitration Arrangement (hereinafter referred to as MPIA) pursuant to Art. 25 of the DSU. However, the efficacy of such a system remains doubtful, particularly in view of concerns regarding its enforcement by the dispute settlement body.[64] This would exacerbate compliance problems. Further, only a handful of WTO members have joined the initiative which indicates lack in confidence of members in such tentative

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[58] Notification of Appeal by India, WT/DS541/7 *available at*: https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DS/541-7.pdf&Open=True (last visited: May 9, 2023) and WT/DS518/10 *available at*: . https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DS/579-10.pdf&Open=True (last visited: May 9, 2023).

[59] Panel Report, *India – Export Related Measure* WT/DS541/R (circulated: 31st October 2019).

[60] Panel Report, *India — Measures Concerning Sugar and Sugarcane* WT/DS581/R. (circulated: December 14, 2021).

[61] Notification of Appeal by United States (WT/DS544/14) *available at*: https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DS/544-14.pdf&Open=True (last visited: May 9, 2023).

[62] Panel Report, *United States - Certain Measures on Steel and Aluminium Products* WT/DS544/R (circulated 9 December 2022).

[63] Al – Sadoon Fahad, "The European Multi – Party Interim Appeal Arbitration Arrangement: A Convincing Solution to the Multilateral Crisis at the WTO", Cambridge International Law Journal Blog (September 6, 2020) available at: http://cilj.co.uk/2020/09/06/the-european-multi-party-interim-appeal-arbitration-arrangement-a-convincing-solution-to-the-multilateralism-crisis-at-the-wto/ (last visited: May 9, 2023).

[64] Olga Starshinova, "Is the MPIA a Solution to the WTO Appellate Body Crisis?" 55 *JWT* 803 (2021).

arrangements. Moreover, issues with respect to the coherence of interpretation may also as arbitrators appointed under MPIA would be free to depart from previous interpretations reached by the Appellate Body and panels.

Certain members are also entering into bilateral free trade agreements or revising such existing agreements. However, such treaties lack robust adjudicatory mechanisms. Further, multiple views may be undertaken by adjudicatory bodies on similar issues arising out of treaties between different nations. Moreover, countries often carve out exceptions on the applicability of dispute resolution mechanisms on contentious issues such as security exceptions. This would further lead to the disintegration of the world trading system.

III

Reform of The WTO Dispute Settlement System

Numerous countries have tabled several proposals for reforms[65] of the dispute settlement system to address the United States' concerns. However, hardly any of these proposals go into the merits of the United States' allegations. What is more concerning is that the United States has not tabled any proposal itself, while rejecting the solutions put by every other member as unworkable. The authors have suggested some proposals in the following paragraphs which could make the dispute settlement system more efficient as well as cater to the procedural concerns raised by the United States as well as the WTO membership.

a. Expert Review Group:

The Sutherland Report on The Future of the WTO[66] recommended setting up a special expert group to review the reports of the Appellate Body and panels[67]. The review reports were to be sent to the DSB and in extreme cases, to the General Council to adopt authoritative interpretation under Art. IX:1 of the WTO Agreement[68]. On the face of it, it seems that this would be just adding another layer of review mechanism to the dispute settlement system. However, if the expert group is given considerable discretion, then this could genuinely help in curbing instances of judicial overreach as well as promote the development of law. The expert group should undertake a bi-annual review of all findings and legal interpretations developed by the Appellate Body and panels and make recommendations to the DSB and General Council to adopt definitive interpretations on those issues. Such recommendations

[65] For a more general discussion see Bernard Hoekman and Petros Mavroidis, "WTO Reform: Back to the Past to Build for the Future", 12 *Global Policy* 5 -12 (2021);

[66] Report by Consultative Board to the Director-General Supachai Panitchpakdi, The Future of the WTO: Addressing Institutional Challenges in the New Millenium (2004).

[67] *Id.* at para 251.

[68] *Id.*

should be made only after compulsory consultation with the Appellate Body members and members of the panel whose report is under review. Moreover, the views of the Panel and Appellate Body should be compulsorily mentioned in the recommendations made by the expert review group. There should not be any majority rule for any recommendation to be made but rather the body should send all permissible interpretations to the DSB and General Council. Furthermore, Art. IX:1 of the WTO Agreement should be amended to oblige the General Council to adopt definitive interpretations on the recommended issues. Nevertheless, such recommendations or authoritative interpretations adopted in consideration of such recommendations, should not have any effect on an ongoing or settled disputes. This will to some extent compensate for the legislative void that has enveloped the WTO for now.

b. Terms, Tenures, Appointment, and Number of Appellate Body Members:

Members such as the European Union and India have recommended providing the Appellate Body members with a single and longer tenure for a period of six to eight years. [69] However, the tenure should not go beyond six years. The number of Appellate Body Members should be increased to twelve. Members have recommended increasing this number to nine. However, considering the heavy litigation that takes place at the WTO, it would be prudent to increase the numbers to twelve. Single tenures coupled with an increased number of members in the Appellate Body would better cater to representation issues[70] at the WTO which has a large and varied membership. The process of appointment of new members to the Appellate Body should be automatically instituted at least six months prior to the retirement of an Appellate Body member.[71] The United States has been able to leverage this situation multiple times[72] and ultimately enabled it to bring down the appellate system to a halt. Such an automatic launch of the appointment process would ensure that such incidents do not happen in the future. Further, no appellate body member should be allowed to entertain new appeals prior to 90 days from the end of their tenure. This would alleviate concerns raised by the United States regarding Rule 15 of the Working Procedure for Appellate Review. However, as a matter of expediency outgoing Appellate Body members should be allowed to remain in office until they complete their pending appeals.

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[69] Communication from the European Union, China, Canada, India, Norway, New Zealand, Switzerland, Australia, Republic of Korea, Iceland, Singapore and Mexico to the General Council WT/GC/W/752 (26 November 2018) *available at*: https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=249918&CurrentCatalogueIdIndex=0&FullTextHash=371857150&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True (last visited: May 9, 2023).

[70] Claus-Dieter Ehlermann, "The Workload of the WTO Appellate Body: Problems and Remedies", 20 *JIEL* 23 (2017).

[71] *Id.*

[72] *supra* note 8 at 80-83.

c. Authority for Remand:

The United States has criticised the Appellate Body for entertaining issues of fact in appeal. While in the preceding paragraphs, this criticism has been analysed in detail, there is no doubt that sometimes the boundary between the questions of fact and law becomes difficult to distinguish. Moreover, at times there have been instances wherein the Appellate Body was not able to complete the legal analysis due to insufficiency of facts in the panel report[73]. In such a case, for a positive resolution of dispute, and to avoid agitation on the same issue it would be prudent to grant the Appellate Body the authority of remand so that in case of insufficient factual findings, Appellate Body could refer the dispute back to the panel for more comprehensive factual findings necessary for the resolution of disputes.

d. Consensus:

One of the reasons behind the current deadlock in the dispute settlement system and the WTO, in general, has been the rule of consensus. The rule of consensus, despite its benefits such as the quasi-automatic adoption of reports, has been the chief cause of the arrested development of the WTO.[74] It is high time the WTO needs to resort to voting instead of the consensus rule, whenever required to do so, at least for the adoption of authoritative interpretations and against actions of members which impair the functions of the WTO. This could also be the way out of the current crisis. Perhaps the WTO needs a Uniting for Peace Resolution moment of its own.

g. Compliance and Retaliation:

Compliance with the recommendations of the DSB has been one of the problems which the membership has been facing since the advent of WTO. Although, overall, the record of compliance with DSB recommendations is quite good, what is worrisome is the disproportionate share of certain countries when it comes to non-compliance. Until 2015, thirty-eight suspension of obligations consultations requests were made by the parties to the dispute. Out of the thirty – eight requests, sixty-eight percent of requests were made against the United States and around sixteen percent were against the European Union.[75] This shows the power-driven nature of the WTO compliance mechanism. Countries with greater economic

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[73] *supra* note 42; Jaemin Lee, "The WTO Appellate Boyd as a Trailblazer – Facilitation of Appellate Mechanism Discussion in Other International Courts" in Chang-fa Lo, Junji Nakagawa (eds.), *The Appellate Body of the WTO and its Reform* 326-327 (Springer, 2019).

[74] Ernst-Ulrich Petersmann, "Between "Member-Driven Governance" and "Judicialization": Constitutional and Judicial Dilemmas in the World Trading System" in Chang-fa Lo, Junji Nakagawa (eds.), *The Appellate Body of the WTO and its Reform* 27 (Springer, 2019).

[75] Arie Reich, "The Effectiveness of the WTO Dispute Settlement System: A Statistical Analysis", *EUI Department of Law Research Paper, Paper No.2017/11* 17, (2017) *available at:* https://ssrn.com/abstract=2997094 (last visited: May 9, 2023).

might often keep compliance in abeyance especially when they confront smaller developing nations. This has happened with Ecuador in *EC – Bananas (21.5 Ecuador)*[76] and with Antigua & Barbuda in *US – Gambling*[77]. The average time taken for a dispute to complete all stages of dispute settlement is three years. Until such a period, there is nothing that stops a member from keeping its inconsistent measure in place. Due to the absence of retrospective retaliation or monetary compensation in the dispute settlement system, countries effectively evade their obligation for a long period of time. The members need to rethink the compliance mechanism and shorten the period given to the parties to bring their measures in conformity with their WTO obligations. Moreover, in some cases where a developing or least developed country confronts a developed country member with far greater economic might, individual retaliation remains ineffective given the imbalance in trade between such nations. Therefore, the members need to think of a timeline beyond the expiration of which they could seek collective retaliation.

IV

Conclusion

The United States unilateral actions paralysing the Appellate Body has given the WTO its worst blow since its inception. While most of the reasons given by the United States to justify its actions have little merit, there are certain instances where the Appellate Body may have gone overboard, at least in the opinion of some. However, it must be remembered here that like every other human institution, the Appellate Body too, is fallible, and is susceptible to making mistakes. In any legalized system such dissensions are bound to happen and in such a scenario, it is up to the WTO membership to make the course correction.

In fact, several WTO members have expressed their dissatisfaction regarding the inability of the organization to produce major substantive outcomes. No major agreements except the recently concluded Agreement on Fisheries Subsidies[78] has been able to achieve consensus of the membership. The divide between developing and developed members has continued to grow and so has their inability to prioritise outcomes. This complemented with introduction of export controls and import restrictions and use of essential security measures by members has impacted international trade adversely. However, none of the members, except the United States, have chosen to abandon the path of dialogue and negotiations. One of the

[76] Appellate Body Report, *European Communities — Regime for the Importation, Sale and Distribution of Bananas* (21.5 Ecuador) WT/DS27/AB/RW2/ECU (adopted 22 December 2008).
[77] Panel Report, *United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services* (Art. 22.6) WT/DS285/RW (adopted 22 May 2007).
[78] WTO, WTO members secure unprecedented package of trade outcomes at MC12 (17 June 2022) https://www.wto.org/english/news_e/news22_e/mc12_17jun22_e.htm (last accessed: 13th May 2023).

key features of the WTO is that it is a 'members-driven' organization and not a 'member-driven' organization. It must be understood that such unilateral actions undermine the legitimacy and security of the rules-based multilateral system. The WTO membership needs to stand up to this unilateral act. It needs to bypass the rule of consensus to restore the dispute settlement function and need not wait to dispel the concerns of the United States. Such concerns must be addressed but only after sending a message across the membership that there is no place for such unilateral actions in the multi-lateral trading body. Moreover, the appointment of a permanent expert review group could pave the way for an easier and more credible way to adopt authoritative interpretations.

Furthermore, the membership must strive endlessly to iron out their differences on certain substantive issues such as certain trade remedies and special and differential treatment. The members must decide upon some criteria to take advantage of the flexibilities of the WTO obligations and to ensure that such relaxation trickle down to the members who need them the most. This is necessary for things to move forward at the WTO. The members should also use the current opportunity to usher in much-needed reforms of the sequencing problem and make way for collective retaliation in certain cases.

The reason behind the success of GATT and the establishment of the WTO has been the ability of its members to cooperate despite the varied interests. The membership must not forget that by ensuring cooperation in trade, they are ensuring world peace.

THE SMART CITIES MODEL IN INDIA: AN EVALUATION

Dr. Rajesh Kumar*

Abstract

Urbanization is an ongoing process. It grows and spreads with the nation's development. But over time, the old patterns become obsolete and demands for new interventions become inevitable. The increasing pace of Urbanization intensifies the comprehensive requirement for the development of adequate physical, social, economic, and institutional infrastructure. These demands are usually met by initiating the process of rejuvenation and constant upgradation so that the utility and habitability of the urban centers can be maintained.

In the Indian context, around 31% of its population lives in urban areas and contributes 63% of its GDP (as per the last Census data). It is expected that by 2030, 40% of India's population will be living in urban areas and will contribute around 75% of its GDP. With such a fast-increasing Urbanization there is an inevitable need for the basic infrastructure. Moreover, there is a need for the creation of new urban centers that can become the torchbearer for the next generation of Urbanization for other developing cities. But all that depends on the functioning of the urban local governments. To give a fresh look to the process of solving this problem the Central Government in 2015, initiated a grand project named Smart Cities Mission (SCM) to create 100 models of urban development.

Considering the importance of this urban rejuvenation initiative, the present paper has looked into the important aspects connecting to the SCM. The introductory part has covered the importance of urbanization; the ongoing trends; the necessity of smart cities; meaning, concept, and contextual relevancy of the smart cities. The SCM's structural and functional aspect has covered the evaluation of the legal standi; features; coverage, duration, and execution; funding mechanism; connection between the SCM and SDG; and the challenges to SCM. The last part concludes the whole analysis and also presents suggestions and interventions for enhancing the effectiveness of this urban rejuvenation mission.

Keywords:

Urban Rejuvenation, Smart Cities Mission, Urban Local Government, Funding Mechanism.

I

Introduction

Urbanization is one of the determinants of development. It works as a catalytic force for the aspects of development. If it is well planned and managed, then it can play a very vital role in crafting the overall developmental trajectory. Throughout the history of mankind, the urban centers played a very positive role in the growth story of the country concerned. Besides

pushing forward the developmental agenda, urbanization also helps in removing socio-economic inequalities.[1] By 2050, an estimated 7 out of 10 people in the world will likely live in urban areas. Moreover, cities are also the engine of economic growth and contribute more than 80 percent of global GDP.[2]

Besides economic fruits, urbanization also sets the foundation for the cosmopolitan culture where the narrow socio-cultural differences are diminished and it becomes a beautifully designed pot in which all the differences meltdown. Cities are also the flag bearer in the march of urbanization that sets the parameters for its future. In modern times, the high pace of technological advancement also demands a special approach towards the process of urbanization. The growing demands and efforts for smart cities are the recognition of that fact.

In the Indian context, urbanization has a long history. In the past, India had highly developed urban centers in the form of Harappa; Mohenjo-Daro; Lothal; etc. Not only this, but many other urban centers were famous for their special importance. For example, in ancient India, the city of Takshashila[3] was famous as an educational center; the city of Kashi[4] was known for its spiritual relevance; etc. But with the pace of time, the urban centers also lose and gain their relevance.

Presently, India's urban spaces accommodate 31% of the population and contribute 63% of the GDP[5] and it is expected that by 2030, the urban centers will accommodate 40% of the population and 75% of GDP.[6] In such a fast-urbanizing country, it is necessary to have the required physical, institutional, social, and economic infrastructure. All these aspects of the urban spaces contribute to the elevation of quality of life as well as in attracting investment. Consequently, it will result in a virtuous cycle of growth and development. The development of Smart Cities would be a progression in that direction.[7]

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[1] UN DESA, Urbanization: Expanding Opportunities, But Deeper Divides, *available at: https://www.un.org/development/desa/en/news/social/urbanization-expanding-opportunities-but-deeper-divides.html* (last visited on May 10, 2023).

[2] UN DESA, Make Cities and Human Settlements Inclusive, Safe, Resilient and Sustainable, *available at*: https://unstats.un.org/sdgs/report/2022/goal-11/#:~:text=By%202050%2C%20an%20estimated%207,of%20global%20greenhouse%20gas%20emissions (last visited on May 07, 2023).

[3] Santanu Paul, "Takshashila University: The Knowledgebase of Ancient India", *available at*: https://www.bengalchronicle.com/2021/10/05/takshashila-university/, (last visited on March 09, 2023).

[4] Vaibhav Mishra, "The Significance of Kashi" *The Spiritual India, available at:* https://thespiritualindia.com/the-significance-of-kashi/, (last visited on March 10, 2023).

[5] Urbanization and Urban Sprawl: A Perspective on India's Urban Growth, *Bengal Chronicle* (October 05, 2021), *available at:* https://www.niua.org/tod/todfisc/book.php?book=1&section=2 (last visited on April 25, 2023).

[6] Smart Cities Mission: A Step Towards Smart India, *available at:* https://www.india.gov.in/spotlight/smart-cities-mission-step-towards-smart-india, (last visited on April 25, 2023).

[7] *Ibid.*

Given the rising technological advancement, the importance of the concept of the smart city is gaining momentum. Around the world, countries are investing in the development of smart cities. In this direction, India has also in 2015 initiated an ambitious project namely the Smart City Mission. The present paper has looked into various aspects related to its structural and governance aspects. But before the paper analyzes these aspects, it is pertinent to understand its conceptual dimensions such as the meaning of a smart city; need for the smart cities; the basic attributes of smart cities; etc.

With respect to defining the Smart City, there is no universally accepted definition of it. It has different conceptualizations for the different people based on their geographical location, administrative setup, governance model, level of economic development, willingness towards reforms, the availability of resources, etc.[8] But in common parlance, it represents an idea where the overall management of the urban area is based on efficiency; effectiveness; economy; and sustainability.[9] The overall service-orientedness in that urban area is towards the people living there. Smartness is a perennial reflection of the overall functionality of the urban administration. It brings a high level of efficiency to the traditional networks and services. In today's modern time, this smartness is considered to have a direct relationship with the usage of digital technology. Considering this, it can be said that the smart city concept employs modern Information Communication Technology (ICT) to achieve its objective.[10]

India's SCM aims to achieve objectives such as the use of smart solutions to offer the basic infrastructure; a fair quality of life and a clean and sustainable environment.[11] It focuses on the idea of sustainability with inclusiveness. The Smart City Mission aims to create a replica model of the Smart Cities that will work as a lighthouse for all the surrounding aspiring areas.

Next comes the question concerning the need for Smart Cities, it can be observed that urbanization around the world is on the rise at a very fast pace. It is predicted that by 2050 approximately two-thirds (i.e., 68%) of the world's population will be living in the cities. The cities are facing a very high level of inequalities and it is further on the rise. The recent Covid-19 pandemic has also exposed the gross inequalities in the existing urban centers in terms of accessing basic amenities. Additionally, the cities are facing various other challenges namely:

[8] Ministry of Urban Development, GoI, "Smart Cities: Mission Statement and Guidelines", 5, *available at*: https://smartcities.gov.in/sites/default/files/SmartCityGuidelines.pdf, (last visited on April 12, 2023).
[9] *Ibid.*
[10] European Commission, Smart Cities: Cities Using Technological Solutions to Improve the Management and Efficiency of the Urban Environment, *available at*: https://commission.europa.eu/eu-regional-and-urban-development/topics/cities-and-urban-development/city-initiatives/smart-cities_en, (last visited on April 13, 2023).
[11] Vision of Smart Cities Mission, *Available at*: https://smartcities.gov.in/, (last visited on April 13, 2023).

lack of a people-centric approach; environmental unsustainability; Unplanned urbanization; lack of the required innovativeness; disregard of the social and planetary balance; etc.[12] Besides these, the proposed solutions such as the digital solution to the daily urban challenges; adoption of sustainable and clean energy; smart transportation; smart mobility; citizen centric approach; ensuring the efficiency, effectiveness, and economic; etc., by the smart cities are also playing the role of pull factors in the adoption smart cities models around the globe.[13]

After this brief conceptual understanding of the Smart Cities, it is necessary to have an analysis of India's ambitious SCM. The upcoming sections of the paper have evaluated the governance and structural aspects of this Mission and looked into some important questions namely: How the SCM is unique in its structural and governance aspects?; What is the special mechanism for funding under the SCM?; Is there any outcome-oriented mechanism in the SCM?; Is there any connection between the SCM and SDG?; Whether the SCM predominated by technological advancement or based on the inclusionary approach?; Given the bureaucratic roadblocks, whether the SCM can achieve the objectives set out at the time of its initiation?; Is there any gap between the objectives set and the ground reality?; What are the challenges that are posing a risk of failure to the SCM?; What are the ways out to deal with these challenges?; etc.

II

Organizational and Functional Aspect

Legal Standi:

India's Constitution provides for a federal model which is comprised of three levels of the government, i.e. The Central, the State, and the Local Government. From the jurisdictional perspective, the Constitution provides for the three lists[14] of subjects that determine the jurisdiction of the Union and the State Governments. The subject connecting to the local governance[15] (that includes urban and village level governance) falls within the subjects of the State List that provides exclusive jurisdiction to the State government. However, constitutionally the State government has powers to manage the affairs connected to urbanization but there are specific provisions that allow the Union government to play a

[12] Claudio Providas and Mohammad Farjood, "Why Truly Smart Cities Are Crucial for Development" *available at*: https://www.undp.org/asia-pacific/blog/why-truly-smart-cities-are-crucial-development, (last visited on April 14, 2023).
[13] What Makes Smart Cities as Urgent Need for the Future?, *available at*: https://www.lpcentre.com/articles/what-makes-smart-cities-an-urgent-need-for-the-future, (last visited on April 14, 2023).
[14] Union List; State List; and Concurrent List of the VIIth Schedule, Constitution of India, 1950.
[15] Entry 5 of the State List provides, "Local government, that is to say, the Constitution and powers of municipal corporation, improvement trusts, districts board, mining settlement authorities and other local authorities for the purpose of local self-government or village administration".

supporting role in the overall urban governance. For instance, under Article 280 of the Constitution of India, the Finance Commission of India through its periodical report divests the funds for the betterment of the urban local governance.[16] In addition to this, the provisions for the public purpose grants (Article 282[17]) and loans (Article 293[18]) also allow the Union government to support the measures for urban development. The Union government uses Article 282 to initiate a policy or program of development that also includes the policy related to urban development. The SCM has also been initiated under this mechanism.

Coverage, Duration and Execution of SCM:

The SCM has been launched by the Union government on June 25, 2015. It aimed to cover 100 cities over a five-year period i.e., 2015-16 to 2019-20. Considering the impacts of the Covid-19, the duration of the Mission has been extended till 2024. The Mission has two major components i.e., local area development that would be enabled through the area-based development, and with respect to the existing cities, their infrastructure will be done by the Pan-city development. The existing regions shall be transformed through retrofitting (improvement), redevelopment (renewal), and the surrounding areas shall be developed as part of the greenfield development (city extension). The existing cities will be given the transformation through the application of smart solutions.[19] The distribution of the Smart Cities will be based on the equitable criteria (50:50 ratio to the urban population of State/Union Territories and Number of Statutory towns in the State/ Union Territories. The distribution formula used for the allocation of funds under AMRUT (Atal Mission for Rejuvenation and Urban Transformation) has also been adopted under the SCM. There is also a provision for the periodic review of the distribution of cities (every two years). It will be based on an assessment of their performance and consequence it will allow the re-allocation and thereby the other potential smart cities will be covered under the SCM.[20]

The Mission was aimed to achieve key objectives such as promoting cities to provide core infrastructure; a clean and sustainable environment; and providing a decent quality of life to the citizens through the application of smart solutions. The SCM is being executed through a Special Purpose Vehicle (SPV) for decision-making; planning; project designing and

[16] Article 280 (3) (c) says that the Commission shall make recommendations to the President as to "the measures needed to augment the Consolidated Fund of a State to supplement the resources of the Municipalities in the State on the basis of the recommendations made by the Finance Commission of the State".
[17] Article 282 provides that "the Union or a State may make any grant for any public purpose, notwithstanding that the purpose is not one with respect to which Parliament or the Legislator of the State, as the case may be, may make laws".
[18] Borrowings by the States.
[19] Smart City Mission, *available at*: https://smartcities.gov.in/smartcities, (last visited on April 10, 2023).
[20] *Ibid.*

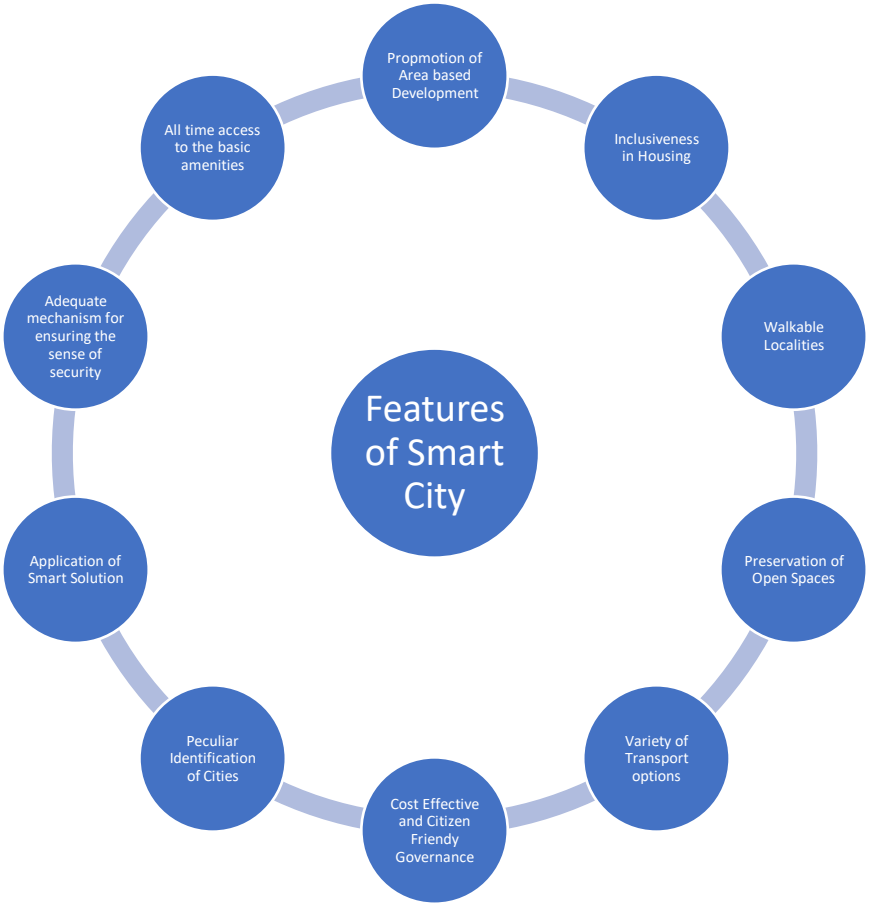
Implementation. The SPV in doing so ensures the following: constant focus on the objectives; protection of the investment; risk isolation; smoothness in the sale/purchase/taxation of the property; and asset ownership.[21] Under this mechanism, the SPV will be a company incorporated under the Companies Act, 2013. Here the State/Union Territories (UTs) and the Urban Local Bodies (ULB) shall have 50:50 equity shareholding and together (the State/UT and ULB) will have majority shareholding and control of SPV.[22]

III

Features of the Smart City

In the execution of the smart cities project the technology will play a major role. The usage of data collected by digital technologies will further strengthen the initiatives at the ground level. The catalytic and enabling role of digital technologies would be having far-ranging contributions in achieving the aforementioned goals of smart cities. Besides this variety of features of the smart cities also makes it an attractive idea that must be implemented. The following diagram presents a holistic understanding of the all the aspects connected with the functionality of urban centers.[23]:

[21] *Supra* note 8, at 12.
[22] *Ibid.*
[23] *Supra* note 8, at 7.



Besides the abovementioned features, the Mission will provide the solution through the application of smart technology. The smart solutions will broadly cover aspects such as E-governance and citizen services; Waste management; Water management; Energy management; Urban mobility; and others. E-governance and citizen services will include public information, grievance redressal, electronic service delivery, citizen engagement, citizens- city's eyes and ears, video crime monitoring, etc. Under waste management, the solution will be related to the aspects namely waste to energy and fuel, waste to compost, wastewater to be treated, recycling and reduction of construction and demolition waste, etc. Further, the water management will include smart meters and management, leakage identification, preventive maintenance, and water quality monitoring. The energy management will cover smart meters and management, renewable sources of energy, energy-efficient and green buildings, etc. Urban mobility will include smart parking, intelligent traffic management, integrated multi-model transport, etc. The smart solutions will also cover aspects such as telemedicine and Tele-education, incubation/trade facilitation centers, and skill development centers.[24] Looking at these features, it can be observed that all these features are people-centric

[24] *Id.* at 6.

and if implemented properly would certainly enhance the quality of life standards of the residents of these cities. Additionally, these smart cities would play the role of lighthouses for the surrounding urbanizing areas.

Funding Mechanism and Convergence of Schemes:

SCM is being operated as a Centrally Sponsored Scheme[25]. The Mission has a total fund of Rupees 2.05 Lakh Crore (2.05 Trillion). Out of this approximately 50% (around one lakh crore) of the total mission funds will come from Central and State Governments. The rest of the funds will come from the following: convergence and PPP (Public-Private Partnership); funds from debts and loans; funds from ULB's own revenue and funds from the market by the SPV. Out of One Lakh Crore (for 5 Years), 48,000 Crores (an average of 100 Crore per city per year) by the Centre and an equal amount has to be contributed by State/ULB.[26] The cost of each smart city is different and dependent on the level of its ambition, model, and its ability to execute and repay. Government grants play a significant role in attracting investment from internal and external sources. Further, the SPV's revenue model ensures the required security to the lenders and investors which determines the possibility of success of the SCM.[27] The release of the yearly installment of funds has been made subject to the following conditions such as timely submission of quarterly city scorecards, satisfactory physical and financial progress, achievement of milestones mentioned in the SCM, and fully functioning the SPV as has been prescribed under the Mission.[28]

The SCM has also made provision for the convergence of the area-specific existing schemes of the Governments. These schemes are fine-tuned to serve the broad objectives of the SCM. For instance, the strong complementarity between the Atal Mission for Rejuvenation and Urban Transformation (AMRUT) and SCM has strengthened both projects.[29] Similarly, other schemes such as Swachh Bharat Mission, National Heritage City Development and Augmentation Yojana, Digital India, Skill Development, Housing for all, Construction of a Museum funded by the Cultural Department, and other programs for social infrastructure, etc., have been converged with the objectives of the SCM. Thus, it can be observed that by integrating the physical, institutional, social, and economic infrastructure, comprehensive urban development is ensured.[30]

[25] A kind of policy measure which is jointly funded by the Union government and the State government.
[26] *Supra* note 8, at 13.
[27] *Ibid.*
[28] *Id.* at 15.
[29] *Id.* at 17.
[30] *Ibid.*

IV

SCM and SDG

Goal 11 of the Sustainable Development Goals (SDG) is focused on making cities and human settlements inclusive, safe, resilient, and sustainable. The SCM is also aimed to achieve similar objectives i.e., liveability, economic ability, and sustainability.[31] Liveability includes the aspects connected to the quality of life which covers services like affordable housing, public transit, waste and water management, safety, health and sanitation, and education. Further, economic ability includes the characteristics that make a city conducive for doing business, job classification, and programs to address climate change and innovation. It also plays the role of a pull factor in driving people towards the cities. And lastly, the sustainability that takes care of not only the present but also the future needs. It is a dynamic equilibrium between nature and the ecosystems humans create.[32]

The SCM has provision for the employment of ICT for providing smart solutions but its impact on the environment has not been properly looked into. For example, the use of ICT in a smart city can give an environmental advantage to certain areas and may transfer the risk load to others. Usage of ICT has its own energy and resource-related consequences for sustainability which extends beyond the geographical limits of the city to the global repercussions. The consequences concerning the ICT project's lifetime and supply chain are being recognized and recorded. In such a situation the environmental costs are being paid by different populations.[33] Thus, it can be observed that there are concerns with the excessive usage of ICT in the SCM and its possible negative impact on environmental sustainability but solutions to these can also be found by tailoring the application of ICT.

Appraisal of SCM:

The SCM is in progress for the last eight years. However, it had been launched with the target of 100 smart cities in a period of 5 years. Given the impact of Covid-19, the Central Government has extended the deadline till June 2024.[34] To analyze the performance of the mission, it is pertinent to look into the gaps between the goals set and the ground reality. The

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[31] Siddharth Garg, "Smart Cities: India" (Nordic Asia Impact), *available at*: https://nordicasiaimpact.org/smart-cities-india/, (last visited on April 13, 2023).

[32] *Ibid.*

[33] Ushnish Sengupta and Ulysses Sengupta, "SDG-11 and Smart Cities: Contradictions and Overlaps Between Social and Environmental Justice Research Agendas" 1, *Frontiers in Sociology* vol. 07 (2022), *available at:* https://www.frontiersin.org/articles/10.3389/fsoc.2022.995603/full, (last visited on March 26, 2023).

[34] Pavan Thimmavajjala, "8 Years On, Are India's Smart Cities Ready?", *India Spend*, July 03, 2023, *available at*: https://www.indiaspend.com/development/8-years-on-are-indias-smart-cities-ready-867575#:~:text=The%20Smart%20Cities%20Mission%20was,programme%20has%20seen%20slow%20progress., (last visited on July 04, 2023).

performance of SCM at the city level shows that 34 cities completed more than the number of projects planned for implementation (Bhopal, Indore, Agra, Varanasi, Bhubaneswar, Chennai, Coimbatore, Erode, Ranchi, Salem, Surat, Udaipur, Visakhapatnam, Ahmedabad, Kakinada, Pune, Vellore, Pimpri-Chinchwad, Madurai, Amaravati, Tiruchirappalli and Thanjavur). And 68 cities are yet to meet the targets wherein the performances of some are quite poor (i.e., Amaravati, Bhagalpur, Muzaffarpur, Shillong, and cities of the northeastern states; Jammu and Kashmir; Lakshadweep; Telangana, etc.[35]

As of January 2023, the Ministry of Housing and Urban Development had issued 7,804 work orders worth Rupees 1,81,322 crores for the SCM. Out of which 5,246 projects (67.22 percent) worth Rupees 98,796 crores have been completed. The remaining projects (32.77%) will also be completed by this year. The seriousness of the government is also reflected in the budgetary allocation for the SCM. The Union Budget for the financial year (F) 2023-24 has increased the budget allocation for the SCM from Rupees 14,100 crore in FY 2022-23 to Rupees 16,000 crore.[36] With respect to the release and utilization of funds, the Centre and State have jointly released 69,685 crore rupees, of which 59,791 crore rupees have been utilized.[37]

The investment in urban development through SCM has started showing positive impacts. The infrastructure created by the SCM has been found useful during the Covid-19 pandemic. For instance, the municipalities used their Integrated Command and Control Centers (ICCCs) as war rooms for Covid-19 response under the Smart Cities Mission.[38] However, the ICCCs set up under the Mission are meant to coordinate traffic management, surveillance, utilities, and grievance redressal. Out of the 100 municipalities under the Smart Cities Mission, the ICCCs of 45 cities are online or operational. During Covid-19, as part of the war rooms response, the ICCCs implemented initiatives such as CCTV surveillance of public places; GIS (geographic information system) mapping of Covid-19 positive cases; GPS tracking of healthcare workers; Predictive analytics (heat maps) for virus-containment across different zones of the city; Virtual training to doctors and healthcare professionals; Real-time tracking

[35] *Ibid.*
[36] Amrtansh Arora, "67% of Total 'Smart Cities Mission' Projects Complete, Govt. Tells Parliament" *The Print*, February 06, 2023, *available at*: https://theprint.in/india/governance/67-of-total-smart-cities-mission-projects-complete-govt-tells-parliament-karnataka-tops-list/1357360/, (last visited on March 09, 2023).
[37] AIR News, "86% of Funds Utilized, 69% of Projects Completed Under Smart City Mission" March 23, 2023, *available at*: https://newsonair.com/2023/03/23/86-of-funds-utilised-69-of-projects-completed-under-smart-city-mission/#:~:text=The%20Minister%20said%2C%20under%20Smart,crore%20rupees%20have%20been%20utilised., (last visited on March 26, 2023).
[38] Damini Nath, "Municipalities Using Smart Cities' Command Centre Turn into War Room" *The Hindu* (April 06, 2020), *available at:* https://www.thehindu.com/news/national/coronavirus-municipalities-using-smart-cities-command-centres-turn-into-war-rooms/article31274714.ece, (last visited on March 25, 2023).

of ambulances and disinfection services; Providing medical services through video-conferencing, tele-counseling, and telemedicine; etc.[39] The abovementioned outcomes of the SCM show a positive trend in its overall appraisal.

Challenges:

Besides the above analyzed structural aspects, The SCM is also facing various sorts of challenges namely, non-seriousness towards the deadlines resulting in delaying which further increases the cost of development[40]; non-release of the prescribed share of funds by the States and UTs[41]: 28 out of 36 States and UTs have not released their share this includes the cities of Warangal and Karim Nagar of the State of Telangana, Lakshadweep, Sikkim, Manipur, Nagaland, J&K, Tripura, etc.; shying away from the utilization of the fund allotted[42]; bureaucratic nature of status quo[43]; political and ideological differences[44] (e.g. State of West Bengal withdrew from the Scheme); huge amount of data generation and mutually interdependent infrastructure but no protection mechanism for keep in it foolproof[45]; convergence of the schemes and alleged overlapping of objectives[46]; high-tech dependency may create digital divide in the society and may affect the (i) urban poor, (ii) unskilled and (iii) informal sector adversely; high possibility of cyberattacks, may result in chocking the access to even the basic amenities[47]; little coordination and planning in providing the basic amenities

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[39] *Ibid.*

[40] Damini Nath, "The Smart Cities Mission: With Deadline Looming, A Status Check" *Indian Express*, (March 16, 2023), *available at*: https://indianexpress.com/article/explained/explained-law/smart-cities-deadline-8499073/, (last visited on March 20, 2023).

[41] Nidhi Sharma, "Smart City Mission: 28 States, UTs Fail to Release Share of Funds for Smart Cities", *The Economic Times* (November 19, 2021), *available at:* https://economictimes.indiatimes.com/news/india/smart-city-mission-28-states-uts-fail-to-release-share-of-funds-for-smart-cities/articleshow/87790895.cms?from=mdr, (last visited on March 20, 2023).

[42] Smart City Mission in Northeast: Utilization of Fund is Lowest in Assam, *NEZINE Bureau* (April 26, 2022), *available at*: https://www.nezine.com/info/NTBJdWtJaVNPOWtFbVFGbDg2UFdrUT09/smart-city-mission-in-northeast:-utilisation-of-fund-is-the-lowest-in-assam.html, (last visited on March 20, 2023).

[43] Nripendra P. Rana, Sunil Luthra *et.al*., *Barrier to the Development of Smart Cities in Indian Context*, 506 (Springer Publications, 2018), *available at*: https://link.springer.com/article/10.1007/s10796-018-9873-4, (last visited on April 02, 2023).

[44] FE Online, "Mamata Banerjee Rejects PM Modi's Smart City Project for West Bengal: Here's Why" *Financial Express* (August 19, 2016), *available at*: https://www.financialexpress.com/india-news/smart-city-project-mamata-banerjee-reject-narendra-modi-west-bengal/351826/, (last visited on April 02, 2023).

[45] Abhay Sharma, "Security and Privacy In Indian Smart Cities", *Digital First Magazine* (December 15, 2021), *available at*: https://www.digitalfirstmagazine.com/security-and-privacy-in-indian-smart-cities/, (last visited on April 02, 2023).

[46] V. Murugaiah, R. Shashidhar *et.al.*, "Smart Cities Mission and AMRUT Scheme: Analysis in the Context of Sustainable Development", 52, *OIDA International Journal of Sustainable Development*, vol. 11, no. 10, 49-60 (2018), *available at*: https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID3290270_code1520621.pdf?abstractid=3290270&mirid=1, (last visited on April 03, 2023).

[47] Maitrayee Mullick and Archana Patnaik, "Pandemic Management, Citizens and the Indian Smart Cities: Reflections from the Right to the Smart City and the Digital Divide", 2 *City, Culture and Society*, vol.30 (September 2022), *available at*:

(i.e., basic services and amenities for its citizen i.e. clean air, potable water, jobs, environment, transportation, affordable housing, slums, Storm water drainage and Solid waste management) etc.[48] There is no doubt that India's history of unplanned urbanization has made urban governance a challenging task but the SCM has been taking care of these challenges and would be able to provide solutions to all these issues. The concluding part of the paper discusses the suggestions that can be utilized in responding to these challenges.

VI

Conclusion and Way Forward

Smart City is being perceived as a solution to all the problems of the present-day urban problems. The features of the SCM also support this pattern. The above analyzed various aspects of the SCM and the recent outcomes of the Mission have shown that smart cities would no doubt be the torch bearer of the future developments connecting urbanization. As projected in the objectives of the SCM, it will play the role of a lighthouse for the surrounding areas. The present paper has discussed various aspects of the SCM such as jurisdictional aspects, objectives, duration, funding and execution mechanism, features, challenges, etc. While dealing with all these aspects the paper has concluded that the Mission would be a game changer for the future of urbanization in India.

There are certain apprehensions concerning its execution mechanism that have been pointed out in the section covering the challenges. Overall it can be observed that the SCM has shown a ray of hope for bringing order to the existing urban mess. As discussed in the preceding paragraphs, the positive contribution of the ICCCs in responding to the Covid-19 pandemic has proved its effectiveness. To make the SCM an engine for the future of urbanization in India, it is the need of the hours that following suggestions should be taken seriously:

1. Cooperation and coordination help in the efficient execution and function of any developmental initiative. Its importance has also been proved by the ICCCs during Covid-19.
2. The cities that are performing at their best and the cities that are performing their worst should be teamed up. This would help them both in learning from each other's mistakes and innovativeness.

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https://www.sciencedirect.com/science/article/pii/S1877916622000352#:~:text=The%20Smart%20Cities%20Mission%20initiatives,evolves%20within%20the%20pandemic%20scenario., (last visited on April 03, 2023).

[48] Ramanath Jha and Sayli Udas, "Indian's Urban Challenges: Recommendation for the New Government" *ORF* (June, 19, 2019), *available at*: https://www.orfonline.org/research/indias-urban-challenges-recommendations-for-the-new-government-2019-2024-52148/, (last visited on April 04, 2023).

3. The SCM is based on providing smart solutions and for that it has been employing the ICT tools. The usage of technology has both pros and cons. On the positive side, it helps in decision-making based on unbiased data and on the negative side it gives rise to concerns of data protection and right to privacy. The recent legislative initiative in the form of Digital Data Projection Bill 2023, would hopefully take care of these concerns. The proposed laws provide for stringent provisions for the violators.
4. The process of digitalization must be easy and the simplest possible. In that context, the example of digital payments can be an inspiration. The Unified Payment Interface (UPI) system has been made so easy that even small businesspersons (tea sellers, street hawkers, barber shops, etc.) without any technological know-how, are using these methods. This would also provide a solution to the digital divide in the urban areas.
5. The need of the hour is the incorporation of professionalism in the funding and outcome approach. This would bring efficiency and transparency in urban governance and would enhance the trust of the governed in the ULBs.
6. The 21st century demands that politics must be issues-based. The politics and ideology must be subservient to the developmental initiatives. Political opportunism should not be at the cost of urban development.
7. The support mechanism for the lagging urban centers should be in place. The time-to-time intervention and financial as well as administrative support can be very helpful in ensuring equality with equity.
8. The lighthouse role through AMRUT and SCM is a novel idea and should be used to make required policy adjustments in the small suburban areas. There should be a well-designed process to guide the shift from the villages to the metropolitan areas.
9. The SCM has decreased the role of red-tapism and given the required space to the Public Private Partnership (PPP). This should spread to the other aspects of urban service delivery mechanisms.
10. The SCM has aimed to keep the people first in essence and outcome. This approach must be the foundation of all the actions and policies of the urban administration. The essence of this can be projected by placing the report/scorecard in the public domain. That would keep the administration people-oriented.

With the above-given analysis, it can be observed that SCM's ambitions are the need of the hour. The overall direction of the Mission shows a positive sign for the future of India's urbanization. The success of the Mission would play a catalytic role and would transform sectors including the economy, society, physical infrastructure, etc. Most importantly the long-

lasting success of the Mission is dependent on the smartness among the people. It is the people's awareness that keeps the system in check and push it for an innovative solution to all sorts of problems.

THE INEXORABLE MARCH OF CLIMATE CHANGE AND ITS DEVASTATING IMPACT ON INDIA: AN IN-DEPTH ANALYSIS

Dr. Sameera Khan*

Abstract

The issue of climate change is adversely impacting nations worldwide and has become a global predicament. India is particularly susceptible to experiencing the harmful impacts of climate change. The Indian economy largely depends on agriculture and India is the most populated country in the world. Altered rainfall patterns coupled with increased droughts frequency along with flood instances have diminished agricultural yield substantially thus resulting in food insecurities and rural distress. As a result, various environmental threats are posed by changing climates which can create socio-economic challenges for India. This requires a thorough examination of its disastrous impact. The analysis delves into the multifarious aspects of climate change in India by analysing several factors such as rising temperatures, unpredictable monsoons, rising sea levels and extreme weather phenomenon like flash floods and cloud bursts. There is an extensive review of scientific studies along with empirical evidence to understand the catastrophic effects of climate change on important sectors like agriculture, water resources, public health, and biodiversity. The increased public health risks posed by heatwaves, vector-borne diseases, and air pollution and their disproportionate impact on the marginalized sections of society have also been explored. This shows that the fragility of the Indian ecosystems is an additional challenge faced by society at present. This is because not only does it compound the existing challenges but also brings new ones which adversely affect forest cover, wetlands, and coastal areas. This heightens their vulnerability towards natural disasters making ecosystem preservation vital for future generation's survival. The impact of climate change on India has been studied by the author at a large scale. The author has explored how it affects India on different fronts like agriculture to biodiversity to ecosystems. It has been explored how it is essential to develop an effective framework both at the national and international levels to effectively counter the adverse impacts of climate change and provides suggestions for the same.

Keywords: *climate change, India, impact assessment, vulnerability, adaptation*

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I.

INTRODUCTION

"The world must come together to confront climate change. There is little scientific dispute that if we do nothing, we will face more drought, famine, and mass displacement that will fuel more conflict for decades.

- Barack Obama

- Climate change as a global predicament

Climate change is widely recognized as a global predicament with wide-ranging implications for societies and ecosystems across the world.[1] The scientific consensus overwhelmingly supports the view that human activities, particularly the burning of fossil fuels and deforestation, are the primary drivers of climate change.[2] This has led to a rise in global temperatures, with significant consequences for various aspects of the planet. One of the most evident impacts of climate change is the melting of polar ice caps and glaciers. This phenomenon contributes to rising sea levels, endangering coastal regions and small island nations. The Intergovernmental Panel on Climate Change (IPCC) projects a global sea-level rise of up to one meter by the end of the century if greenhouse gas emissions continue unabated.[3]

Extreme weather events, including heatwaves, droughts, floods, hurricanes, and wildfires, have become more frequent and intense due to climate change. The ramifications of these events can be catastrophic for both human communities, physical structures, and the natural environment. During last year's cycle of Atlantic hurricanes there was one of the highest levels of hurricanes ever recorded which lead to extensive destruction as well as loss of life. [4]

Climate change also poses risks to biodiversity and ecosystems, threatening the intricate balance of natural systems. Shifts in temperature and precipitation patterns disrupt habitats and alter the distribution of species, leading to biodiversity loss. This loss has far-reaching consequences for ecosystem services, such as pollination, nutrient cycling, and water

[1] IPCC. (2014). Climate Change 2014: Synthesis Report. Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change [Core Writing Team, R.K. Pachauri and L.A. Meyer (Eds.)]. Retrieved from https://www.ipcc.ch/report/ar5/syr/.
[2] Ibid.
[3] Intergovernmental Panel on Climate Change. "Special Report on the Ocean and Cryosphere in a Changing Climate." 2019 Accessed [14 May, 2023]. Available at: https://www.ipcc.ch/srocc/.
[4] NOAA. "Historic 2020 Atlantic Hurricane Season Drawing to End." NOAA, November 30, 2020. Accessed [14 May, 2023]. Available at: https://www.noaa.gov/media-release/historic-2020-atlantic-hurricane-season-drawing-to-end.

purification, which are vital for human well-being.[5] Furthermore, climate change intersects with other global challenges, exacerbating issues such as poverty, hunger, and public health. Changes in precipitation patterns and temperature extremes can reduce agricultural productivity and increase food insecurity, particularly in vulnerable regions.[6] Additionally, the spread of vector-borne diseases, such as malaria and dengue, is influenced by changing climatic conditions.[7] Climate change also contributes to air pollution, which impacts respiratory health and increases the prevalence of respiratory diseases.[8]

- An Exploration of Climate Change in India

India, with its large population and heavy dependence on agriculture as a primary economic sector, is particularly vulnerable to the adverse impacts of climate change.[9] It is imperative to conduct a thorough examination of the specific effects of climate change on India, considering various sectors and dimensions, in order to understand the challenges, it faces and develop effective strategies for mitigation and adaptation. [10] The IPCC's evaluations offer an exhaustive appraisal of the probable consequences precipitated by alterations in global climate, such as escalating temperature conditions worldwide, transforming distributions of precipitation patterns and sea-level levels that are advancing. Moreover, these reports also project severe climatological occurrences that may manifest themselves with greater frequency than ever before. These changes have direct and indirect effects on various sectors and aspects of India's socio-economic fabric. India's vulnerability to climate change stems from its heavy reliance on agriculture, which employs a significant portion of the population and contributes substantially to the country's GDP.[11] Changes in temperature and rainfall patterns can have profound effects on crop yields, leading to reduced agricultural productivity, increased food insecurity, and economic hardships for farmers. The Indian Council of Agricultural Research (ICAR) released a report in 2018 where the impact of changes brought about by climate change

[5] Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services. "Global Assessment Report on Biodiversity and Ecosystem Services." (2019) Accessed 14th May 2023. Available at: https://www.ipbes.net/global-assessment-report-biodiversity-ecosystem-services.
[6] Food and Agriculture Organization of the United Nations. "The State of Food Security and Nutrition in the World." 2020 Accessed 14th May 2023. Available at: http://www.fao.org/state-of-food-security-nutrition/en/.
[7] World Health Organization. "Climate Change and Health." 2021 Accessed 14th May 2023. Available at: https://www.who.int/news-room/fact-sheets/detail/climate-change-and-health/.
[8] World Health Organization. "Ambient (Outdoor) Air Quality and Health." 2018 Accessed 14th May 2023. Available at: https://www.who.int/airpollution/ambient/health-impacts/en/.
[9] World Bank. "India." 2013 Accessed 14th May 2023. Available at: https://www.worldbank.org/en/news/feature/2013/06/19/india.
[10] *Supra* Note 1.
[11] *Supra* Note 9.

like changed monsoon patterns, increase in draughts and heat stress on crops was highlighted.[12] India has the largest population in the world with more than 1.4 billion people. This results in tremendous strain on its infrastructure, public health systems and natural resources when confronted with disturbances caused by climatic disruptions. Heatwaves, intensified by rising temperatures, can have severe health impacts, particularly among vulnerable populations.[13] The Lancet Countdown on Health and Climate Change report provides insights into the various health risks associated with climate change in India, such as heat-related illnesses, vector-borne diseases, and air pollution.[14] The impacts of climate change also extend to India's water resources. Changing precipitation patterns and increased evaporation rates can lead to water stress and scarcity in various regions of the country.[15] The National Institute of Hydrology (NIH) highlights the consequences of climate change on the availability of water by studying changes like a reduction in snowfall, changes in course of rivers and excessive pressure on the groundwater resources.[16] India is rich in biodiversity and has several diverse ecosystems like forest and wetlands which are rapidly deteriorating as an outcome of climate change. The loss of biodiversity and ecosystem degradation have significant implications for ecosystem services, food security, and livelihoods.[17] The report by the Indian Network on Climate Change Assessment (INCCA) examines the impacts of climate change on ecosystems and biodiversity in India, emphasizing the need for conservation and adaptive management strategies.[18]

II

INDIA ON THE FRONTLINE OF CLIMATE CHANGE

The magnitude of climate change has far-reaching consequences for all nations across the globe. India is specifically vulnerable due to being the most populous country in existence which relies heavily on agriculture. This leaves it particularly exposed to adverse impacts

[12] Indian Council of Agricultural Research (ICAR). (2018). "Climate Change and Indian Agriculture: Impacts, Adaptation, and Mitigation." Accessed 14th May 2023. Available at: https://www.icar.org.in/content/climate-change-and-indian-agriculture-impacts-adaptation-and-mitigation.
[13] *Supra* Note 1.
[14] Lancet Countdown on Health and Climate Change. (2020) "India: Country Report 2020." Accessed 14th May 2023. Available at: https://www.lancetcountdown.org/media/3865/india-country-report-2020.pdf.
[15] *Supra* Note 9.
[16] National Institute of Hydrology (NIH). (2017). "Climate Change Impact on Water Resources in India: A Report on Assessment of Vulnerability and Adaptation." Accessed 14th May 2023. Available at: http://www.nihroorkee.gov.in/english/climate-change-impact-on-water-resources-in-india-a-report-on-assessment-of-vulnerability-and-adaptation.
[17] *Supra* Note 1.
[18] Ministry of Environment, Forest and Climate Change, Government of India. "Climate Change: India's Perspective." (2019) Accessed 14th May 2023. Available at: https://www.moef.gov.in/wp-content/uploads/2019/04/climate-change-india.pdf.

arising from this phenomenon. A comprehensive insight into various factors associated with climate change within India through reviewing both scientific studies and empirical evidence while exploring its implications on socio-economic aspects too. Throughout the years, temperatures in India have steadily risen resulting in potentially detrimental consequences for various sectors. An examination of scientific literature associated with climate change within India proves beneficial as it grants access to observed impacts, projected trends, and potential future scenarios. These studies encompass several elements including but not limited to shifts in temperature patterns, and variances in precipitation patterns alongside rising sea levels and their implications for different sectors.[19] The empirical evidence is validated by actual examples in India's real-life experiences, which give credence to the consequences brought about by climate change. Environmental factors on how human health and socio-economic prosperity are affected can be exposed through field research analysis as well as case study reports that rely heavily on data-driven techniques. [20]

The Indian populace is reliant on agriculture, a sector that's highly susceptible to climate change. The irregularities in temperature and patterns of rainfall can impact crop productivity, water availability issues along with significant changes within the pest dynamics; which overall negatively impacts food security measures. To ensure people are fed and farmer's welfare upheld while simultaneously boosting rural economies there must be advancements made towards adaptation methods as well as adoption of sustainable agricultural practices. [21] These studies examine alterations in the timing, intensity, and spatial distribution of rainfall, and their adverse implications for water availability, crop yields, and water-dependent sectors such as hydropower generation and irrigation.

Rising temperatures affect agriculture by altering crop growth cycles, increasing water demand, and promoting the spread of pests and diseases.[22] Changes in the patterns of monsoon rainfall have been observed in India, resulting in increased variability and unpredictability. These shifts pose challenges for agriculture, as farmers struggle to plan their crop cycles and manage water

[19] The Climate Reality Project. "How the Climate Crisis is Impacting India." Accessed 14th May 2023. Available at: https://www.climaterealityproject.org/blog/how-climate-crisis-impacting-india.

[20] BBC News. (2021) "India's Battle with Extreme Climate Events." Accessed 14th May 2023. Available at: https://www.bbc.com/news/world-asia-india-58155294.

[21] World Economic Forum. (2023). "India Holds the Key to Hitting Global Climate Change Targets." Accessed 14th May 2023. Available at: https://www.weforum.org/agenda/2023/01/india-holds-the-key-to-hitting-global-climate-change-targets-here-s-why/.

[22] The Probe. "Climate Change: India's Future Would Be Warmer and Wetter." Accessed 14th May 2023. Available at: https://theprobe.in/stories/climate-change-indias-future-would-be-warmer-and-wetter/.

resources effectively.[23] The changing climate contributes to increased health risks in India. Heatwaves, intensified by rising temperatures, can lead to heat-related illnesses and fatalities. Climate change also influences the spread of vector-borne diseases, such as dengue and malaria, and worsens air pollution levels. Vulnerable populations, including the elderly and marginalized communities, are particularly at risk. Enhancing public health infrastructure, implementing climate-resilient healthcare systems, and promoting awareness are essential.[24]

The adverse effects of climate change have far-reaching economic and social consequences in India. Damage to infrastructure, disruptions in supply chains, and loss of livelihoods impact economic growth, employment, and social stability. Addressing climate change becomes crucial for sustainable economic development, poverty alleviation, and social equity. By investing in climate-resilient infrastructure, promoting green technologies and industries, and implementing robust adaptation and mitigation strategies, India can mitigate the adverse effects of climate change and foster sustainable economic development, poverty alleviation, and social equity. India's extensive coastline is highly vulnerable to rising sea levels. This phenomenon leads to increased coastal erosion, intrusion of saline water into freshwater sources, and heightened vulnerability to storm surges. Coastal communities, infrastructure, and ecosystems are at risk.[25] These studies highlight the need for coastal adaptation measures, including infrastructure planning, coastal zone management, and sustainable coastal development practices. India has witnessed a rise in the frequency and intensity of extreme weather events, such as cyclones, floods, and heatwaves. Such events can have grave consequences such as destruction on a large scale, adverse impact on infrastructure, agricultural yield, lives of humans and overall socio-economic development.[26] This can be evidenced by several events that have taken place in recent history which evidence the same. The Cyclone Fani struck India along the Eastern Coast in 2019. It had a severe impact on the state of Odisha. This resulted in significant damage to infrastructure, including houses, power lines, and roads. The total number of people impacted was over 15 million. It also led to the displacement of thousands. According to the Indian Meteorological Department, the frequency of severe cyclonic storms

[23] IndiaSpend. (2021) "Climate Change is Making India's Monsoon More Erratic." Accessed 14th May 2023. Available at: https://www.indiaspend.com/earthcheck/climate-change-is-making-indias-monsoon-more-erratic-780356.

[24] Watts, N., et al. (2020). “The 2020 report of The Lancet Countdown on health and climate change: responding to converging crises.” The Lancet, 397(10269), 129-170. doi: 10.1016/S0140-6736(20)32290-X.

[25] The Third Pole. “Climate change in India.” Retrieved May 14, 2023, from https://www.thethirdpole.net/en/hub/climate-change-in-india/.

[26] Hindustan Times. (2021, August 10). “India to face irreversible impacts of the climate crisis, flags IPCC report.” Accessed May 14, 2023, from https://www.hindustantimes.com/environment/india-to-face-irreversible-impacts-of-climate-crisis-flags-ipcc-report-101628498654877.html.

in the North Indian Ocean region has increased from 0.45 storms per year during 1891-2000 to 1.17 storms per year during 2001-2020. [27]

In Kerala, floods were triggered in the state of Kerala. This resulted in widespread destruction and loss of life. The floods affected millions of people, submerged villages, damaged infrastructure, and led to significant economic losses.[28] According to a report by the Ministry of Home Affairs, India experienced an average of 8.4 floods per year during 2010-2018, affecting an average area of 7.7 million hectares. Delhi experienced a prolonged heatwave in May 2020, with temperatures soaring above 45 degrees Celsius. The heatwave exacerbated health issues, led to water shortages, and affected vulnerable populations, particularly the homeless. A study published in the journal Science Advances in 2020 revealed that heatwaves in India have become more frequent and longer in duration. It estimated that heatwaves caused over 3,000 deaths in 2019.[29] Therefore, it is important that India supports vulnerable communities to mitigate the socio-economic impacts of climate change.[30] By understanding the climate change factors specific to India and their implications on socio-economic aspects is essential for developing effective strategies to address the challenges posed by climate change. Rising temperatures, unpredictable monsoons, sea-level rise, and extreme weather events all contribute to India's vulnerability. Scientific studies and empirical evidence provide valuable insights into the observed impacts and projected trends, highlighting the urgency of action.

The implications on agriculture, public health, and the economy necessitate the implementation of adaptation and mitigation measures. These include sustainable agricultural practices, improved water management, resilient infrastructure, and healthcare systems. Additionally, addressing climate change requires a multi-sectoral and inclusive approach that prioritizes the needs of vulnerable communities. By integrating scientific knowledge into policy frameworks, investing in research and development, and fostering international collaborations, India can work towards a resilient and sustainable future amidst the ongoing climate crisis. Taking proactive measures to mitigate and adapt to climate change will not only protect the

[27] Hindustan Times, 2019 - https://www.hindustantimes.com/india-news/cyclone-fani-topples-11-lakh-homes-60-metre-pylon/story-kqFLQaWVE4w2JSOqEXgfTM.html

[28] India Today, 2018 - https://www.indiatoday.in/india/story/how-devastating-was-the-kerala-flood-of-2018-1312013-2018-08-19.

[29] Hindustan Times, 2020 - https://www.hindustantimes.com/cities/delhi-scorches-under-intense-heat-wave-101622336196165.html.

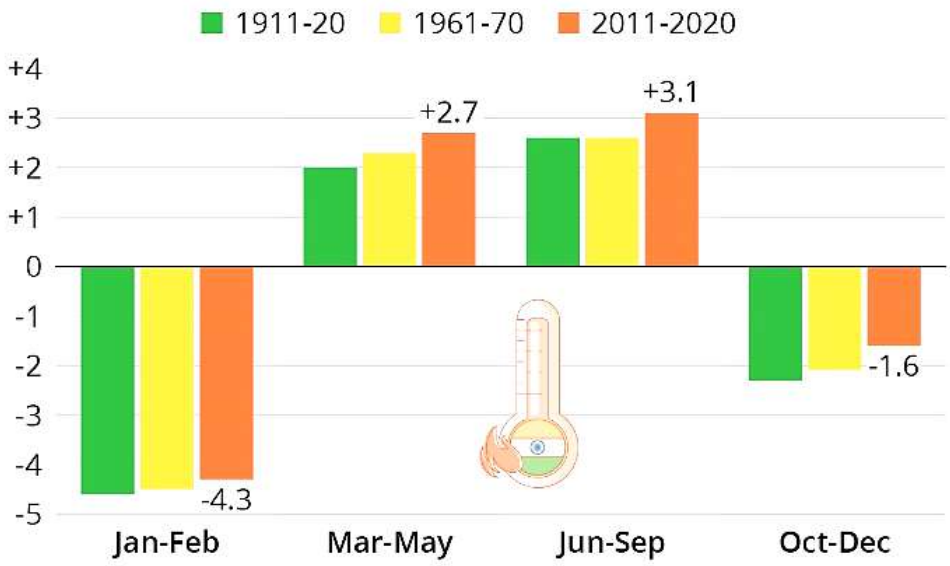
[30] The Economic Times. (2023, September 15). "2023 should be the year climate change is mainstreamed into India's development decisions." Accessed May 14, 2023, from https://m.economictimes.com/news/india/2023-should-be-the-year-climate-change-is-mainstreamed-into-indias-development-decisions/amp_articleshow/96649145.cms.

environment but also safeguard the socio-economic well-being and livelihoods of the Indian population.

III

CATASTROPHIC REALITY OF PUBLIC HEALTH RISKS

Climate change poses significant public health risks to India, with several direct and indirect impacts on the population. The three major public health risks associated with climate change in India are heat waves, vector-borne diseases, and air pollution exacerbation. The impacts of these risks on vulnerable populations and the efforts being made to mitigate their effects have been assessed. The increasing severity and occurrence of heat waves as an effect of the changing climate has made India one of the most impacted nations. In 2015, India saw its most fatal heat wave on record, claiming over 2500 lives. Those especially susceptible to heat-related afflictions like heat stress, dehydration and heat stroke include the elderly, children, expectant mothers, and those whose occupation requires them to be outside. What's more, the rising temperatures also intensify chronic medical conditions such as heart disease, lung disease and diabetes. One study found that high temperatures heighten the likelihood of hospitalization for a range of medical issues, with elderly individuals and those in lower income brackets facing the greatest risk.[31] Urban areas, characterized by the urban heat island effect, face additional difficulties due to the higher temperatures and limited access to infrastructure for cooling.[32]



[31] Anand, S., Taniyil, S., Kumar, R., & Singh, M. (2020). "Associations between temperature and hospital admissions for cardiovascular, respiratory, digestive and genitourinary diseases in the elderly: a time-series study in India." Environmental Health, 19(1), 62. doi: 10.1186/s12940-020-00628-1.

[32] India Today. (2021, November 12). "How has climate change affected Indian cities?" Retrieved May 14, 2023, from https://www.indiatoday.in/diu/story/how-has-climate-change-affected-indian-cities-1876164-2021-11-12.

Average of mean temperature 1901-10 used as a baseline

Source: India Meteorological Department, Ministry of Earth Sciences via MOPSI Envi Stats India Report

The graph indicates how India is Heating up over the last few decades. It indicates a significant rise in temperature over the years which shows that extreme weather conditions are becoming more prevalent posing a grave public health risk. Vector-borne diseases such as dengue, malaria, and chikungunya are also linked to changing climatic conditions. Rising temperatures and humidity provide conducive environments for disease vectors such as mosquitoes to breed and spread. In addition, extreme weather events such as floods and cyclones create stagnant water pools that serve as breeding grounds for mosquitoes. The projected temperature increase in India could increase the transmission potential of dengue and malaria by 2-4% and 4-7%, respectively. Changing climatic conditions such as temperature, rainfall patterns, and humidity influence the breeding, survival, and behavior of mosquitoes.[33] This will cause a population imbalance of mosquitoes and lead to an increased prevalence of vector-borne diseases. This would result in the geographic range of these diseases expanding, and previously unaffected regions becoming susceptible. The burden of vector-borne diseases is often highest in low-income and marginalized communities, where access to healthcare and preventive measures is limited. Air pollution exacerbation is another significant public health risk associated with climate change. The burning of fossil fuels for energy production and transportation releases greenhouse gases and air pollutants such as particulate matter, nitrogen oxides, and sulphur dioxide into the air. These pollutants have serious health consequences, such as respiratory and cardiovascular diseases, and premature death. Climate change exacerbates air pollution by increasing the frequency and severity of extreme weather events such as dust storms and wildfires, which release additional pollutants into the air. It was found that the air pollution-induced burden of disease in India could increase by 20-30% by 2050 due to climate change.[34] The impacts of these public health risks are disproportionately borne by vulnerable populations, such as the elderly, children, and low-income communities, who often lack access to healthcare and basic services. The Government of India has initiated actions to alleviate perilous scenarios, analogous to architecting heat action plans to safeguard susceptible groups during

[33] Joshi, P. K., Bhatia, R., & Varghese, C. (2013). "Climate change and its impact on diseases in India. New Delhi: Indian Council of Medical Research."
https://www.researchgate.net/publication/256034994_Climate_Change_and_its_Impact_on_India.

[34] Harish, S., Nagaraju, B., Rayapati, N. K., & Rakesh, G. (2019). "Climate change and its impact on air pollution-induced health risks in India: A case study on projected future air quality over mega cities using Reg CM 4.2." Sustainable Cities and Society, 47, 101473. doi: 10.1016/j.scs.2019.101473.

heat waves and implementing vector control measures. The National Clean Air Project commenced in 2019 to reduce air pollution levels across the country. To address air pollution, comprehensive tactics are requisite, encompassing reducing pollutants from factories and transportation, promoting clean energy sources, implementing effective civic planning to mitigate the civic urban heat island effect, and adopting stringent air quality benchmarks. [35] Climate change poses a grave threat toward the well-being of the Indian population, encompassing heatwaves, vector-borne diseases, and air pollution exacerbation These perils harbour serious ramifications for health, especially amongst the susceptible population, necessitating expeditious countermeasures. Government officials, grassroots campaigns, and private citizens must work together to develop remedies mitigating and accommodating such changes to safeguard community health and champion sustainable development.

IV

FRAGILE ECOSYSTEMS AND BIODIVERSITY IN INDIA

Climate change has profound implications for ecosystems and biodiversity, particularly in a country as geographically diverse as India. Fragile ecosystems such as forests, wetlands, and coastal areas are vulnerable to the impacts of climate change, leading to the loss of biodiversity and ecosystem degradation. An in-depth analysis of the effects of climate change on India's fragile ecosystems and biodiversity, highlighting the need for ecosystem preservation and conservation has been provided.

A plethora of organisms finds sanctuary within the expanse of forests, necessitating the preservation of their habitat for the prosperity of biodiversity. However, the epoch of climate change has ushered several challenges to the forests of India. Rising temperatures, changing precipitation patterns, and the increased frequency of extreme meteorological events, such as droughts and wildfires, have negative consequences for forest health.[36] Fluctuations in temperature and rainfall impact the propagation, reproduction, and distribution of tree species, resulting in the shifts in forest compositions. Moreover, prolonged droughts amplify the susceptibility of woodlands to forest composition, further exacerbating the degradation of forests. The depletion of woodlands not only influences biodiversity but also disrupts ecological system services, such as water regulation, soil conservation, and climatic regulation.

Marshes, swamps, and other wetlands nurture exclusive forms of life and furnish indispensable advantages such as purifying water, mitigating floods, and storing carbon.

[35] LiveMint. (2019, July 22). "The growing threat of climate change in India." Retrieved from https://www.livemint.com/news/india/the-growing-threat-of-climate-change-in-india-1563716968468.html.
[36] *Supra* Note 30.

Nonetheless, fluctuations in climate jeopardize wetlands in India. Sea level rise, salinity, and disrupted rain patterns distress the hydrology and symbiosis of wetland ecosystems.[37] Shoreline wetlands are exceptionally susceptible to the consequences of climatic change, with rising sea levels leading to saltwater intrusion, habitat loss, and increased coastal erosion. The loss of wetlands not only reduces biodiversity but also diminishes their capacity to provide ecosystem services, which has implications for water availability, flood regulation, and climate resilience.

Climate change accelerates the loss of biodiversity in India. Changes in temperature and precipitation disrupt the intricate ecological relationships that support diverse species. Rising temperatures and altered rainfall patterns affect the timing of biological events, such as flowering and migration, leading to mismatches between species interactions.[38] Furthermore, habitat loss, fragmentation, and degradation resulting from climate change-induced factors, including deforestation and land-use change, further exacerbate the loss of biodiversity. The decline in biodiversity has cascading effects on ecosystem functioning, such as pollination, seed dispersal, and nutrient cycling, compromising the resilience and stability of ecosystems.

Climate change increases the frequency and intensity of natural disasters, including cyclones, floods, and storms, which have devastating impacts on ecosystems and communities in India. Fragile ecosystems such as mangroves and coastal forests act as natural barriers, attenuating the impacts of these disasters by absorbing storm surges and reducing erosion. However, the degradation of these ecosystems weakens their protective functions.[39] Preserving and restoring ecosystems, including mangroves, can enhance resilience to natural disasters, safeguarding lives, livelihoods, and biodiversity. Additionally, ecosystem-based adaptation strategies, such as the conservation of biodiversity-rich areas and the promotion of sustainable land management practices, can enhance the adaptive capacity of ecosystems to climate change impacts.

The impacts of climate change on India's fragile ecosystems and biodiversity are evident and require urgent attention. The loss of forests, degradation of wetlands, and decline in biodiversity have far-reaching consequences for ecosystem services, biodiversity conservation, and human well-being. Ecosystem preservation and conservation are crucial for mitigating the impacts of climate change and ensuring the long-term sustainability of India's

[37] Ibid.
[38] Oxford University Press. (n.d.). "Climate Change and India: Adaptation Strategies for a Developing Country. In Climate Change and India" (pp. 299-318). Retrieved from https://academic.oup.com/book/35227/chapter/299749921.
[39] India Today. (2021, November 12). "How has climate change affected Indian cities?" Retrieved from https://www.indiatoday.in/diu/story/how-has-climate-change-affected-indian-cities-1876164-2021-11-12.

ecosystems. To address these challenges, integrated and holistic approaches are necessary, encompassing policy interventions, scientific research, community participation, and international collaborations. It is essential to the safeguard and revitalization of forests, wetlands, and coastal areas, given their importance in the regulation of the climate, the preservation of biological diversity, and the purveyance of the advantages arising from ecosystems.

We need to make efforts on sustainable land practices, reducing deforestation, and implementing reforestation and afforestation programs Guarding against draining or polluting wetlands, imposing tighter controls on constructions along coastal lines, successfully managing waters, and establishing protected areas can assist in keeping these critical ecosystems alive. Furthermore, fostering public awareness and engagement, backing livelihoods that do not deplete, and weaving olden ways of relating to nature into schemes to keep it safe can lend to the long-term preservation of ecosystems and biodiversity.[40]

Climate change has a significant impact on the fragile ecosystem and biodiversity. This necessitates taking measures to preserve and conserve them. We need to recognize that these ecosystems are important. This can be done through the implementation of adaptive management strategies and the promotion of sustainable practices. Using these, the resilience of ecosystems in India can be enhanced and the biodiversity protected. This can assist in countering the negative effects climate change has on fragile ecosystems and the communities dependent on them.

V

DEVELOPING EFFECTIVE CLIMATE CHANGE FRAMEWORKS

Addressing the challenges posed by climate change requires the development of robust frameworks that encompass mitigation, adaptation, and sustainable development strategies. This chapter explores the importance of national and international cooperation, policy interventions, and strategies for building resilience in the face of climate change.

- ***Importance of National and International Cooperation***

- *Collaborative Approach:* Climate change is a global issue that requires collective action. National and international cooperation is essential to effectively address the causes and impacts of climate change. Cooperation among nations enables knowledge-sharing,

[40] *Supra* Note 30.

technology transfer, and financial support for developing countries to implement climate change mitigation and adaptation measures.[41]

- *Multilateral Agreements:* International agreements, such as the Paris Agreement, play a crucial role in fostering cooperation and commitment among nations to limit global warming. The Paris Agreement establishes a framework for countries to set emission reduction targets, enhance resilience, and provide financial and technological support to vulnerable nations.[42]
- *National Policy Frameworks:* Countries need to develop comprehensive national policy frameworks that align with global goals and address their specific climate change challenges. These frameworks should integrate mitigation and adaptation strategies, prioritize renewable energy sources, promote energy efficiency, and incorporate sustainable land and water management practices.[43]

➢ ***Policy Interventions for Mitigation and Adaptation***

- *Mitigation Strategies:* Mitigation efforts aim to reduce greenhouse gas emissions and slow down the pace of climate change. Policy interventions may include promoting renewable energy sources, improving energy efficiency in industries and transportation, implementing carbon pricing mechanisms, and encouraging sustainable agricultural practices (IPCC, 2018).
- *Adaptation Measures:* The strategies for adaptation are focussed on countering the adverse impact of climate change through the building of resilience. They include the development of infrastructure which is resilient to climate, promotion measures to reduce risks from disasters, efficiently managing water resources and introducing climate considerations into urban planning and land-use policies.[44]

➢ ***Strategies for Sustainable Development and Resilience***

- *Sustainable Development Goals:* It is important that broader sustainable development goals also see an integration of climate change considerations. This requires the promotion of inclusive and sustainable economic growth. This will ensure access to clean energy, require

[41] UNFCCC. (2015). Paris Agreement. Retrieved from https://unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement.
[42] *Ibid.*
[43] India Climate Change Knowledge Portal. (2021). "National Action Plan on Climate Change." Retrieved from https://www.ccasp.nic.in/en/.
[44] World Bank. (2019). "Building Resilience: Integrating Climate and Disaster Risk into Development." Retrieved from https://openknowledge.worldbank.org/handle/10986/32037.

the improvement of environmental conservation efforts, enhancement of food security, and address social inequalities aggravated by the changing climate.[45]

- *Building Resilience:* It is vital for the reduction of vulnerability to climate change effects. This includes enhancing community-based adaptation approaches, strengthening early warning systems, investing in climate-smart agriculture, supporting livelihood diversification, and promoting social safety nets to protect vulnerable populations.[46]

➢ ***Financing and Capacity Building***

- *Financial Mechanisms:* There are sufficient funds required for the effective implementation of climate change frameworks. International financial mechanisms, such as the Green Climate Fund, aim to support developing countries in their climate change mitigation and adaptation efforts. Countries need to explore innovative financing models, mobilize domestic resources, and engage in public-private partnerships to secure the necessary funding.[47]
- *Capacity Building:* Building the capacity of countries, particularly developing nations, is crucial for effective climate change action. Capacity building efforts should focus on strengthening technical expertise, promoting research and development, enhancing institutional capacity, and providing training and education on climate change-related issues. This empowers nations to formulate and implement effective policies and measures.[48]

➢ ***Monitoring, Reporting, and Reviewing Progress***

- It is important to establish robust systems of monitoring for tracking the progress of climate change frameworks and evaluate their effectiveness. This will help to make informed policy decisions. Monitoring systems should include comprehensive data collection, indicators, and reporting mechanisms to measure greenhouse gas emissions, adaptation progress, and the implementation of climate change initiatives.[49]
- Regular review processes help assess the adequacy and effectiveness of climate change frameworks. Countries should participate in periodic reviews, such as the Global Stocktake under the Paris Agreement, to evaluate collective progress, identify gaps, and enhance

[45] UNDP. (2015). Sustainable Development Goals. Retrieved from https://www.undp.org/content/undp/en/home/sustainable-development-goals.html.
[46] World Bank. (2019). Building Resilience: Integrating Climate and Disaster Risk into Development. Retrieved from https://openknowledge.worldbank.org/handle/10986/32037.
[47] UNFCCC. (2019). "Financial Mechanism of the Convention." Retrieved from https://unfccc.int/topics/finance/the-big-picture/the-financial-mechanism-of-the-convention.
[48] Ibid.
[49] Ibid.

ambition in climate action. Transparent and inclusive review processes facilitate learning, knowledge-sharing, and accountability among nations.[50]

Developing effective climate change frameworks requires a multi-faceted approach that encompasses national and international cooperation, policy interventions, strategies for sustainable development and resilience, financing mechanisms, capacity building, and robust monitoring and review processes. By implementing these frameworks, nations can address the challenges posed by climate change, reduce greenhouse gas emissions, build climate resilience, and create a more sustainable and prosperous future for present and future generations.

VI
CONCLUSION: THE WAY FORWARD

The preceding chapters have provided a comprehensive understanding of the devastating impact of climate change in India. Rising temperatures, unpredictable monsoons, sea-level rise, extreme weather events, health risks, fragile ecosystems, and biodiversity loss are among the critical challenges faced by the country. This chapter serves as a summary and reflection on the key findings presented throughout this study and emphasizes the urgent need for action, as well as the importance of continued research and effective policy implementation.

- Recap of Key Findings

The analysis of scientific studies, empirical evidence, and reports highlighted the alarming consequences of climate change in India. The country's vulnerability is amplified due to its large population, heavy dependence on agriculture, and fragile ecosystems. Rising temperatures have far-reaching impacts on various sectors, including agriculture, public health, and infrastructure. Unpredictable monsoons disrupt water availability and agriculture, while sea-level rise threatens coastal regions. Extreme weather events pose risks to human lives and socio-economic development. Furthermore, health risks, such as heatwaves, vector-borne diseases, and air pollution, further compound the challenges. The degradation of fragile ecosystems and loss of biodiversity further exacerbate the vulnerability of India's natural resources and ecosystems.

- Call for Urgent Action

The findings presented in this study underscore the urgent need for comprehensive and immediate action to address climate change in India. The impacts are already being felt, and

[50] *Supra* Note 38.

the consequences will only intensify without timely interventions. The government, policymakers, stakeholders, and the international community must recognize the gravity of the situation and work collaboratively to mitigate greenhouse gas emissions, enhance adaptation measures, and promote sustainable development practices. The time for action is now, as delaying or inadequate responses will result in irreparable damage to ecosystems, livelihoods, and the well-being of present and future generations.

- Collaborative Approach towards Future Research and Implementation

To address the challenges of climate change effectively, it is essential to continue advancing research and improving policy implementation. Future research should focus on further understanding the specific regional impacts of climate change in India, exploring innovative and sustainable solutions, and evaluating the effectiveness of adaptation and mitigation measures. This research can inform evidence-based policy decisions, resource allocation, and the development of comprehensive climate change frameworks. Policy implementation requires the integration of climate change considerations into various sectors, including agriculture, public health, infrastructure development, and ecosystem preservation. It necessitates the development of robust institutional frameworks, stakeholder engagement, capacity building, and financial mechanisms to support implementation efforts. Additionally, international cooperation and knowledge-sharing platforms should be strengthened to facilitate collaboration and learning from global best practices.

The ramifications of climate change present considerable difficulties to India's societal and financial structures, natural environments, and at-risk groups. The previous passages have furnished an all-encompassing summation of the principal conclusions demonstrated in this work, underlining the pressing necessity for activity, partnership, and progressing investigation. Tackling climate change requires a multifarious approach, entailing the development of far-reaching frameworks, policy interventions, monetary mechanisms, and capacity-building efforts. By behaving resolutely, India can relieve the disastrous impacts of climate change, enhance flexibility, and forge a sustainable and prosperous future for its inhabitants and the planet.

VII

SUGGESTIONS FOR COUNTERING THE ADVERSE RAMIFICATIONS OF CLIMATE CHANGE IN INDIA

Countering the adverse ramifications of climate change in India requires a comprehensive and multi-dimensional approach. Here are some suggestions for addressing this urgent issue:

1. Mitigation Strategies:
    - *Transition to renewable energy sources:* Promote the use of clean and sustainable energy sources such as solar and wind power, reducing reliance on fossil fuels.
    - *Energy efficiency:* Encourage energy-efficient practices and technologies in industries, buildings, and transportation to reduce greenhouse gas emissions.
    - *Afforestation and reforestation:* Increase forest cover and protect existing forests to absorb carbon dioxide and mitigate climate change.
    - *Sustainable agriculture:* Promote climate-smart agricultural practices that reduce emissions, conserve water, and enhance soil health.
2. Adaptation Measures:
    - *Climate-resilient infrastructure:* Design and implement infrastructure projects that can withstand the impacts of climate change, such as improved drainage systems, flood-resistant buildings, and resilient transportation networks.
    - *Water resource management:* Enhance water storage, conservation, and distribution systems to cope with changing rainfall patterns and ensure water security.
    - *Disaster preparedness:* Strengthen early warning systems, emergency response mechanisms, and community resilience to mitigate the impacts of extreme weather events.
    - *Biodiversity conservation:* Protect and restore ecosystems to enhance their resilience and preserve biodiversity, which plays a crucial role in maintaining ecosystem services.

3. Policy and Governance:
    - *Enact and enforce robust environmental policies:* Implement stringent regulations and standards to reduce emissions, promote sustainable practices, and hold polluters accountable.

- *Integrated planning:* Integrate climate change considerations into urban planning, land use management, and development policies to ensure resilience and sustainability.
- *Stakeholder engagement:* Encourage active participation of communities, civil society organizations, and private sector entities in climate change mitigation and adaptation efforts.
- *International cooperation:* Collaborate with global partners, participate in international agreements such as the Paris Agreement, and access financial and technical support for climate action.

4. Awareness and Education:
    - *Public awareness campaigns:* Raise awareness about climate change, its impacts, and the importance of individual and collective action to mitigate and adapt to it.
    - *Climate change education:* Integrate climate change-related topics into educational curricula at all levels to foster a culture of sustainability and empower future generations.
5. Sustainable Transportation:
    - *Promote public transportation:* Improve and expand public transportation systems, including buses and trains, to reduce reliance on private vehicles and lower emissions.
    - *Encourage electric mobility:* Incentivize the adoption of electric vehicles and develop charging infrastructure to transition towards a greener transportation sector.
    - *Non-motorized transport:* Invest in pedestrian-friendly infrastructure, cycling lanes, and pedestrian zones to promote walking and cycling as viable transportation options.

6. Circular Economy and Waste Management:
    - *Waste reduction and recycling:* Implement effective waste management systems to reduce the generation of waste and promote recycling and composting practices.
    - *Resource conservation:* Encourage the adoption of circular economy principles, such as reusing materials, promoting eco-friendly products, and minimizing resource extraction.
7. Climate Finance and Support:

- *Access climate finance:* Advocate for increased access to climate finance mechanisms and funds to support climate change mitigation and adaptation projects.
- *Technology transfer:* Facilitate the transfer of clean and sustainable technologies from developed countries to support India's transition to a low-carbon economy.
- *Capacity building:* Invest in training and capacity-building programs to enhance technical expertise and knowledge on climate change mitigation and adaptation measures.

8. Research and Innovation:
    - *Foster research and development:* Support research institutions and encourage innovation in renewable energy, climate-resilient agriculture, and sustainable technologies.
    - *Data collection and analysis:* Improve data collection systems, monitoring networks, and climate modelling capabilities to enhance understanding and prediction of climate change impacts in India.
9. Community Participation and Empowerment:
    - *Empower local communities:* Involve local communities in decision-making processes, empower them with knowledge and resources, and support community-led initiatives for climate action.
    - *Indigenous knowledge and practices:* Recognize and integrate traditional knowledge and practices of indigenous communities in climate change adaptation and natural resource management.

It is crucial to recognize that these suggestions should be tailored to India's specific context, considering its diverse socio-economic conditions and regional variations. Continuous monitoring, evaluation, and adjustment of strategies are essential to ensure their effectiveness in countering the adverse ramifications of climate change.

A JURISPRUDENTIAL CRITIQUE OF PRISONERS' RIGHTS THROUGH THE PARADIGM OF MENTAL HEALTH

Manya*

Abstract

Mental well-being is considered as one of the most important element of a human being in completeness. It is not only an important right, but holds an important place in the ancient and modern philosophies, thereby seeping in the jurisprudence and justice theories. Further, these theories and philosophies have culminated into the rule of law and reflect as a very pertinent element in the access to justice regime. The article aims at highlighting the importance of these philosophies as a core value which binds us till date in order to have a comprehensive rights regime for the mentally ill prisoners. It also aims at critiquing the gaps in the modern day legislations and legal instruments from the jurisprudential perspective. This article delves into the jurisprudence behind a need for prisoners 'rights from the lens of mental health, wherein the concept of justice and the need for mental well-being is first discussed. Thereafter, emanating from justice is the concept of rule of law which has been discussed in the light of access to justice in order to realize the right to mental health. Further, mental health of prisoners is analysed from the constitutional perspective, emphasizing on the gradual incorporation of the prison jurisprudence.

I

Introduction

All human beings, including prisoners, have the best possible quality of bodily and mental health by virtue of their birth. The right to physical and mental well-being of prisoners has been acknowledged not only by the World Health Organization's[1] Constitution and other international treaties and declarations, but also by the Hon'ble Supreme Court of India.[2] Prisons restrict prisoners 'personal liberty, which is a major cause of mental illness. Apart from that, the World Health Organization (WHO) has recognised concerns such as overcrowding, loss of privacy, violence inside prisons, future fears such as social inclusion as contributing to mental diseases among inmates.[3] Poor people are crammed into overcrowded prisons for months or even years while awaiting their initial trial, forced to forego job prospects and unable to support

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1 Preamble to the Constitution of the World Health Organization.

2 Parmanand Katara v Union of India and Others 1989 SCR (3) 997.

3 Lars Møller, Heino Stöver, Ralf Jürgens, Alex Gatherer and Haik Nikogosian (eds), "*Health In Prisons, A WHO Guide To The Essentials In Prison Health"* (2007).

their family. Legal exclusion has a particularly negative impact on women, who are frequently subjected to discrimination, assault, and sexual harassment. Women with mental illnesses who are facing incarceration are much more vulnerable when it comes to getting justice. It is critical to address these legal issues in order to ensure the protection of fundamental human rights.[4]

This modern day problem of prison injustice as is witnessed across the globe has been indicative of the prevalence of mental health issues among the prison inmates due to their incarceration. However, this alone is not sufficient to answer as to why is there a need for a mental health rights discourse for prisoners. It is pertinent to look back and assess the roots of this right to mental health, more so in case of prisoners.

In the light of the above mentioned, this paper aims to trace and analyse the roots of this "right to mental health (or well-being)" of prisoners by discussing the ancient philosophies on the concept of mental well-being. Further, it has also been aimed to critically analyse the rule of law with respect to access to justice from a jurisprudential perspective.

This paper will examine and critically analyse the historical and philosophical underpinnings of mental well-being, and its importance to achieve social justice. It will describe the reasons behind and need for moving towards the regime of rule of law. Further, it will go on to elucidate how the rule of law is being adopted by expanding the scope of access to justice to incarcerated people, and will assess the principle of equivalence needed for the realisation of prisoners 'right to mental health. Finally, it will look at the constitutional perspective of the rights of mentally ill prisoners and the judicial developments thereafter.

II

Mental Well- Being

Health and well-being have been correlatives from the time immemorial. As defined by the World Health Organization:

"Mental health is a state of well-being in which an individual realises his or her own abilities, can cope with the normal stresses of life, can work productively, and is able to make a contribution to his or her community." While there are two key parts to the present approach to the public mental-health regime: first, health without mental health is not possible; and second, mere absence of mental impairment does not entail good mental health. At the same time, it is important to look back in time and assess what mental health meant historically.

[4] OECD, "Expert Roundtables on Equal Access to Justice, Background Notes", (unpublished, 2015).

Emotional well-being, the ability to live a full and creative life, and the flexibility to deal with life's unavoidable adversities are all seen as beneficial attributes of mental wellness. According to Dhairyam[5], The culture in India and its philosophy has been one of a kind in promoting spiritual independence and fostering growth in the people.[6] Indian philosophy as well as Indian psychology has plethora of techniques in raising human consciousness. The ancient Indian civilization, also looked as 'Jagat Guru', owing to its golden history of his unique tradition and specific culture; describes that "everything has life and is respected to everyone with having a specific position, which reflects the wellness of everyone." The Indian philosophy has always propagated about mental wellness as a combination of the welfare of the individuals and the society.

Several concepts about how to live a good life and maintain well being were employed in India during the Vedic as well as Upanishadic periods. These broadly lay the ground work for understanding human nature, behaviour and place in the cosmos.[7] Furthermore, the term "mental well-being" had been defined in a variety of ways. Different cultures attempted to answer questions about the value of human life. Athenian philosophy emphasises "good deed and good character," but Victorian philosophy emphasises "honour, discipline, and duty," among other human characteristics.

In the modern society, there is a close relation between mental well being and happiness, as suggested by Kelsen. According to Kelsen, the desire to be happy is at the root of our efforts to create a just society. A just society would be one in which people are content with their lives. Therefore, he not only proposes happiness as a key element of well being, but also an important aspect to achieve social order and just society. In his words: " *But what does it really mean to say that a social order is just? It means that this order regulates the behaviour of men in a way satisfactory to all men, that is to say, so that all men find their happiness in it. The longing for justice's men's eternal longing for happiness. It is happiness that man cannot find alone, as an isolated individual, and hence seeks in society. Justice is social happiness. It is happiness guaranteed by a social order."*[8]

Kelsen assumes a qualitative understanding of societal and human happiness; a just social order must imply "happiness in an objective-collective sense," which means "fulfilment of specific demands, recognised... as needs deserving of being satisfied." Justice creates and

[5] D Dhairyam, "Research need for development of psychotherapy. In: Recent trends in Psychology." (Orient Longmans, Bombay, 1961).
[6] *Ibid.*
[7] S.K. Kumar, "Happiness and well-being in Indian tradition." 105-112 (Psychological Studies, 2006).
[8] Hans Kelsen, "What is Justice?"(1957).

mediates a type of social existence in which the desire for happiness confronts its inevitability. Aristotle was convinced that a particular way of social architecture is the optimum solution to manage social relations. As per him, to have a happy life or to be able to live properly, seeking justice is the only possible way. However, modernists have a different view point.

In modernity, the concept of achieving a decent society is fraught with difficulties. On the one hand, we now recognise that our social life is human-made, and that, as a result, we should be able to establish a social structure that responds to our needs and wishes. On the other hand, as moderns who recognise the inevitability of change, we recognise that any given social organisation could have been, and can become, something else.

In Nietzsche's perspective, a stable idea of justice is impossible for the modern because the modern 'knows' too much and, as a result, finds pluralism and perspectivism, or, to put it another way, pragmatism towards truth. We live in a historical period that recognises that change will always triumph over stability. "*Whatever its theor(y)ies of justice, late- modernity is doomed to dynamic - as opposed to static – justice."*

The above analysis presents a case for the need of mental well-being for all to have a just social order. Prisoners are also a part of this society. They come from the society and return back to the society itself. Hence, it is pertinent to discuss about the mental well being or mental health of prisoners.

III

Rule of Law vis-a-vis Access to Justice

When we talk about prisoners, it becomes mandatory to have a discussion on the legal system because a person becomes a prisoner by a sanction from a legal authority. We may say, the rule of law is of utmost importance in the present discourse as it dictates, or rather give power to some to curtail other person's liberty after deliberating the reasons based on the law. In this situation, the rule of law becomes of utmost importance so as to minimise arbitrariness.

The Rule of Law is an umbrella covering liberal political morality, which includes human rights, democracy, social justice and fairness, and liberty. Considering the diversity of these characteristics and values, it can be said that they do not always collaborate with each other, and we necessarily need different tools and methods to analyse social institutions on one hand, and political ones on the other.

The Rule of Law is of utmost importance in defending and realising the people's fundamental rights and freedoms, as well as in promoting social growth and development. Access to public services, control abuse of power, and establish a social contract between common people and the government are key to have a meaningful and impactful Rule of Law.

Development is intrinsically related to the Rule of Law, and to have a society based on stronger rule of law is one of the goals of the "2030 Agenda" and "Sustainable Development Goals (SDGs)".

Goal 16 specifically enables the Member States "to implement policy reforms at the national level that enhance progress on other SDGs". This is in line with the Rule of Law as when people receive quality services from the government, i.e., in the form of inclusive justice systems that are also accountable, their faith in the legitimacy of the same enhances. This in turn will help in empowering individuals as well as communities, both at national and international scales, to use judicial ways to safeguard their human rights.

Access to justice is a fundamental piece in completing the canvass of the Rule of Law. People have the right to seek justice, which is fundamental component of the rule of law. This right also involves to be heard, exercise rights with disabilities and inabilities, fight prejudices, etc, which is impossible without access to justice.

The idea of 'access to justice', like that of 'justice, 'is ambiguous, and one of the reasons it has been frequently brought up in legal and political discourse is that it is capable of a number of meanings depending on the commenters 'views and perceptions. Professor Paterson has attempted to address the concept of 'access to justice 'as follows:

"Access to Justice" as a phrase can be traced back to the nineteenth century, but as a concept it is a comparative newcomer to the political firmament, coming into frequent use only in the 1970s. Since then there has been no holding it. Hundreds of books, articles and reports have included it in their title, not to mention a swathe of initiatives from lawyer associations, politicians, governments, charities and NGOs around the world. As the redoubtable Roger Smith noted in 2010, 'In general...the phrase "access to justice" has a well-accepted, rather vague meaning and denotes something which is clearly – like the rule of law – a good thing and impossible to argue you are against. The strength and weakness of the phrase is in its nebulousness." In short, access to justice is like 'community 'in being a feel- good concept- one that everyone can sign up with unethical examination."[9]

By 2030, SDG 16.3 commits the international community to promote the rule of law at both the national and international levels, as well as to ensure that everyone has equal access to justice. An individual's quality of life as well as the strength of a country's rule of law is impacted by access to justice, and even more so for disadvantages groups, which can be increased by effective legal assistance. "Goal 16 on building peaceful, just, and inclusive

[9] A Paterson, "Lawyers and the Public Good: democracy in Action?"(The Hamlyn Lectures, 2011).

societies includes a dedicated target on the rule of law and access to justice, which is to be considered an important accelerator of progress across the entire 2030 agenda, as it contributes to poverty eradication (SDG 1), gender equality (SDG 5), decent work (SDG 8), and reduced inequalities (SDG 10), among other things."Member States acknowledged the connection of justice, peace, and development when they adopted the 2030 Agenda and included an explicit aim on peaceful, just, and inclusive communities." However, as it stands today, many people across the globe still lack effective access to justice and affordable legal assistance. This can be corroborated by the fact that under trial prison detention his still high, at about 31% over the last decade. In societies affected by crisis with high requirement of legal assistance, there is a lack of institutional capacity coupled with lack of sufficient financial resources with the courts to deal with high societal demands. The term "access to justice" encompasses both descriptive and normative aspects. In its broadest meaning, it refers to the extent to which citizens have access to legal services that allow them to assert and safeguard their legal rights.[10]

Access to justice, in its normative sense, implies an ideal state where there is equal access for all, which connotes that it is the responsibility of the state to provide everyone with same opportunities and capacities to exercise their rights. Right to legal aid is often a determinant right of access to justice.

However, in reality, there can be two ways to look at access to justice. The first view point is restricted in its essence, wherein, access to justice is limited to an individual's right to enforce in courts of law with operates within the domain of fairness, justice, expediency, and effectiveness with respect to cost.[11] A border view point considers equal access for all to legal services, institutional capacity for the disabled and vulnerable groups, availability of alternatives to traditional ways of conflict resolution processes, and bridging the gap between the majority and the marginal from seeking redress.[12]

Thus, access to justice can help in making adjudication faster and cost effective, as well as providing for ADRs (Alternate Dispute Resolution), with diversity of litigants, be it vulnerable groups of marginalised populations.[13]

After the above discussion, it is pertinent to mention that access to justice in both the narrow and the broader sense fuels for a better rights regime for the incarcerated population. It is

[10] Tom Cornford, "*The meaning of access to justice" (*Access To Justice- Beyond The Policies And Politics of Austerity, 2016).
[11] Francesco Francioni , "The Rights of Access to Justice under Customary Law" (Access To Justice As A Human Right, 2017).
[12]" Access to Justice Advisory Committee Access to Justice: An Action Plan" (Canberra, 1994).
[13] R Smith, *"Justice: Redressing the balance*" 9 (London, Legal Action Group, 1977).

therefore necessary to pay attention to it, and incorporate this principle of access to justice not only in the legislative framework, but also in the infrastructural needs and human resources of the country. Internationally, focus has been shifted to strengthen the rule of law by incorporating the principle of access to justice by realising the same in various international instruments and covenants. It is not pertinent to discuss and evaluate the principle of equivalence as we have so have derived, vis-à-vis the mental health care pertaining to the prisoners.

IV

Principle of Equivalence in Mental Health Care of Prisoners

It has been seen that instruments pertaining to human rights make an assumption that the reason behind sending the prisoners to the prison is not 'for punishment', rather 'as punishment'. Therefore, they retain all the human rights with the exception of the right to liberty.[14] And so, it should include equitable access to healthcare.[15]

It is pertinent to state the principle as mentioned in The United Nations Basic Principles for the Treatment of Prisoners, which says: "Prisoners shall have access to the health services available in the country without discrimination on the grounds of their legal situation."[16] The principle of equivalence, which states that prisoner populations should receive healthcare comparable to that provided to the general population of the country in which they are detained, is frequently cited by government policy documents[1718] and international health and human rights organisations[19] as the benchmark against which prison healthcare should be measured.[20]

The notions of equity and principles of distributive justice which are generally accepted, acts as a support system for the principle of equivalence. Equals must be treated equally according to their equalities, according to Aristotle's formal theory of justice (and the corollary

[14] N. Flynn, "Introduction to Prisons and Imprisonment. Winchester" 33(Waterside Press, 1998).
[15] M. Levy, "Health services for prisoners" 510-11 (BMJ, 2011).
[16] UN Basic Principles for the Treatment of Prisoners, resolution/adopted by the General Assembly, 28 March 1991, A/RES/45/111. http://www.unhcr.org/refworld/docid/ 48abd5740.html (accessed 5 May 2023)
[17] 17 Joint Prison Service and National Health Service Executive Working Group, *"The Future Organisation of Prison Healthcare. London"* (Department of Health, 1999).
[18] Department of Justice. Correctional Health care, *"Guidelines for the Management of an Adequate Delivery System"* U.S. Department of Justice, National Institute of Corrections, 2001. http://static.nicic.gov/Library/017521.pdf (accessed 5 May 2023).
[19] WHO (regional office for Europe) health in prisons project and the Pompidou Group of the council of Europe. Prisons, Drugs and Society: A Consensus Statement on Principles, Policies and Practices. 2001. http://www.euro.who.int/ document/E81559.pdf (accessed 5 May 2023).
[20] R. Lines, "From equivalence of standards to equivalence of objectives: the entitlement of prisoners to health care standards higher than those outside prisons" 269-80 (Int J Prison Health, 2006).

that they are treated unequally according to their inequalities).[21] Rawls believed that primary goods should be distributed equally unless the poorest people profit from an unequal distribution.[22] Extending these principles to healthcare, Daniels contends that justice necessitates a distribution that maximises equality of opportunity, which includes taking proactive measures to decrease health disparities.[23] Consequently, unequal distribution can be justified by the ideal of fairness. In health related matters, the principle of equivalence contends that prisoners are intrinsically equal to those outside of the prisons, and mere imprisonment does not calls for a moral explanation to give them a different sets of treatment in relation to human rights, where inequality would amount to harm. However, justice as defined by Rawls could be used to justify unequally beneficial treatment in order to compensate for a prior systematic disadvantage.[24]

A trend has been witnessed in the Indian prison system which relates to the over representation of mental health problems as compared to non prison population which makes the prison healthcare complex.[25] The WHO is of the opinion that the aim of policy for equity in health is "not to eliminate all health differences so that everyone has the same level and quality of health, but rather to reduce or eliminate those which result from factors which are considered to be both avoidable and unfair".[26] The principle of equivalence should be applied to reduce avoidable or unfair health disparities between the prisoner population and the general population, while also striving to meet the United Nations International Covenant on Economic, Social, and Cultural Rights, which affirms "everyone's right to the highest attainable standard of mental health."[27] Further, the implementation of the principle of equivalence is also in line with other human rights instruments such as the "Basic Principles Governing the Treatment of Prisoners",[28] which only consider the loss of liberty as a kind of punishment, not the loss of liberty combined with other disadvantages like inferior healthcare. It is now

[21] Aristotle, (translated by J. A. K. Thomson), *"Nicomachean Ethics"* (Penguin Classics, London, 2004).
[22] J. Rawls, *"A Theory of Justice*" (Harvard University Press, Cambridge, 1971).
[23] R. Walmsley, *"World Prison Population List*" (8th edn, Kings College London International Centre for Prison Studies, 2009). http://www.kcl.ac.uk/depsta/law/ research/icps/downloads/wppl-8th_41 .pdf (accessed 5 May 2023).
[24] Supra Note 22.
[25] Supra Note 3.
[26] M. Whitehead, "The concepts and principles of equity in health. Int J Health Services" 429-45 (1992).
[27] General Assembly. International Covenant on Economic, Social and Cultural Rights, GA Res 2200A (XXI), 21 UN GA0R Supp (No. 16) at 49, UN Doc A/6316 (1966); 993 UNTS 993 UNTS 3; 6 ILM 368(1967). http://www.un.org/Depts/dhl/ resguide/resins.htm (accessed 5 May 2023).
[28] Basic Principles for the Treatment of Prisoners, resolution/adopted by the General Assembly, 28 March 1991, A/RES/45/111. http://www.unhcr.org/refworld/docid/ 48abd5740.html (accessed 5 May 2023).

important to discuss the Indian legal development, principally and fundamentally on one hand and practically through judicial decisions and legislative changes on the other.

V

Constitutional Perspective and Prison Jurisprudence

Our Constitution begins with the Preamble that itself enlists "Justice- social, economic and political" as its primary objective. For the present discourse, it is necessary to understand the above in the light of the prison system. In this respect, it is pertinent to quote what Krishna Iyer, J opined prison as:

"A reformative philosophy, rehabilitative strategy, therapeutic prison treatment and enlivening of prisoner's personality through a technology of fostering the fullness of being such a creative art of social defense and correctional process activating fundamental guarantees of prisoner's rights is the hopeful note of national prison policy struck by the constitution and the court".[29]

The idea of prisons and the jurisprudence underlying the same has evolved over a period of time through plethora of judicial decisions, which shall be discussed in the latter part of this chapter. The definition and conception of a prison in the traditional sense no longer exists. Prisoners once enter the prison system are stripped off of various freedoms, like liberty, security, heterosexual relations, autonomy, so forth and so on.[30] Indian prison jurisprudence has been widely impacted by the penal changes around the world, and credit is due to human rights jurisprudence to bring about this change. The process of penal reform started by the inception of the reformative idea of punishments.[31] The meaning of the prison of the time should be one that embraces reformative values. The reformative part considers how to incorporate humane ideals into the prison system, and prison authorities must work toward this goal.[32] The level of legal protection provided by the legal system for the reformation of convicts should be determined by a national legal framework, which India lacks.

[29] Mohammed Giasuddin v. State of Andhra Pradesh, A.I.R. 1977 S.C.1926
[30] Gresham Sykes, *"The Pains of Imprisonment"*, Norman Johnston, Leonard Savitz *et al.* (edi.), "*The Sociology of Punishment and Correction"* 131 (John Wiely & Sons, Inc, New York, 1962).
[31] Rupert Cross, "Punishment Prison and The Public" 43(Stevens and Sons, London, 1971).
[32] M.J. Sethna, "*Society and the Criminal"* 352 (3rd edi., N.M. Tripathi Pvt. Ltd., Bombay, 1971).

The Indian constitution recognises jail administration as a state responsibility.[33] The primary function of prison administration is to ensure the safe custody and control of inmates.[34] There are several complexities in realising prisoners' rights, and State devised legislations usually fall short in dealing with these complexities. A national policy might be helpful in dealing with the state based regressive laws in this area, which is also complaint with International human rights standards.

India's prison system is still governed by legislation that dates back over a century.[35] The Prisons Act only addresses the classification and segregation of convicts based on the nature and condition of their incarceration. Many of the concepts established by the judiciary, as well as those recommended by human rights law, were not included into its premises. The Prisons Act likewise tries to shift the burden of jail management onto the state.[36] Even solitary imprisonment, which the judges had protested vehemently, is still included in the Act.[37] If the freedom to roam, mix, mingle, converse, and share company with co-prisoners is considerably reduced, it will be in violation of Art. 21, unless the restriction is backed by legislation, and that law should spell out a fair, just, and reasonable approach.[38] Various research[39] undertaken by psychiatric and medical professionals imply that jails have a significant negative impact on prisoners' mental health. Prisoners are more vulnerable to mental health concerns such as stress, suicide ideation, insomnia, anxiety, and so on. Furthermore, it has been discovered[40] that there is an inverse association between available psychiatric care and jail, highlighting the issue of mental health in prisons.

Therefore, in the light of the above, the shift towards a reformative prison justice system is not only a welcoming step, rather a much needed one. To have reformation as one of the objectives of punishment has redefined the prison jurisprudence. Justice Krishna Iyer was the person who, often called as the father of prison jurisprudence in India, strongly advocated for having reformative treatment of prisoners. He tried to infuse reformative values into the jail

[33] The Constitution of India, 1949, Schedule 7 List II, Entry 4.
[34] Paul F. Cromwell, Jr., "*Jails and Justice"*95 *(* Charles Thomas Publisher, Springfield, 1975).
[35] The Prisons Act, 1894.
[36] *Id*, s. 4.
[37] *Id*, s. 29.
[38] *Sunil Batra* v. *Delhi Administration* A.I.R. 1978 S.C.1675
[39] SM Assadi, M Noroozian, M Pakravannejad, O Yahyazadeh, S Aghayan, SV Shariat, et al, *"Psychiatric morbidity among sentenced prisoners: Prevalence study in Iran*"(Br J Psychiatry, 2006).
[40] LS Penrose, "Mental disease and crime: Outline of a comparative study of European statistics" (Br J Medical Psychology, 1939).

administration in all of his decisions. The judges of his time also changed the definition of crime. It was observed that:[41]

"Crime is a pathological aberration that the criminal can ordinarily be redeemed that the state has to rehabilitates rather than avenge. The sub-culture that leads to anti-social behavior has to be countered not by undue cruelty but by re-culturisation. Therefore, the focus of interest in penology is the individual and the goal is salvaging him for society. The infliction of harsh and savage punishment is thus a relic of past and regressive times."

The Indian judicial system of prison management has been reorganised and modernised. As quoted above, it demonstrates the proper influence of international human rights law on the Indian judiciary. The Gandhian idea of treating offenders as patients and the therapeutic role of punishment was highlighted by the Court in the Giasuddin case.[42] After reviewing all of the circumstances surrounding the appellant, the Supreme Court decided that the sentence should be lowered to 18 months. The court further ordered that a guarded parole release be made every three months for at least a week, punctuating the overall prison term, and that adequate mental cum-manual work be assigned, as well as payment of salary while in jail. Under Section 357 of the Cr.P.C., the appellant was ordered to pay a fine of Rs. 1200/- to be paid to the victim of deception. Krishna Iyer, J., who delivered the verdict, further stated that the judge must employ a broad range of powers in reforming the criminal before him.[43] This verdict therefore introduced the concept of reformation outside of the four walls of prison.

The Hon'ble supreme Court of India highlighted issues like overcrowding, torture, delayed trial, ill treatment of prisoners, neglected health and hygiene, etc. The Court cited an unhealthy living environment inside the facility as a serious problem which affects the mental health of the inmates.[44] The court also emphasised the importance of the state providing enough amenities for the prisoners in order to improve their living conditions inside the prison. The condition stayed the same a decade after this verdict, and another judgment showed the same to the court.[45]

One of the detainees, P. Bharathi of the Central Prison in Puducherry, wrote a letter to one of the Honorable Judges of the Supreme Court about his ordeal. It was decided that the

[41] Mohammed Giasuddin v. State of Andhra Pradesh, A.I.R. 1977 S.C.1926.
[42] Supra Note 41.
[43]" The judgment observes that the judge have to use their power to provide actual hospital treatment for the prisoners and liberal parole in advancing the reformation of prisoners."
[44] *Ramamurthy* v. *State of Karnataka,* (1997) S.C.C. (Cri) 386.
[45] P. Bharathi v. Union Territory of Pondicherry and Others, 2007 Cri. L. J. 1413.

letter will be considered as a writ petition. It discussed the prison's inadequate sanitary and maintenance conditions, as well as limits on visiting by the prisoner's relatives. Basic necessities like toilets at night being non functional in jails were compromised. Not just that, two plastic buckets were provided for the purpose at night, and next morning, the inmates were asked to clean the buckets full of excreta, which directly violates the right to live with dignity of prisoners. Shockingly, this was done as per jail laws. Therefore, there is a strict need of updating jail laws and bringing a centralised legal framework to see jail administration.

Mrs. Veena Sethi vs. State Of Bihar And Ors[46] arose from a report published in the Indian Express on December 17, 1981 about 16 mentally ill inmates at the Hazaribagh Central Jail who had each spent more than 25 years in prison. All of these people [most of whom were accused of committing an offence under Section 302 of the Indian Penal Code (IPC)] were sentenced to prison by the Court due to overcrowding in mental asylums, according to the judgment.

Jail records not being maintained properly would result in rotting of prisoners behind the bars with mental illnesses. Several prisoners spend their life in prisons due to this reason, which actually they should have been presented before a court of law immediately owing to their mental health conditions. The court's decision strongly condemns the callous manner in which the jail administration, as well as the Magistrate and other departments, handled these cases. These detainees were finally released by the court. However, the decision did not address the problem of improving jail conditions for mentally ill inmates.

In 1984, a prisoner named Rama Murthy from the Bangalore Central Jail wrote a letter to the Chief Justice of the Bangalore High Court about prisoner grievances (the case of Rama Murthy v. State of Karnataka, 1997[47]), after which the court took cognizance and ordered a District Court Judge to visit the Bangalore Central Jail to verify the allegations (the case of Rama Murthy v. State of Karnataka, 1997), after which the court took.

The Judge took to the pen and wrote a report regarding the state of patients with mental incapacities in the prisons, wherein he noted that these prisoners were forced to stay behind he bars, in fact what they needed was significant mental health support and medical need from the outside. In this case, an appreciable recommendation was made by the Judge, i.e., "in the case of mentally ill patients, the National Institute of Mental Health and Neuro-Sciences

[46] Mrs.Veena Sethi vs. State Of Bihar And Ors AIR 1983 SC 339
[47] Rama Murthy v. State of Karnataka, 1997 LAWS(SC)-1996-12-150.

(NIMHANS) authorities should be asked to treat them as in-patients until they recover their normalcy rather than referring them back to prison." However, unfortunately, the same was not included in the Court's directives in that matter. The issue of illegal detention of inmates was raised in the case of Sheela Barse v. Union of India[48] in 1989, when the Supreme Court of India issued an order forbidding the imprisonment of non-criminal mentally ill people in prisons.

Senior Advocate Gopal Subramanium was then given the task by the government to make sure that the order was followed faithfully throughout Assam. Some unsettling facts were written by him about the same, like the fact that the number of persons incarcerated in Assam jails based on mental illness was frightening, and that upon investigating further, several of them were not suffering from mental diseases. For example, in one case, a person was sentenced to prison for being very talkative.[49]

Although the Court's action was commendable, its execution was limited to Assam, and despite the fact that the judgement was intended to safeguard non-criminal mentally ill patients from the jail environment, mentally ill people accused of criminal offences were left out. Once again, no attention was paid to improving the conditions of jails so that these mentally ill persons could be accommodated.

Court thereafter took action, however, the same was restricted to Assam with respect to its execution. The downside of the same was mentally ill inmates accused of criminal offences were not included in the list of prisoners safeguarded against non criminality from jail environment. Shortly after the decision, the National Human Rights Commission (NHRC) released its Annual Report for 1994-95,[50] highlighting the appalling conditions of prisoners by visiting overcrowded prisons such as Tihar in Delhi and underutilised ones such as the open jail in Hyderabad. The study again highlighted the pathetic conditions of inmates dealing with mental illnesses. The National Seminar on Prison Reforms, 2014,[51] organised by the National Human Rights Commission (NHRC), recognised several issues and presented recommendations/proposals to address them. The rights of mentally ill prisoners were ultimately placed on the list. However, the difficult element, namely implementation, remains to be completed. Therefore, it can be said that through various judicial decisions the rights of the mentally ill prisoners have been tried to be realized and implemented. To materialize these

[48] Sheela Barse v. Union of India (1993) 4 SCC 204.
[49] *Supra Note 48.*
[50] *https://nhrc.nic.in/annualreports/1994-95.*
[51] National Human Rights Commission NATIONAL SEMINAR ON PRISON REFORMS 2014 https://nhrc.nic.in/sites/default/files/recomm_of_NS_on_Prison_Reforms_2014_1.pdf

judicial trends, legislature has also been active in taking care of the rights of the mentally ill prisoners.

A mentally ill prisoner is a person who has been ordered to be detained in or removed from a psychiatric hospital, psychiatric nursing home, jail, or any other place of safe custody under section 27 of the Mental Health Act, 1978 (hereafter 'MHA').[52] When a mentally ill individual is treated harshly or is not properly cared for and controlled,[53] an order under section 27 is issued. The document will use the phrases mentally ill and lunatic interchangeably because the judiciary has done so in the past.

A new piece of legislation, the Mental Healthcare Act (MHA) 2017 has been implemented which realised the rights of prisoners with respect to their mental health, and imposed a corresponding duty on the State to implement those rights.

VI

Justice Unrealised

As discussed above, there have been plethora of initiatives to deal with realisation of rights of the mentally ill inmates, however, the same has progressed only in the written form, but not as a matter of fact. Even today, mentally ill inmates are ill treated and effectively turned insane.[54] a lot of recommendations are still not adopted and implemented by the States, which should be formally implemented by way of national laws. In India, the Mental Healthcare Act, 2017, has been implemented, however, the ground level impact of the same is yet to be seen. Lack of institutions, be it mental hospitals or other care institutions is a huge barrier in implementing the laws, due to which a large number of mentally ill prison population have to live inside the jails with no recourse to proper healthcare services.

The NHRC recommended a short term solution to the issue of institutional shortage, wherein they suggested that private hospitals be used until government institutions are created to take care of this issue. They further suggested that inmates with mental illnesses be housed separately in prison barracks, which can be fruitful if a separate building is created inside jails for such inmate, and does not cause explicit seclusion and discrimination. These special buildings must also be equipped with trained staff to deal with such inmates in order to avoid

[52] Section 2 in The Mental Health Act, 1987
[53] Section 27 in The Mental Health Act, 1987
[54] Aparna Chandra, Mrinal Satish, Ritu Kumar & Suma Sebastian (eds.), *'Prisoners' Rights*" (4th Edition Vol-I, 2017).

abuse, which is otherwise rampant in jails. The jail environment can be damaging to the point where a mentally ill prisoner's condition worsens with time,[55] while others seek suicide.[56]

It must also be pressed that in case an inmate with mental illness is not showing any improvement despite keeping them separately under psychiatric care, then that inmate must be released rather than being left in the prison to die. This is also in line with the right to live with dignity. To add, details and procedures must also be chalked out for the maximum year of imprisonment in case of mentally ill prisoners, along with parole rules.

The remaining issues have been addressed in the NHRC's recommendations. All the government has to do now is put the rules into action. This is because, under Article 14 of the Constitution,[57] people with mental illnesses have the right to equitable treatment, and it is the government's responsibility to uphold this right. Lastly, an inclusive approach is the need of the hour to actualise the rights of mentally ill inmates.

VII

Conclusion

Our ancient philosophies have given utmost importance to well being, both physical and mental. What is relevant for this paper is mental wellness. Be it ancient Indian philosophies or Greek philosophy, the value of mental health had been intact since time immemorial. In the modern times, Kelsen took a step further and related happiness as well being and went on to say that it is collective individual happiness that leads to social justice. Prisoners are equally a part of the society, and to achieve social justice, it is pertinent that their happiness and mental well being must be maintained. The rule of law has been a support in strengthening this form of social justice, and in the modern times, a great deal of importance has been given to the principle of access to justice, which in a way is a tool to materialize the rule of law. Together, all these principles work towards safeguarding the rights of all individuals, in this case, mentally ill prisoners. Further, it has been observed that these principles have been incorporated in the human rights based international instruments and covenants which amplify the principle of equivalence, especially in the case of mental health care of prisoners.

In India, a new area of jurisprudence was developed by judicial decisions so as to safeguard the rights of prisoners, more so that of mentally ill prisoners. Justice Krishna Iyer had played a

[55] Charanjit Singh And National ... vs State And Ors. on 4 March, 2005
[56] Sheila Barse vs Union Of India And Ors. (1993) 4 SCC 204
[57] *"Equality before law - The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India"*

vital role in developing this prison jurisprudence which not only led to plethora of judicial pronouncements, but also changes in the legislative framework. The latest Mental Health Care Act of 2017 has given a statutory right to the prisoners of that of mental health and with that a corresponding duty has been imposed on the State to implement these rights.

Although, as it stands today, prisoners are still going through a vicious cycle of mental health abuse and violation of human rights. Inmates 'stigma, isolation, and prejudice frequently result in abuses of their rights, causing stress and dissatisfaction. This scenario frequently escalates into mental disorders, which can lead to major impairments and disabilities due to a lack of psychological support on the inside. It must be noted that fundamentally and historically, we have given utmost primacy to mental health of all the individuals, including prisoners. The lacunaes in the law must keep going back to these principles in order to achieve a just society where every prisoners 'right to mental health is realised.

ESSENTIAL RELIGIOUS PRACTICE TEST: A THREAT TO INDIVIDUAL LIBERTY

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Abstract

The Essential Religious Practice test has been the bedrock of Indian religious freedom jurisprudence. For the last seventy years, the Indian judiciary has relied upon this test to resolve the conflict between individual, state and religious denominations in matters of religion. However, on many occasions, this test has been found wanting on complex questions of discrimination. The recent case of Resham v State of Karnataka is one such occasion. In its judgement, the Karnataka High court placed extensive reliance upon the Essential Religious Practice test to determine whether the order passed by the government to restrict the use of Hijab in schools is valid.

Prima facie, the judgement and the government order may seem reasonable and valid. However, on a deeper level, they fail to recognise the indirect discrimination caused by the government's action. The application of ERP. test in the judgement makes it indifferent to the indirect discrimination caused by the government order. Therefore, in this paper, the authors will attempt to suggest a new test to replace the ERP. Test. A test that would be better suited to resolve complex questions of direct and indirect discrimination based upon religion.

The authors of this paper will argue that the new test could be found in the constituent assembly itself. In the constituent assembly, the members believed that religious freedom and practice should only be restricted in circumstances where the practice violates the individual's civil liberty. In this paper, we argue that this is the best approach to resolve the conflict between individuals, states and religious denominations on matters of religion. This approach will help us develop a better understanding of direct and indirect discrimination.

Keywords:

E.R.P, Religious Freedom, Hijab, Discrimination, Religion.

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I
Introduction

Religion has been a complex phenomenon, even for discrimination and constitutional law. Religion as the ground of discrimination could bring us instances of systematic prejudice by the State and fellow citizens. However, religion is amply different from other proposed identifying 'markers' as a ground of discrimination. For instance, Freedman[1] asserts that the identifying principles may include immutability of marker,[2] historical disadvantage,[3] or even lack of political representation.[4] In the case of religion, none of these identifying factors could be a certainty. A person could change his religion any day; a religious group might face no historical disadvantage despite all that the group may still have to face discrimination. Therefore, determination of discrimination on the grounds of religion requires methods broader than the mere test of equality. Instances may arise where individuals claim discrimination and violation of rights by a religious group and state, yet the equality test may not ascertain the discrimination.

To resolve this conflict, courts around the world have adopted various mechanisms.[5] These mechanisms generally originate from and are based upon the Grundnorm of that particular State. India being a melting pot of various cultures have to face similar problems. Here conflict between individuals, State and religious groups on issue of religion and religious practices is pretty apparent. Therefore, the burden to harmonise the relationship between the individual, State and religious groups fell upon the judiciary.[6] The Indian courts in the last 75 years have given numerous judgements to diffuse the conflict between various stakeholders on the question of religion. In these verdicts, the Indian courts have applied several methods (most prominent of them being the essential religious practice test)[7] to pronounce the judgement on the religious freedom of individuals and groups. These judgements attempted to bring the Indian religious life in consonance with the idea of the Indian Constitution. These judgements attempted to invalidate discrimination against individuals in the name of religion by allowing the state action in matters of religion.

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[1] Sandra Fredman, *Discrimination Law* (Oxford University Press, Oxford, 2011).
[2] *Id*, at 131.
[3] *Id*, at 138.
[4] *Id*, at 134.
[5] Sandra Fredman, *Discrimination Law*, (Oxford University Press, Oxford, 2011).
[6] The Constitution of India, Art. 32, 226.
[7] In the Essential Religious Practice test, asserts that those practice which are essential for the existence of the religion shall be protected under the Indian Constitution. The responsibility to determine whether a practice is essential or not fell upon the Indian judiciary.

However, after all these years and countless decisions on religious freedom, the recent judgement of the Karnataka High court in *Resham* v *State of Karnataka*[8] (popularly known as the hijab-ban case) brought before us the vulnerability of essential religious practice tests. The test has been applied by the Indian courts for dissolving the conflict between religious freedom and state interference in the religious life of the individual. It brought before us the incapability of the E.R.P test regime in ascertaining the discrimination against individuals or groups in the name of religion. Hence, the time has come to move away from the current regime of the Essential Religious Practice test and replace it with another test better equipped to ascertain discrimination in the most complex of situations.

In this paper, the authors will argue against the current regime of the Essential Religious Practice test and favour a new test to replace the old one. For this purpose, in the next part of the paper, the authors will first trace the history of the Essential Religious Practice test in the colonial legal system and the constituent assembly. After that, the authors will unearth the role of Indian courts in developing the Essential Religious Practice test. In the next part, the authors will argue that the Essential Religious Practice test is incapable of dealing with complex claims of discrimination with the help of the Resham v State of Karnataka judgement. Then in the last part, the authors will suggest a new test to replace the Essential Religious Practice test to better adjudicate the claims of discrimination against individuals and groups.

II
The ERP Test: A Complex History

The Indian Constitution has attempted to establish a robust relationship between religion and the State. The Constitution keeps the power of the State in check to the extent that the State considers all religions equal.[9] The Constitution permits the State to enter the domain of religious matters but to a limited degree.[10] It could be a matter of debate as to how much the State can regulate the matters of religion. Nevertheless, in this part, we will not indulge in that debate; instead, we will attempt to trace the history of the principle of separation between religion and state in the Indian sub-continent. In this chapter, we will contend that the historical events relating to the separation between religion and the State have transplanted the concept of essential religious practice into our legal jurisprudence instead of constituent assembly.

[8] (2022) SCC OnLineKar 315.
[9] The Constitution of India, Art. 25(1)
[10] *Id*, Art. 25(2).

2.1 Essential Religious Practice in Colonial Era

The arrival of European states in the Indian sub-continent influenced the culture of this region. With the Muslim empire losing its power, the Europeans and, most importantly, the British replaced them in the Indian administrative power structure.[11] This change in power structure has brought with it different kinds of complications. The British have found themselves in a society whose legal system and political culture were quite different from their own. They saw that there was no certainty in the Indian legal system.[12] In this region, religion plays an essential role in the determination of religious as well as civil obligations.[13] They came here with the intention of trade, but to trade properly, they need some certainty in the legal system.[14] Therefore, when the British got the opportunity to administer this region, their first goal was to bring certainty to the legal system.[15] They understood the importance of religion in the life of an Indian; hence, they did not force any change upon the native population.[16]

Since the colonial regime was interested in trade, they made rules concerning taxes and commercial purposes, but they kept themselves out of the matters of religion.[17] There could be multiple explanations for such segregation between religious and commercial law. The most prominent of them would be that British officers required the support of the native population in governance; hence, they did not want to annoy the native population by regulating their religion.[18] To ensure non-interference of the colonial Government in matters of religion Warren Hastings in 1773, passed a regulation mandating that the personal matters of Hindus and Muslims shall be governed by their personal laws. It proclaimed that the colonial government should not interfere in the matter of religion of the native population.[19]

The regulation passed by Hastings insured autonomy to the religion, but a few questions still needed to be answered. The first question is, to what extent shall this autonomy be granted to the region? Secondly, do the personal laws have any kind of certainty or not? Answering these questions was so essential for the colonial rulers that for this purpose, they appointed many religious leaders as the native informant of the colonial Government.

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[11] Werner Menski, *Hindu law beyond tradition and modernity* 156 (Oxford University Press, New Delhi, 2003).
[12] Bernard Cohn, *Colonialism and its Forms of Knowledge* (Princeton University Press, Princeton, 1996).
[13] Sugata Bose & Ayesha Jalal, *Modern south Asia: History, culture & political economy* (Routledge, London 1998).
[14] Supra Note 12.
[15] *Id.*
[16] *Id.*
[17] Supra Note 11 at 158.
[18] JDM Darrett, *Religion, law and the state in India* 231 (Faber& Faber, London, 1968).
[19] Supra Note 11 at 161.

These local informants were crucial in establishing a proper governance mechanism in this country. When early courts were established in the presidency of Bengal, the courts also had jurisdiction over the native population. The newly established courts heard all kinds of matters. These matters include the matters of personal life and religion as well.[20] To deal with them, pandits and maulvis were appointed in the courts.[21] The English judges assisted these local informants in deciding the matters related to religion. However, the colonial judges were not satisfied with the employment of these informants as there was a possibility that the natives might become corrupt members of the court.[22] Furthermore, the colonial judges found that there was no certainty in the opinion of these religious informants, which could cause severe injustice to the litigants.[23]

To tackle this problem, the administrators have followed the two-way approach. In this approach, they tried to restrict and control the power of maulvis and pandits. First, the company administration decided to bring certainty to the Hindu legal system. For this purpose, they adopted the policy of codification.[24] They tried to codify basic texts on Hindu laws. The administrators did this with the help of local pandits.[25] However, there was one problem. The Hindu law was never based upon one single text like Abrahamic religions. In Hinduism, there were multiple texts and various communities had their customs. Furthermore, the texts used for the codification of Hindu law were modern texts and commentaries, which are written on historical documents.[26] This has resulted in bad interpretation and understanding of the shastra texts.[27] It has created more uncertainty in the whole system. However, certainty was not the sole goal of such codifications. In the later part of the 19th and earlier part of the 20th century, it was believed that codification could help in the social reform of religion.[28]

According to the colonial government, the foundation of the argument of codification and social reform arose from the idea that it will only allow those practice which is essential for the religion.[29] However, this idea of essentiality does not arise suddenly. It was part of the two-way approach of the colonial policy of modifying the Hindu law. When colonial administrators were ascertaining the extent of advice, they could take from Pandits, they found out that the

[20] Supra Note 12.
[21] Supra Note 18 at 268.
[22] *Id*, at 243.
[23] *Id.*
[24] *id*, at 244.
[25] M.P Jain, *Outline of Indian legal history* 576 (LexisNexis, Bombay, 1990)
[26] Supra Note 11 at 146.
[27] *Id.*
[28] Supra Note 25 at 634.
[29] JDM Darrett, *Hindu law past and present* 58 (A. Mukherjee & co., Calcutta, 1957).

native population took advice from these priests in some essential subjects of religion only. For all other aspects of religion, they trust their own choice.[30] Therefore, the company officials concluded that the judges should not accept the advice of the Pandits and the Maulvis in all matters. Their advice should only be considered in the essential matters of religion.[31]

This idea of essentiality worked well till the 1860s. Until then, the Maulvis and Pandits were essential to the legal system. However, post-1864 British adopted the policy of precedents.[32] In this, the judges would decide the questions on the matter of religion with the help of precedents developed in all these years without the help of any Pandit or the Maulvis.[33] This approach created problems of its Kind. The colonial Government never understood that Hinduism was an umbrella term. It includes in itself many communities that have significant variances in their customs. Hence, they decided issue on personal life and religion questions in a one-size-fits-all approach. This approach generated complete dissatisfaction among the native population. The colonial courts allowed custom to precede over codified law[34] to tackle this issue. In a significant judgment, the Privy council upheld the primacy of custom over written law.[35] *'In this case, the wife of the deceased zamindar adopted a son [Post her husband's demise] with the consent of her husband's sapindas. The consent of her husband was missing. On the death of the husband, the zamindari was seized by the Government.'*[36]

The wife contested the confiscation of zamindari. *'After going through various commentaries and sources, the Privy Council observed that clear proof of usage/custom will outweigh the written law. As a result, the zamindari was handed back to the heir of the zamindar.'*[37] This judgment was pretty momentous as it brought the concept of the essential religious practice test into full glory. It was the first time when a court of law affirmed that religion was out of the court's control. It has been recognised for the first time that the court shall not determine the basic aspects of the religion. Nevertheless, the approach of the primacy of religion over the law has been criticised by the Indian reformist. They argued that if the law provides primacy to custom, then the law for religious reform can never be adopted. Hence, to balance both sides, the colonial Government asserted the idea that the courts shall decide on essential religious practice. The balancing approach proved significant as it led to many reforms in religious

[30] Supra Note 18 at 230,235.
[31] *Id.*
[32] *Id,* at 227-28.
[33] *Id.*
[34] *Collector of Madura V. Mootoo Ramalinga,* (1868) 12 MLA 397.
[35] *Id.*
[36] *Id.*
[37] *Id.*

customs. These reforms include specifying the minimum age for marriage of women.[38] Right of women in the property of the family[39] and many others.

The Indian sub-continent has a different cultural and administrative framework than any other place in the world.[40] In this region, religion is as essential in the life of the residents as food. Therefore, any administrator who came to this part of the world has to respect the religious life of the natives.[41] This administrative necessity of religious deference has developed a new kind of secularism in this region. In this secularism, religion was part of public life and the state must treat all religions equally.

Since religion was part of public life in the sub-continent, the State adopted the policy of non-interference in the matters of religion.[42] However, with time the governing bodies have realised that all the aspect of religious custom was not going to satisfy the basic principles of human dignity. Hence, it was necessary that religious denominations must not have free will over the life of an individual.[43] Therefore, to regulate religious practice, the colonial State developed a concept similar to essential religious practice.[44]

With time India became an independent state with an aspiration of equality, liberty, and human dignity as basic tenets of the new State. In this new state, the question of religious practice and state regulation remains complex problems waiting to be answered in the constituent assembly.

2.2 The constituent assembly and religious freedom

In the constituent assembly, the essential question before the members of the assembly was how could they reform a traditional society based on religious beliefs into a modern society based upon the principles of liberty and equality. Few members of the assembly opined that the active role of the State in regulating the supremacy of religion in the lives of the citizen would go a long way in fulfilling the goal of a modern state.[45] They argued that, historically, in the name of religion and religious practice, innumerable acts of discrimination were committed against certain groups and individuals.[46] Therefore, the State must not protect religious practices under the fundamental rights chapter of the Indian Constitution to move away from this biased regime. They believed that religion must remain a private affair of the

[38] Supra Note 11 at 204.
[39] *Ibid.*
[40] Supra Note 12.
[41] *Id.*
[42] Supra Note 11 at 158.
[43] *Id.*
[44] *Id.*
[45] K M Munshi, I, *Indian Constitutional Documents* 309 (Bharatiya Vidya Bhavan, 1967).
[46] *Id.*

individual.[47] Furthermore, the State must take steps to ensure that principles of liberty and equality shall not be violated in the name of religious practice.

The members on the other side of the spectrum criticised the notion of religion and religious practice as a private affair of the individual.[48] They advocated that public life in India is much different from public life in the United States.[49] Here religion is an essential aspect of an individual's life.[50] Therefore, restricting religion to the private affair of an individual would create anxiety in the minds of Indian citizens. It would affect the legitimacy of the State in the eyes of the citizens.[51] These members believed that religious freedom as a fundamental right has no worth under the Constitution unless religion is part of the individual's public life.[52] They argued that if the constituent assembly ever intends to provide the fundamental right of religious freedom to the citizen of this country, then they must accept the notion of religious practice as a part of the religious freedom clause.

These two contradictory opinions on protecting religious practice under the Indian Constitution necessitated a compromise in the constituent assembly. This compromise was reached in the fundamental rights sub-committee itself.[53] Initially, the fundamental rights sub-committee advocated that religious worship should be protected as a fundamental right under the religious freedom clause instead of religious practice. Nevertheless, the committee on minority rights favoured religious practice instead of religious worship.[54] Therefore, when the religious freedom clause was finally drafted, it adopted the views of members from both sides of the spectrum. Article 25 of the Indian Constitution protected religious practice as a fundamental aspect of religious freedom. However, this freedom was not absolute.[55] The State had the power to regulate religious practice if it violated the individual's fundamental right. The State could further regulate religious practice if necessary for social welfare and reform.[56] Therefore, the compromise was very clear and assertive. The State shall allow freedom of religious practice to the extent it does violate the principles of liberty and equality. The constituent assembly

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[47] *Id.*
[48] 'Constituent Assembly Debate Vol X' (1949) Lok Shabha, available *at* http://164.100.47.194/loksabha/writereaddata/cadebatefiles/vol10.html (Last visited on 4th May 2023).
[49] *Id.*
[50] Constituent Assembly Debate Vol VII' (1949) Lok Shabha, available *at* http://164.100.47.194/loksabha/writereaddata/cadebatefiles/vol7.html ((Last visited on 8th May 2023).
[51] *Id.*
[52] *Id.*
[53] B Shiva Rao, II, *The Framing of India's Constitution: Select Documents* 173,208 (Government of India Press, Nasik, 1968).
[54] *Id.*
[55] The Constitution of India, Art. 25(1).
[56] *Id,* Art. 25(2).

never discussed the concept of essential religious practice. Instead, the assembly was clearly of the opinion that religion or religious practice shall not come in the way of an individual's right to liberty and equality. If it does, then the practice shall not survive. It was the Indian courts that brought the essential religious practice into the lamplight in its judgements. Due to this, on many occasions, the true intentions of the constituent assembly were suppressed in the complex legal interpretation of the Indian courts.

III
Essential Religious Practice and Supreme Court: Tale of A Reformist Court

Recognition of religious freedom as a fundamental right under the Indian Constitution ensured the protection of religious practice by the institutions of the State itself. It assured that any individual who feels that his right to religious practice is violated could demand its protection from the State itself. The responsibility of adjudicating and protecting the religious freedom of individuals and groups fell upon the shoulders of the Indian judiciary (prominently the Supreme court).[57] In the last seventy years, the Supreme Court attempted to interpret the religious freedom clause according to the wishes of our founding fathers. Nevertheless, the results were quite mixed.

The Supreme Court's judgements on religious freedom can be divided into two phases. The phases can be divided into before and after the judgements by Justice Gajendragadkar on religious freedom. The judgments before Justice Gajendragadkar's era show the Apex court's intention to treat civil liberty issues more eminently than the administration of religious property.[58] This approach of the Apex court aligns with the intention of the makers of our Constitution. The court fulfils the goals established by the constituent assembly to bring modernity to a traditional society. The Supreme Court's approach further ensured that there would be no unnecessary interventions upon the individual's religious freedom.

3.1 Supreme court and ERP in initial years

In one of the initial adjudications, the issue before the Apex court was to what extent the state can intervene in the administration of religious property. In the Shirur Mutt[59] Case, the issue before the Supreme court was the validity of "Madras Hindu Religious and Charitable

[57] The Constitution of India, Art. 32.

[58] *Ratilal Panachand Gandhi v. The State of Bombay*, AIR 1954 SC 388; The *Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt*, AIR 1954 SCR 1005.

[59] *The Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt*, AIR 1954 SCR 1005.

Endowments Act, 1951".[60] In this legislation, the Government had the power to take over the administration of religious institutions such as matts. This power can be used when the Government is satisfied with maladministration in the religious institution.[61] The Mutt Adhipati of Shirur Mutt challenged the legislation before the High Court, which agreed with the petitioner's views.[62] Against the high court's judgement, the state filed an appeal before the Supreme Court. The Supreme court analysed the arguments of both sides comprehensively. After that, the court held that under Article 26, 'matters of religion' are an absolute fundamental right.[63] Therefore, it can only be restricted in unison with the restriction provided in the Article. The court observed that anything essential for the existence of religion itself shall be part of the term 'in matters of religion.'[64] The court further observed that the religious groups shall determines what is essential for religion. However, since the administration of property is not an essential aspect of religion, it shall not fall within the term 'matter of religion.'[65] Therefore, the Government can regulate it under ordinary law. At this point, the court added an important caveat in its judgement. The court held that the Government could make laws to regulate the administration of religious property, but the State cannot take over the administration of religious property into its hand.[66] These arguments were quite significant. It established that religious denominations should remain free from state control as far as possible.

Similar observations can be gathered in *"Ratilal Panachand Gandhi* v. *The State of Bombay."*[67] Here two separate petitions were filled to assail the constitutional validity of the Bombay trust act 1950. The Act was challenged due to the overarching power it provides to the State in administrating the property of religious denominations.[68] Here the court agreed that State could regulate the administration of a denomination's property by a simple law. Nevertheless, the law must not extend to replace the State in place of religious denomination as an administrator of the property.[69] These judgements tell us that in the initial years, the supreme court favoured limited state control in admiration of religious property.

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[60] *Id* at para 5.
[61] *Id* at para 6.
[62] *Id* at para 5.
[63] *Id* at para 16.
[64] *Id* at para 23.
[65] *Id.*
[66] *Id.*
[67] AIR 1954 SC 388.
[68] *Id* at para 2, 3.
[69] *Id* at para 12, 14.

The same Supreme court flipped its approach when questions were related to the individual's civil liberty. In an important judgement on temple entry in Sri *Venkataramana Devaruand* Vs *State of Mysore*,[70] The Supreme court rejected the petitioners' contention that Article 25(2) of the Constitution will not apply to the temple of the petitioner since the petitioners are part of a religious denomination separate from the Hindu religion.[71] The court held that the purpose of Article 25(2) is to bring social reform to the traditional society. Therefore, the term Hindu must be given a wider interpretation to achieve this goal.[72] A mere claim of a religious denomination that they are not part of the Hindu religion shall not exempt them from applying Article 25(2) of the Constitution.[73] This judgement shows us that in matters of civil liberty, the Supreme court gave deference to the state instead of religious denomination. The court agreed that an individual or the group have religious freedom under the Indian Constitution, but it could not violate the individual's civil liberty.

The view that civil liberty shall override the power of religious denominations to maintain their affairs has been established extensively in the dissenting opinion of *Sardar Syedna Tahir Saifuddin* v *State of Bombay*.[74] In his dissent, C.J. B.P Sinha observed that if there is a conflict between the individual's civil liberties and a religious duty. Then civil liberty shall prevail over religious duty.[75] These judgements tell us that in the initial years, the Supreme court followed the true intention of our constitution-makers. The court restricted the State from interfering in matters of religion when the questions were not related to the civil liberty of an individual. However, it gave a free hand to the State to protect the civil liberty of the individual. Our founding fathers in the constituent assembly, too, wanted to achieve this goal only through the Constitution.

3.2 ERP and new approach of the Supreme Court

Then in the Supreme court came the era of Justice Gajendragadkar. A judge who was adamant about religious reforms since his days as a High court judge.[76] In an important judgement on the property administration in Ajmer dargah,[77] he undid all the previous Supreme Court's precedent upon this subject. The issue in the Dargah committee case was the validity of the

[70] AIR 1958 SC 255.
[71] *Id* at para 8.
[72] *Id* at para 25.
[73] *Id.*
[74] 1962 SCR Supl. (2) 496.
[75] *Id.*
[76] Justice Gajendragadkar in Bombay High court dealt with cases like Narasu Appa mali and *Sardar Syedna Tahir Saifuddin*. In these cases, he was not in favour of protecting religious custom over state law.
[77] *The Durgah Committee, Ajmer v. Syed Hussain Ali,* AIR 1961 SC 1402.

Dargah Khwaja Saheb Act, 1955.[78] The petitioners argued that the Act provided authority to the State to manage and take over the property of the Dargah. Therefore, the Act must be held unconstitutional. The arguments of the petitioner aligned with the Shirur Mutt judgement.[79]

Nevertheless, Justice Gajendragadkar did not agree with the opinions of the petitioner. Instead, he affluently pushed his agenda of social reform in the judgement. He observed that-

> *Whilst we are dealing with this point, it may not be out of place incidentally to strike a note of caution and [o]bserve that so that the practices in question should be treated as a part of the religion, they must be regarded by the said religion as its essential and integral part; otherwise even purely secular practices which are not an essential or an integral part of religion are apt to be clothed with a religious form and may claim being treated as religious practices within the meaning of Art. 26.*[80]

This observation gave immense deference to the State. It imposed a responsibility upon the courts to consider even the essential religious practices and administration of denomination's property from the lens of social reform. If, at any point in time, the court sense that the legislation approved by the State is made for social reform, it must allow the legislation to stand. The court can invalidate the legislation because it restricts the essential religious practice of a religious denomination. Nevertheless, while doing so, the courts have to be extra cautious. They have to impose a higher burden upon the religious denomination to prove that the practice is essential to religion and in line with the state's social reform agenda. Hence, this judgement brought the concept of reformative religion to the forefront of Indian religious freedom jurisprudence.

This judgement opened the floodgate of cases where the Supreme court interpreted the ambit of essential religious practice according to its whims and fancies. In *Tilkayat Shri Govindlalji Maharaj* v. *The State of Rajasthan*,[81] The Supreme court held that the religious denomination could not claim that they have the authority to administer the property of the denomination. The court reached this conclusion based on historical events. The court held that in the Mughal era, the temple went into private due to the treatment of Mughal kings. This means that the

[78] *Id* at para 1.
[79] Supra Note 61.
[80] Supra Note 77 at para 33.
[81] AIR 1963 SC 1638.

temple is not a private institution.[82] Therefore, the temple administration is not an essential part of the religion of the denomination. Hence, the legislation is constitutional as it does not violate the essential religious practice of the denomination.[83]

Similarly, in the judgement of *State of Rajasthan* v. *Sajjanlal Panjawat*.[84] The Supreme court gave more significance to historical events over the respondents' religious beliefs. In this case, the Rajasthan Public Trusts Act of 1959 was challenged. Under this legislation power of Jains to manage their temple was taken away, and it was vested in the state government.[85] The respondent contended that the temple's management was protected under the Constitution as a fundamental right. The court observed otherwise and held that, in the pre-colonial era, the Jains were disposed of from the management of affairs of the temple.[86] Therefore, temple management is not part of the essential religious practice of the denomination. Hence, the legislation is valid to the extent it vests the power of management of the temple in the hands of the Government.[87]

This judgement consolidated the new interpretation of the essential religious practice test. According to this interpretation, the courts shall determine whether a practice is essential for a religious denomination or not on its own. The courts have been freed from the burden of considering the arguments of the religious denomination upon the subject. This could best be gathered from the *Commissioner of Police* V. *Acharya J. Avadhuta*[88] judgement. In this instance, the religious denomination argued that Tandav dance is an essential religious practice. The founder of the denomination has recognised the dance as essential.[89] Had this case been decided in the Supreme Court's initial years, the court would have agreed with the petitioners' arguments. Instead, on this occasion, the court held that the Tandav dance was not part of the religious practice of the denomination in the initial years. It was added later as part of religious practice. Due to this, Tandav dance is not an essential religious practice. Therefore, it could not be protected under the Indian Constitution.[90]

The modern approach of the Indian courts, where the courts themselves recognise whether a practice is essential, reached its zenith when the Supreme court held that mosque is not essential

[82] *Id* at para 20-25
[83] *Id.*
[84] AIR 1975 SC 706.
[85] *Id* at para 2.
[86] *Id* at para 23.
[87] *Id* at para 23.
[88] (2004) 12 SCC 770.
[89] *Id.*
[90] *Id.*

in Islam.[91] In another interesting judgement, it has been held that a person can only keep a beard if he can show he is religious. The person has to show that he believes in his religion.[92] All these judgments bring a change in the Supreme Court's approach. Initially, the Supreme Court defers with the religious denomination in determining the essential religious practice of the denomination. Post-1965, the approach has changed, and now the courts shall determine what is essential to the religion. However, there is something more in the change of approach of the Apex court. With this change, the courts have given too much deference to the State while adjudicating religious legislation. This leads to a scenario where a petitioner must undo a huge burden to challenge the legislation successfully. The State has a free hand to muster any law in the name of social reform. In the recent Hijab judgement of the Karnataka high court, the petitioner has to face a similar problem. Therefore, In the next part, we will show why the modern approach to the Essential religious practice test violates the individual's liberty.

IV
The Hijab Judgement: A Failure of ERP Test

On the 5th of February 2022, the Karnataka government passed an executive order[93] under the Karnataka Education Act 1983.[94] According to this order,

> *[T]he students should compulsorily adhere to the dress code/uniform as follows: a. in government schools, as prescribed by the Government; b. in private schools, as prescribed by the school management; c. in Pre–University colleges that come within the jurisdiction of the Department of the Pre–University Education, as prescribed by the College Development Committee or College Supervision Committee; and d. wherever no dress code is prescribed, such attire would accord with 'equality & integrity' and would not disrupt the 'public order.*[95]

On the face of it, the order may seem just and valid to us. A government order prescribed a dress code in the pre-university institutions of the State. Besides, the government's order was alleged to be discriminatory against certain groups of Individuals. The order was challenged before the Karnataka High court.[96] There were various points of contention in this adjudication.

[91] *Dr. M. Ismail Faruqui Vs. Union of India* (1994) 6 SCC 360.
[92] *Mohammed Zubair V. Union of India*, 2016 SCC Online SC 1472.
[93] *Resham v State of Karnataka*, (2022) SCC OnLineKar 315 at 18.
[94] *Id.*
[95] *Id* at 113, 114.
[96] *Id*, at 19.

Nevertheless, in this paper, the authors will only discuss the contention that "Whether wearing hijab/head-scarf is a part of 'essential religious practice' in Islamic Faith protected under Article 25 of the Constitution?" The High court, in its judgement, concluded that the use of Hijab would not fall within the ambit of essential religious practice.[97] For this purpose, the court relied upon the religious texts of Islam.[98] The court, in its judgment, traced the history of Hijab in the Arabian world. They observed that in the earlier times, Hijab was used to protect women in conflict-ridden Arabia. Later on, the Hijab did not remain absolute when the times changed.[99] The text does prescribe using Hijab for decent dressing, but its use was not mandatory. The need for a Hijab could be determined according to the circumstances.[100] After that, the court concluded that using Hijab is not essential in Islam.

These arguments of the Karnataka High court may prima facie seem rational to us. The court, in its adjudication, has looked upon the religious texts of the petitioners and concluded that the practice in issue is not an essential part of the religion. However, there was something more in the court's opinion than mere ascertainment of essential religious practice. A deeper reading of the judgement will tell us that the concept of the essential religious practice test has violated the rights of the petitioner instead of protecting them. The test developed for social reform in Indian society has violated the individual's liberty.

4.1 ERP Test: A Free Pass to the State

In this part, we will not contend with the court's opinion on whether the Hijab is an essential part of Islam or not. Instead, we will argue that in its overzealousness to apply the essential religious practice test, the court has failed to look at the indirect discrimination carried out by the executive order on certain groups of individuals. In its judgement, the court comprehensively discussed the nature of secularism in India. The court asserted that India follows positive secularism. Our approach to secularism is different from the United States.[101] In our secularism, we do not believe in religious atheism or devoutness; instead, we believe in tolerance of religious beliefs.[102] The Karnataka high court gathered this opinion for various Supreme Court judgements. *In Re Kerala Education Bill*,[103] C.J. S.R Das observed that India

[97] *Id*, at 87.
[98] *Id*, at 60, 61.
[99] *Id*, at 70, 71.
[100] *Id.*
[101] *Id*, at 51.
[102] *Id*, at 52.
[103] 1959 (1) SCR 995.

had welcomed people from various cultures, creeds and races. Furthermore, in S.R Bommai[104] and *Raj Narain* V. *Indira Gandhi*,[105] the Apex court observed that India believes in the principle of tolerance. We welcome people from various cultures and religions. We tolerate and allow them to follow their own beliefs.[106] The Constitution, too, provides religious freedom under which any person can freely profess, practise and propagate the religion. These observations assert that the Indian Constitution believes in positive secularism. Therefore, under the Constitution, an individual can practise his religious beliefs, and the State is responsible for fulfilling that goal. Nonetheless, the current regime of essential religious practice test allows the State to move away from the responsibility of protecting the practice of religious beliefs.

In the last seventy years, the Supreme court has transformed the essential religious practice test into the vehicle of social reform. After that, in the name of social reform, it gave too much deference to the State. Every law of the State passed muster before the Apex court by showing that the sole purpose of the law is to do social reform in the society. Rajiv Dhavan,[107] in his article, criticised this approach of the Apex court. He emphasises that while determining the validity of legislation on the restriction of rights of religious denominations to practice their religion, the courts have first to ascertain whether the restriction is necessary or not. Whether the legislation fulfils the goal of social reform or not. After that, the court must determine whether the practice restricted by the legislation is an essential religious practice or not.[108] If the answer to the first question is affirmative and the second question is negative, then only a religious practice can be restricted.[109] Instead, under the current regime of the essential religious practice test, the courts begin their adjudication with the question of whether the legislation was made for social reform or not. If yes, then the practice can be restricted. The court never checks the proportionality of such legislation.[110] This approach of the Apex court has baffled many jurists of constitutional law, the most prominent of them being H.M Seervai. Seervai[111] advocates that social reform is essential in traditional Indian society; despite that, we cannot end religion in the name of social reform. Therefore, when a court looks upon the issue of religious freedom, it should not give too much deference to the State.

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[104] *S. R. Bommai v. Union of India*, (1994) 2 SCR 644.
[105] *Indira Gandhi v. Raj Narain*, 1975 SCR (3) 333.
[106] *Id.*
[107] Rajeev Dhavan, "Religious Freedom in India", 35(1) *American Journal of Constitutional Law* 209 (2009), at 223-224.
[108] *Id.*
[109] *Id.*
[110] *Id.*
[111] H.M. Seervai, III, *Constitutional Law of India: A Critical Commentary* 1279 (Universal Law Publishing, 2017).

Similarly, great jurist P.K Tripathi[112] believes that while determining whether a religious practice is part of essential religious practice, a court must keep an open mind on the subject. The courts must not use facts of colonial or pre-colonial past to validate the legislations passed by the State.[113] When the Indian Constitution was adopted, a guarantee was provided to its citizens that the State shall not intervene in the individual's religious freedom. Nevertheless, the current regime of the E.R.P. test fails that guarantee.

Some may argue that the recent judgements of the Supreme court and High Court have moved away from this trend. The contemporary judgement of the Supreme court in the Sabrimala[114] and Triple talaq[115] case has held that the civil liberty of an individual is essential. Therefore, the issue of civil liberties can supersede the essential religious practice of a religious denomination.[116] They may argue that instead of relying upon the E.R.P. test, the court has held that we will assert whether the actions of the religious violate the civil liberty of the individual or not. To some extent, this view is right. However, even in these judgements, the respondents against whom the petitions were filled were the religious denomination instead of the State. Therefore, at this point, the religious freedom jurisprudence in India asserts that religious denominations are a source of discrimination against the individual. The tests are not designed to test whether the State has committed any act of discrimination against the individual in the name of religion.

4.2 A Tale of Non-recognition of Indirect Discrimination

This approach could also be seen in the Karnataka High court judgement. In the judgement, the court recognised that India had adopted positive secularism. After that, the court put a caveat upon its conclusion by asserting that the Constitution imposes upon us the fundamental duty to maintain harmony and promote the spirit of common brotherhood in the society; this harmony shall supersede the religious, cultural and linguistic diversity.[117] Furthermore, the court observed that this duty could also be found in Karnataka education Act 1983. The Act empowers the state government to pass orders in a manner which would "inculcate the sense of this duty" and "cultivate a secular outlook" in the society.[118] By these observations, the court

[112] P.K Tripathi, "Secularism: Constitutional Provision and Judicial Review", 8(1) *Journal of Indian Law Institute* 1 (1966).
[113] *Id.*
[114] *Indian Young Lawyers Association v. State of Kerela*, (2019) 11 SCC 1.
[115] *Shayara Bano vs Union of India*, (2017) 9 SCC 1.
[116] Supra Note 114.
[117] Supra Note 93 at 42.
[118] *Id*, at 97.

again attempted to provide deference to the State. Instead of ascertaining whether the order was discriminatory, the court accepted the State's arguments that the order was passed to engendering harmony in the society.

The Karnataka High Court's judgement opines that the Government's actions are valid as the order has an equal application to every individual. This view of the court is problematic as it fails to see the indirect discrimination caused by the order. The High court, in its judgement, gave no significance to the identity of the individual. Nevertheless, the Indian Constitution considers group identity significant.[119] The Constitution allows for the protection of the rights of the group as well.[120] These groups are protected based on religious as well as linguistic identity. These groups were also provided positive rights so they would not lose their identity to the majority.[121] In the Constitution, provisions of equality were incorporated with groups' rights.[122] However, these provisions never restrict the group from enjoying its positive rights.

Furthermore, individual identities are always shaped by group identity. Therefore, legislation could apply equally to everyone, but it could have a diverse impact on the group. For example, a legislation may provide that every mensurating person must not hold a public office. On the face of it, the legislation applies to every person equally. Nevertheless, on a deeper level, the law will only impact women. Therefore, evaluating the law from the standpoint of individual equality may not bring out the true discriminatory nature of the law. The critical race theory has also expressed this view.[123] They argue that groups are an essential part of individual identity. Therefore, group identity must also be kept in mind while adjudicating the validity of legislation.[124] In the Hijab judgement, the Karnataka High court failed to adjudicate the matter from this perspective.

Similarly, the High court discussed the concept of qualified public spaces.[125] The court observed that in qualified public spaces, a person could not use his religious freedom or the freedom of expression. The court agreed with the government's arguments that the school is a qualified public space where uniform is necessary.[126] This High Court’s view fails to define what qualified public spaces mean. Is it merely a school, or is every public space fall within

[119] The Constitution of India, Art. 29, 30.
[120] *Id.*
[121] The Constitution of India, Art. 29(1), 30(1).
[122] The Constitution of India, Art. 29(2), 30(2).
[123] Shreya Atrey, *Intersectional Discrimination*, (Oxford University Press, 2019).
[124] *Id.*
[125] Supra Note 97 at 32.
[126] *Id.*

this category? The court's opinion that the order treats everyone equally fails to see the idea of positive secularism adopted under the Indian Constitution. The High Court's judgement gave the State power to define any space as qualified public space without any reason. This could lead to further discrimination against the group.

The judgement of the Karnataka High court is based upon the traditional approach of the Essential Religious Practice test. It does not look upon the order's necessity or whether it fulfils the legislature's intention. Instead, the court only adjudicates the essentiality of practice in Islam. Once the court concludes that the practice is not essential, it starts deferring to the State's arguments. The court justifies the order based on limited fundamental rights recognised under the Indian Constitution. Not in a single paragraph did the court look upon the indirect discrimination committed by the order. Hence, to deal with the complex issue of group identity and indirect discrimination, we must move away from the Essential religious practice test and adopt a new test better suited to pact with the issue of indirect discrimination.

4.3 Hijab case and the Supreme Court

The judgment of Karnataka High court has been challenged before the Supreme Court.[127] The Supreme delivered a split judgment. The Apex court in its judgment do not focus upon ERP. Rather the focus of the court was on dignity and individual liberty. Hemant Gupta J. found the executive order of the Karnataka government to be valid on the ground that school is a public space. Hence, their privacy shall not prevail over equality. Allowing Muslim girls to wear Hijab will be discriminatory against the members of other religious group.[128]

In contrast Dhulia J. observed contrary. He asserted that dignity shall prevail over discipline. The executive order violates privacy of women. It affects their dignity. Therefore, in the name of privacy in public spaces the government could not take away the dignity and privacy of women.[129] Hence, till now no comprehensive conclusion has been reached. The courts have not able to decide extent of group right and individual freedom. Hence, there is a need of a new test to determine the same.

V
Conclusion: An Attempt Towards Solution

In the last part, the authors have attempted to show the failure of the Essential Religious Practice test in recognising the discrimination against the group. Therefore, in this part the

[127] *Aishat Shifa V. The State of Karnataka*, 2022 Live Law (SC) 842.
[128] *Id.*
[129] *Id.*

authors will attempt to suggest a new test to replace the Essential Religious Practice test. A test that would be better suited to ascertain indirect discrimination against the group.

5.1 The Equality Test: A Dream of Another Day

A possible solution to the failure of the Essential Religious Practice test could be the application of the equality clause to the issue in contention. At this juncture, the courts test the validity of legislation related to religious freedom under Article 25 of the constitution. Instead, if the courts test the validity of the government's actions under Articles 14 and 15 of the Indian constitution, they could apply the test of proportionality to the government's actions. In that scenario, only those actions will survive, which imposes a reasonable restriction upon the religious freedom of individuals and groups. Applying the equality clause to the legislation may seem the best replacement for the Essential Religious Practice test. Nonetheless, the equality test has a few problems, making it unsuitable for our current needs. The most significant of them is the underdeveloped indirect discrimination jurisprudence in India.

The jurisprudence of indirect discrimination is somewhat underdeveloped in India.[130] The Indian courts, while interpreting the equality clause under the Indian constitution, restrict themselves to direct discrimination caused by the government's actions.[131] Only in recent years have the courts started to recognise the concept of indirect discrimination. In an important adjudication in *Anuj Garg* V. *Hotel Asso. of India*,[132] the Supreme court, for the first time, recognised the indirect discrimination caused by the legislation due to the parens patriae character of the state. Before this judgement, on many occasions, the Apex court allowed the discriminatory legislation to exist merely because, in the eyes of the state, they are for the protection of women.[133] In *Lt. Col Nitisha* V. *Union of India*,[134] the supreme court invalidated the order of the ministry of defence on the basis that it was indirectly discriminatory against the women officer in the army.[135]

The Essential Religious Practice test failed because it failed to understand discrimination by the parens patriae character of the state. The test of equality, too, is inefficient in its present form to determine the indirect discrimination caused by government action. Therefore, we need a different approach to answer the complex question of unnecessary restriction upon religious

[130] Dhruva Gandhi, "Locating Indirect Discrimination in India: A Case for Rigorous Review under Article 14" 13(4) *NUJS Law Review* (2020).
[131] *Id.*
[132] (2008) 3 SCC 1.
[133] *Air India v Nargesh Meerza*, AIR 1981 SC 1829.
[134] 2021 SCC OnLine SC 261.
[135] *Ibid.*

freedom. An approach which could work on two fronts. The new method must first allow the state to fulfil its goal of social welfare. Secondly, the test has to determine whether the government's action is the least restrictive measure upon the rights of the individual or not. The test that could work on both these fronts can be found in the Constituent assembly.

5.2 Finding Solution in The Constituent Assembly

In the constituent assembly, there has been tremendous debate on the inclusion of the term religious practice in the Indian constitution.[136] Many prominent members of the assembly were against the idea of such inclusion. They believed that, historically, in the name of religious practice, many groups have discriminated against weaker sections of society.[137] Therefore, including such a term will badly impact the new nation's promise of equality.[138] There were members on the other side of the aisle as well. These members were in favour of the inclusion of such terms. They advocated that the Indian constitution provides for religious freedom. To achieve this freedom in its true glory, religious conscience and freedom must be protected.[139] This has resulted in an impasse between both sides. A compromise was necessary for this situation. This cooperation was reached in the constituent assembly itself. Term religious practice was part of draft Article 16 on the condition that the state can make laws to enhance social welfare.[140] It has further been asserted in the assembly that religious practice shall only be restricted in those circumstances when the actions violate the civil obligation of an individual.[141] In the assembly, nothing has been said to suggest the adoption of Essential Religious Practice test as a method to resolve conflicts related to religious freedom. The assembly favoured absolute freedom of religious practice to the extent that it does not conflict with the individual's civil liberty.

The approach of the constituent assembly that religious freedom shall only be restricted in those circumstances when it violates the civil liberty of the individual help us in dealing with complex cases of discrimination. This approach could recognise both direct and indirect discrimination against individuals and groups. In this method, the court will not be burdened with ascertaining whether a practice is Essential Religious Practice or not. Instead, the courts have only to determine whether the practice violates any civil liberty or not. On the face of it, the test may

[136] Constituent Assembly Debate Vol VII' (1949) Lok Shabha, available at http://164.100.47.194/loksabha/writereaddata/cadebatefiles/vol7.html (Last visited on 10th May 2022).
[137] K M Munshi, I, Indian Constitutional Documents 309 (Bhartiya Vidya Bhavan, 1967).
[138] *Id.*
[139] Supra Note 133.
[140] *Id.*
[141] *Id.*

seem much harsher than the Essential Religious Practice. A situation may arise when those practices essential for the religion may fall prey to the wrath of the law. Nevertheless, on a deeper level, this approach is much better than the Essential Religious Practice test. The indispensable problem with the Essential Religious Practice test is that it gave too much deference to the state. The test considered community as a threat to the liberty of the individual. However, the new approach allows the court to scrutinise the activities of the government and community. Instead of considering whether a practice is essential to religion, the court would only look at the impact of practice upon the individual's civil liberty. The state cannot restrict religious practice if the courts conclude that the practice does not violate any civil obligation. Hence, in the new approach, the issue of fact has moved from whether a practice is Essential Religious Practice or not to whether the practice violates any civil obligation. Due to this, the application of the proportionality test became possible.

Let us consider the facts of the Hijab case in light of the new approach. In the Hijab case, the government argued that Hijab was banned to maintain public harmony.[142] A necessity for the peaceful working of the society. According to the new approach, using the Hijab violates the civil obligation of maintaining peace and harmony in society. Therefore, a constitutional court has to consider whether the order passed by the state is the least restrictive measure to fulfil the goal of peace and harmony in society. The Indian constitution provides the concept of positive secularism.[143] Under this, every religious denomination can express its beliefs publicly unless it violates public peace and harmony.[144] However, it has to be determined by the court when restricting the practice of religious denomination is necessary to maintain peace and harmony in society. The Indian free speech jurisprudence asserts that the restriction on the expression of the individual shall be the last measure to be applied by the law.[145] A state shall fulfil its duty to maintain public order in the society simultaneously with the free expression.[146] Therefore, in the present scenario, the court can conclude that there are other measures that the government can use to maintain public order in the state instead of restricting the use of the Hijab. Hence, the new approach could better determine the necessity of government action than the old Essential Religious Practice test.

We can also apply the new test to the Hijab case to ascertain whether the order causes indirect discrimination or not. The petitioner argued that the order only impacted the Muslim

[142] Supra Note 93 at 32.
[143] *In Re Kerala Education Bill,* 1959 (1) SCR 995.
[144] *Id.*
[145] *K.A. Abbas v. Union of India,* 1971 SCR (2) 446
[146] *Id.*

community as it was the sole community that used such dress to express their religious beliefs.[147] In the new test, the court shall determine whether the expression causes any harm to any other community. Does the practice violate any civil obligation? If not, then the state cannot restrict such practice. It means that despite being indirect discrimination, the state cannot impact the religious freedom of religious individuals and denominations.

A critique of the new test could be that it fails to understand the state's role in social welfare. It might be argued that restricting Hijab will empower Muslim women. This problem, we believe, is an agency problem. The question is who shall determine what Muslim women want. Is the state have an agency to determine what the women want? The solution to this problem could be to determine the issue based on the availability of stakeholders. If a stakeholder raises a particular issue, then only the court shall attempt to determine the stakeholder's right. The time has come when we as citizens stop looking at the state as our protector. We must move away from the mentality of the state as our parent.

Hence, the time has come when we should move away from the Essential Religious Practice test and apply the new test suggested in the Constituent assembly to determine the individual's religious freedom.

[147] Supra Note 93.

INTRODUCTION TO TRANSFER OF PROPERTY BY DR. ANJAY KUMAR, SATYAM LAW INTERNATIONAL PUBLISHER (2023)

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The property right is inbuilt in human nature and is one of the basic requirements of a man for his survival. Property is a legal institution the focus of which is to create and protect certain private rights. The institution draws a boundary between public and private power. The property draws a limit on the activities of each private entity. Within that limit, the owner has more freedom than outside. The State cannot arbitrarily get in the way. Every man has got an instinct to enjoy the fruits of his labor and it is this instinct that brings the property into being. The law recognizes this by conferring certain rights on individuals over the things which they have acquired.

John Locke is the pioneer of a school of thought which projects the right to property as man's supreme natural right and a limitation upon the State. The property right was not created by the community or State but existed already in the state of nature and State came into existence for its protection. To Aristotle, property is the condition of a good life. He regards it as the extension of human personality. He is of the view that property is essential for the satisfaction of the instinct of possession as an equally natural medium of generosity.

Protection of property is regarded highest in the hierarchy of values guarded by the Constitution. Transfer of property plays an important role in the progress and development of the nation. India is a welfare state as per the 'preamble' and 'Directive Principle of State Policy' (Part IV) of the Indian Constitution. Transfer of Property Act, 1882 (TPA, 1882) helps to achieve the objective of the Welfare State. The TPA, 1882 was enacted to regulate transactions of transfer of property between parties by their act and also covers incidentally some other matters.

The Importance of the Transfer of Property Act is that it governs every stage of the process through which the different modes of transfer of property e.g., Sale Mortgage, Charges, Lease, Exchange, Gift and Actionable Claims explained in the T.P. Act. The relationship between the transferee and transferor is explained including the jural relations, terms and conditions between the parties during the subsistence of relations i.e., and process of termination, forfeiture of the relationship and legal consequences thereof are explained in the Act.

The present book has subtly discussed the complete analysis and interpretation of the Transfer of Property Act, 1882 from historical genesis to contemporary perspectives. This book consists of 12 chapters that comprehensively touched upon different aspects of the Transfer of Property

Act, 1882. The prominent feature of this book is that the author has attempted to explain various terminologies in diagrams and tabular and comparative analyses between two or more concepts.

The first chapter has focused on the historical background, preamble, objectives, and scope of the act and also the conceptual development of the natures of property such as immovable and movable property. The subsequent chapters have minutely focused upon the various essentials of the interpretation clause, immovable property with significant principles and doctrines such as the doctrine of fixtures, Profit a *Prendre*, instrument, attestation, notice and doctrine of constructive notice along with landmark judicial decisions. The next part of the book takes us to narrow down the fundamentals of nature, meaning and multiple dimensions of the term 'property'. 'Property means the highest right a man can have to anything being that right which one has to lands or tenements, goods or chattels which does not depend on other's courtesy; it includes ownership, estates and interests in corporal things, and also rights such as trademarks, copyrights, patents and even rights in *personam* capable of transfer or transmission, such as debts; and signifies a beneficial right to or a thing considers as having money value, especially concerning transfer or succession, and of their capacity of being acquired.'[1] The author also highlights the essentials of a valid transfer, the definition of transfer of property, transactions amounting to transfer of property, persons competent to transfer, operation of transfer, oral transfer and modes of transfer.

Property must be transferred either absolutely or conditionally. It is an important rule of economics that the wealth of the nation shall always be in a position of transmission, as it will gain maximum profit and benefits. Such transmission of wealth from one to another is better than the accumulation of wealth. With this background, the next couple of chapters, especially chapters 4 and 5, have subtly touched upon the conditional transfers, condition restraining alienation, condition restraining enjoyment, condition of insolvency, transfer for benefit of the unborn person, rule against perpetuity, vested and contingent interest and discussion relating to subsequent contingent interest, conditional transfer, Cy-Pres, condition of defeasance, time for performance, the doctrine of election and apportionment. The author has pressed upon the natural and noteworthy feature of the property, so as it shall retain its value to the optimum level in the contemporary era.

[1] R.C. Cooper v. Union of India (AIR 1970 SC 564)

As the author notes, Chapter 6 highlights transfer by a limited owner, ostensible owner and unauthorized person. This chapter further involves the discussion of the rule of priority, the doctrine of *lis pendens*, fraudulent transfer and the doctrine of part performance.

Chapter 7 deals with the definition of sale, essentials of valid sale, rights and liabilities of buyer and seller, marshalling and discharge of encumbrance on sale

Chapter 8 discusses the definition of mortgage, types of mortgage, rights and liabilities of mortgagor, subrogation, rights and liabilities of mortgagee, marshalling, contribution and charges

Chapter 9 deals with the definition and essentials of a lease, the difference between lease and license, the determination of the lease, rights and liabilities of lessor and lessee, holding over and tenancy-at sufferance.

Chapter 10 identifies the definition of exchange, the right of the party deprived of things received in exchange, rights and liabilities of parties.

Chapter 11 highlights the definition of gift, essentials of gift, suspension or revocation of a gift, onerous gifts and universal donee.

Chapter 12 deals with the meaning and transfer of actionable claim, rights and liability of the transferee of actionable claim.

Chapter 13 discusses landmark judgments.

At the end of the book, a reader would get benefits of author's version of a comprehensive summary of landmark decisions from the apex court on various aspects of property law in a brief manner. The author has picked up judicial decisions which had a great impact on changing rules and principles related to the law of property and other fundamental concepts associated with it.