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Editor's Note

It gives me immense pleasure to present you with the IX edition of the Journal of Campus Law Centre, a platform for the scholarly analysis of various legal issues, most recent developments and important trends in critical depth. This issue of the journal contains research papers from renowned academicians, legal scholars and jurists on myriad issues pertaining to various dimensions such as purposive interpretation, victim impact statement, inheritance rights of Muslim women, gender diversity in the boardroom, good governance, gender equality, fiscal federalism and abortion laws. Thus, our aim is not only to deepen and internationalize Indian public law debates, but also to insert distinctive Indian perspectives into those debates. We also strive to make our publication available to the broadest possible audience at national and international level.

I take this opportunity to thanks my editorial team, whose commitment and perseverance made its publication possible. On behalf of the Editorial, 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.

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

Prof. (Dr.) Gunjan Gupta
Editor
Journal of Campus Law Centre

JOURNAL OF CAMPUS LAW CENTRE

VOLUME IX : 2022

CONTENTS

PURPOSIVE INTERPRETATION FOR STATUTORY NOTICES

Prof. (Dr.) Gunjan Gupta*

Abstract

After having conducted extensive research on the subject, the present author is of considered opinion that the purpose of statutory notice, wherever so required, is only to put the opposite party to information with an intention to avoid litigation. However, the subject when argued before a court of law, the same is construed hyper-technically by lawyers and by judges even more. On the contrary, sometimes the courts would say that having fought the matter for a long time, no purpose would be served in sending the matter back for issuance of fresh notice; and in most of the cases, by that time limitation may have expired. In this view of the matter, they think that such objections should be deemed to have been waived. All such technical objections, be they relate to service of notice or contents thereof, when woven by a single string based on research and experience would reveal that most equitable interpretation would be to treat court summons by itself as a statutory pre-litigation notice, more particularly, when the case has progressed beyond preliminary stage of the matter! Support for such one sentence proposition can be taken by reference to the judgments as discussed hereinafter.

Keywords:

Statutory notice, Pre-litigation notice.

I

Compliance on Service of Court Summons

By virtue of umpteen numbers of judicial pronouncements by the Supreme Court the issue with respect to maintainability of prosecution case, civil or criminal, for the want of proper service of statutory notice, the same has been given time and again purposive interpretation for dispensation of substantive justice. Reference in this connection may be made to larger bench decision of the Supreme Court in *C.C. Alavi Hazi* v *Palapetty Muhammed*[1] where it has been held that all those who may claim that they did not receive statutory notice may comply with the mandate of notice within the stipulated notice period from the date of service of court summons to them or from the date of their first appearance in the matter, failing which they shall not be heard in the matter that they were not served with the notice or that the notice was not proper. To quote from the said judgment *in verbatim:*

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1 AIR 2007 SC 1705.

Any drawer who claims that he did not receive the notice sent by post, can, within 15 days of receipt of summons from the court in respect of the complaint under Section 138 of the Act, make payment of the cheque amount and submit to the Court that he had made payment within 15 days of receipt of summons (by receiving a copy of complaint with the summons) and, therefore, the complaint is liable to be rejected. A person who does not pay within 15 days of receipt of the summons from the Court along with the copy of the complaint under Section 138 of the Act, cannot obviously contend that there was no proper service of notice as required under Section 138, by ignoring statutory presumption to the contrary under Section 27 of the G.C. Act and Section 114 of the Evidence Act. In our view, any other interpretation of the proviso would defeat the very object of the legislation.

Postal Endorsement

Section 27 gives rise to a presumption that service of notice has been effected when it is sent to the correct address by registered post. In view of the said presumption, when stating that a notice has been sent by registered post to the address of the drawer, it is unnecessary to further aver in the complaint that in spite of the return of the notice unserved, it is deemed to have been served or that the addressee is deemed to have knowledge of the notice. Unless and until the contrary is proved by the addressee, service of notice is deemed to have been effected at the time at which the letter would have been delivered in the ordinary course of business. It has already been held that when a notice is sent by registered post and is returned with a postal endorsement "refused" or "not available in the house" or "house locked" or "shop closed" or "addressee not in station", due service has to be presumed.[2]

Similarly, to illustrate the purposive interpretation made by the Supreme Court, reference may be made to three possible situations with respect to service of notice. If a notice is issued and served upon the addressee, no controversy arises. Similarly if the notice is refused by the addressee, it may be presumed to have been served. This is also not disputed. This leaves us with the third situation where the notice could not be served on the addressee for one or the other reason, such as his non availability at the time of delivery, or premises remaining locked on account of his having gone elsewhere etc. etc. If in each such case the law is understood to mean that there has been no service of notice, the

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[2] *Vishwabhandhu* v *Sri Krishna*, Civil Appeal of 2021, dated 29-09-2021, Supreme Court. Reliance placed upon *CC Alavi Hazi* v *Palapetty Muhammed*, AIR 2007 SC (Supp) 1705; *Jagdish Singh* v *Natthu Singh*, AIR 1992 SC 1604; *State of M.P.* v *Hiralal*, (1996) 7 SCC 523; and *V. Raja Kumari* v *P. Subbarama Naidu*, (2004) 8 SCC 774.

Supreme Court in *D. Vinod Shivappa* v *Nandu Belliappa*[3] held that it would completely defeat the very purpose of the Act. It would then be very easy for an unscrupulous and dishonest drawer of a cheque to make himself scarce for sometime after issuing the cheque so that the requisite statutory notice can never be served upon him and consequently he can never be prosecuted. To quote from the said judgment *in extenso:*

> We cannot also lose sight of the fact that the drawer may by dubious means manage to get an incorrect endorsement made on the envelope that the premises has been found locked or that the addressee was not available at the time when postman went for delivery of the letter. It may be that the address is correct and even the addressee is available but a wrong endorsement is manipulated by the addressee. In such a case, if the facts are proved, it may amount to refusal of the notice. If the complainant is able to prove that the drawer of the cheque knew about the notice and deliberately evaded service and got a false endorsement made only to defeat the process of law, the Court shall presume service of notice. This, however, is a matter of evidence and proof. Thus, even in a case where the notice is returned with the endorsement that the premises has always been found locked or the addressee was not available at the time of postal delivery, it will be open to the complainant to prove at the trial by evidence that the endorsement is not correct and that the addressee, namely the drawer of the cheque, with knowledge of the notice had deliberately avoided to receive notice. Therefore, it would be pre-mature at the stage of issuance of process, to move the High Court for quashing of the proceeding under Section 482 of the Code of Criminal Procedure. The question as to whether the service of notice has been fraudulently refused by unscrupulous means is a question of fact to be decided on the basis of evidence. In such a case the High Court ought not to exercise its jurisdiction under Section 482 of the Code of Criminal Procedure.

In *K. Bhaskaran* v *Sankaran Vaidhyan Balan*[4] the statutory notice under section 138 of the Negotiable Instruments Act, 1881 was returned to the sender with endorsement of the postal peon "unclaimed". In view of the legislative scheme, it was held that the expression used in the statute is "giving of notice", which in the given context was not the same as the “receipt of notice”. The Supreme Court observed:

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3 AIR 2006 SC 2179: (2006) 6 SCC 456.

4 AIR 1999 SC 3762.

> If a strict an interpretation is given that the drawer should have actually received the notice for the period of 15 days to start running no matter that the payee sent the notice on the correct address, a trickster [addressee] would get the premium to avoid receiving the notice by different strategies and he could escape from the legal consequences of Section 138 of the Act. It must be borne in mind that Court should not adopt in interpretation which helps a dishonest evader and clips an honest payee as that would defeat the very legislative measure.

Multiple Notices

In *Dalmia Cement (Bharat) Ltd.* v *Galaxy Traders & Agencies Ltd.*[5] it was held that in case where service of notice to the addressee is not clear, the sender may be having two options: namely; firstly, he may concede that the notice is not served and issue another notice; and secondly, while taking the risk, to claim benefit of presumption of service of notice as articulated under section 27 of the General Clauses Act and prove, in case of denial by the opposite party, during the course of the trial that notice was duly served. Thus, purposive interpretation was given to the law in this arena. However, later on, number of times it was said that multiple issuance of notices would not be fatal for the prosecution case, irrespective of service of previous notice(s).

In the same tune is the decision of division bench comprising of two judges of the Supreme Court in *MSR Leathers* v *S. Palaniappan*[6] wherein taking recourse to the doctrine of purposive interpretation in line with the statement of objects and reasons it has conclusively been held, obviously so, that cause of action cannot be allowed to frustrate for the reason that more than one notice was sent by the aggrieved person.

Court Summons *per se* Construed as Notice for Eviction or Dissolution of Firm

Going a step further, reference may be made to Delhi High Court decision in *Jeevan Diesels and Electricals Ltd.* v *Jasbir Singh Chadha (HUF)*[7] where it was held that in case of denial of notice of eviction under section 106 of Transfer of Property Act, service of court summons can very well be taken as a notice of termination of tenancy. Though couched in different words, the same proposition was laid down by the Supreme Court in *Nopancy Investments Pvt. Ltd.* v *Santokh Singh*[8] when it was held that filing of a case for eviction of suit property in a court of law would by itself tantamount to be a notice of

5 (2001) 6 SCC 463.
6 2012 (9) SCALE 445.
7 183 (2011) DLT 712 (Del.).
8 (2008) 2 SCC 728.

eviction and suit cannot be allowed to fail for the want of service of proper notice. The judgment of the Supreme Court in *Nopancy case*[9] has been referred and relied upon in various judgments.[10] The analogy of these judgments is in tune with aforestated larger bench decision of the Supreme Court in *C.C. Alavi Hazi case.*[11]

Legal position would remain the same with respect to notice of partition of HUF or dissolution of partnership firm, inasmuch as in both the situations, service of court notice *per se* has been held to be sufficient for severance of relationship between the parties as that of member of HUF or partner in a firm.[12]

Once Matter is Fought to the Hilt in MCD or DDA Cases, Tantamount to Waiver or Acquiescence of Notice

Another pragmatic decision is *Phool Singh* v *NDMC*[13] where Delhi High Court while relying upon its earlier decision in *Yashoda Kumari* v *MCD*[14] held that the object of sending statutory notices such as under Section 80 CPC or Section 53(B) of the Delhi Development Act, 1957, and which are provisions of giving of prior notices to the governmental authorities before filing of the suit to see if litigation is not necessary, once the suit is contested to the hilt, then the requirement of giving prior notices is to be taken as waived and suits cannot be dismissed merely on account of the fact that prior statutory notices are not sent. Thus, a practical view was taken by the court because the entire object of provisions such as 80 CPC is really now reduced to a dead letter because in almost 100% of the suits, there is complete contest showing opposition to the grant of reliefs as claimed in the suit, and which reliefs are to be claimed by means of statutory notices given prior to filing of the suit. Delhi High Court in *Phool Singh* v *NDMC*[15] held that the suit cannot be taken as barred on account of not serving statutory notices under Sections 477 and 478 of the DMC Act once the parties fought the matter to the hilt.

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9 *Supra.* Also see *Rabinder Nath Saha* v *Sushma Jain*, RSA No. 10 of 2011, dated 26-08-2011, Delhi High Court and *Shri Radhakrishan Temple Trust Maithan, Agra v Hindco Rotatron Pvt. Ltd.*, RFA No. 40of 2010, dated 20-12-2011, Delhi High Court.

10 To name a few of such judgments, reference may be made to *Inderjeet Singh Cheema* v *Next World Immigration Services Associates*, 2015 (1) Civil Court Cases 476 (De.); *Nanak Ram Jaisinghani* v *Tilak Raj Salooja*, 208 (2014) DLT 193 (Del.); and *Cottage Industries Exposition Ltd.* v *Amritpal Kaur*, 2014 (3) Civil Court Cases 421 (Del.).

11 *Supra.*

12 *Jeevan Diesels and Electricals Ltd.* v *Jasbir Singh Chadha (HUF)*, 183 (2011) DLT 712 (Del.).

13 232 (2016) DLT 73.

14 AIR 2004 Del. 225 (Del.).

15 *Supra.*

In division bench decision of Delhi High Court in *Yashoda Kumari* v *MCD*[16] the facts of the matter were that suit was dismissed by the trial court for the want of notice under section 80 of Code of Civil Procedure, 1908 and 53-B of Delhi Development Act despite an application for leave of the court for exemption from notice under section 80(2) of the Code was pending before the court. Reliance was placed upon Supreme Court judgment in *Vannattankandy Ibrayi* v *Kunhabdulla Hajee*[17] to show that notice under Section 80 was liable to be waived and one Calcutta High Court judgment in *Subhro Kamal Mukherjee* v *Chandrabati Devi*[18] to suggest that even grant of leave under Section 80(2) could also be presumed in the circumstances of the case as in the present case. For reaching this conclusion, reference was made to the judgment of the Supreme Court in *Raghunath Das* v *Union of India*[19] holding as follows:

> The object of the notice contemplated by Section 80, CPC is to give to the concerned Government and public officers opportunity to reconsider the legal position and to make amends or settle the claim, if so advised without litigation. The legislative intention behind that section is that public money and time should not be wasted on unnecessary litigation and the Government and the public officers should be given a reasonable opportunity to examine the claim made against them lest they should be drawn into avoidable litigation. The purpose of law is advancement of justice. The provisions in Section 80 are not intended to be used as booby trap against ignorant and illiterate persons.

Since the plaintiff had filed an application for grant of leave under Section 80(2) which was not dealt with and considered by the Court in *Yashoda case*[20] and yet the Court had proceeded to frame this as a preliminary issue, this could not have been done, because once the Court was seized of appellant's application under Section 80(2) it ought to have disposed of this application first by either granting leave or refusing it in which case it was to return the plaint to them which they could refile after service of two months notice.

In the considered opinion of the present author,why not the matter is kept in such cases in abeyance for the notice period by giving an adjournment simplicitor, that too only when a plea is raised by the defendant that they may have done something had they been served with such notice!

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16 *Supra.*
17 2001 (1) SCC 564.
18 AIR 2002 Cal 11.
19 AIR 1969 SC 674.
20 *Supra.*

E-summons by Whatsapp etc. – Validity

Practice Rules[21] when read with section 62 and 65 of Cr.P.C., a full fledged procedure is prescribed for service of summons. No doubt, the revolutionary changes in the field of communication calls for a more pragmatic approach regarding the mode and manner of service of summons. Section 144 of the Negotiable Instruments Act, 1881, provides for service of summons by speed post or by approved courier service. Hon'ble Supreme Court[22] alerted the Magistrates about the need to adopt a pragmatic and realistic approach while issuing process and had directed to issue summons by post as well as by email. Later, the Apex Court[23] observed that in complaints under Section 138, email ID of the accused be also furnished. Recently,[24] it has been held that the Banks are bound to provide the requisite details of accused for court cases.

The above provisions do not provide for service of summons through WhatsApp. Despite the afore-quoted various judgments of the Supreme Court, the correct position of law, therefore, is totally to the contrary. Therefore, it would not be inappropriate, if a formal challenge is made to service of summons by means of Whatsapp, the same is not liable to be accepted mode of service of court summons and NBW could not have been issued.[25]

Even otherwise, the present author is of considered opinion that such electronic modes may certainly be used as supplementary to the regular method of service of summons but not as supplant. We are not unaware as to how spam and unwarranted emails, whatsapp messages and regular messages are pushed into our gadgets as we push garbage into the dustbin; and many of us do not even at times see them always. It being a formal communication, better it is kept formally without intermingling it with such stray messages! [Emphasis.] Such evidence in electronic form though is acceptable, issuance of coercive processes and passing of adverse orders based on such electronic services should be seen with care and circumspection. [Emphasis.]

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21 Kerala Criminal Court Rules of Practice, Rule 7

22 *Indian Banks Assn.* v *Union of India*, (2014) 5 SCC 590.

23 *Meters & Instruments (P) Ltd.* v *Kanchan Mehta*, [(2018) 1 SCC 560].

24 *Makwana Mangaldas Tulsidas* v *State of Gujarat*, [(2020) 4 SCC 695].

25 *Anoop Jacob* v *State of Kerala*, 2021 3 KLT 248: 2021 0 Supreme (Ker.) 389.

II

Notice Period

Complaint would be Premature When Filed before Expiry of Notice Period

Filing of a complaint before expiry of notice period has been held to be fatal for prosecution case.[26] Supreme Court in *Yogendra Pratap Singh* v *Savitri Pandey*[27] also held that appropriate course would be to dismiss such complaint and complainant should file fresh complaint with an application for condonation of delay.

Such confused dictum that frustrates the very purpose of law needs to be outrightly condemned. The present author do hereby do so, without saying much in the matter. Such interpretation *per se* is farce, perverse and lacks judicial wisdom. Suffice would have been to say that such complaints which are premature should be considered for all purposes and intent to have been filed only on a day on which cause of action for filing of such complaint accrued! No prejudice can be said to cause to anyone by such interpretation. Thus, direction for filing or refilling *per se* is absurd .

Notice for Registration of Marriage

It can therefore be said that the law as declared by the Supreme Court, since the case of *Lata Singh*[28] till the decision in *Navtej Singh Johar*[29] has travelled a long distance defining fundamental rights of personal liberty and of privacy. Once a person becomes a major he or she can marry whosoever he/she likes.[30] An inherent aspect of Article 21 of the Constitution would be the freedom of choice in marriage.[31] Choice of woman in choosing her partner in life is a legitimate constitutional right. It is founded on individual choice that is recognized in the Constitution under Article 19.[32] The consent of the family or the community or the clan is not necessary once the two adult individuals agree to enter into wedlock. It is a manifestation of their choice which is recognized under Articles 19 and 21

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26 *Manoj Kumar Nag* v *State of Jharkhand*, 2020 4 JLJR 340: 2021 0 Supreme (Jhk) 253.
27 (2014) 10 SCC 713.
28 *Supra.*
29 *Supra.*
30 *Lata Singh, supra.*
31 *Indian Woman Says Gang-Raped on Orders of Village Court, supra.*
32 *Asha Ranjan, supra.*

of the Constitution.[33] "Neither the State nor the law can dictate a choice of partners or limit the free ability of every person to decide on these matters. Social approval for intimate personal decisions is not the basis for recognising them.[34] Finally, the nine-judges bench in the Right to Privacy Case[35] held that the privacy is the ultimate expression of the sanctity of the individual giving right to choose partner. Based on the law of privacy, the High Court of Uttar Pradesh while speaking through its single bench consisting of Vivek Chawdhary, J, in *Safia Sultana case, supra.*, has made notice under Section 5 of the Act of 1954 optional for the parties.

Notice of Termination of Tenancy on Filing of Suit

As a last proposition on the issue, assuming that the notice of termination was not served upon the tenant, though there is legal presumption of since as held above, the tenancy stood terminated on the filing of the suit in terms of the judgments of the Supreme Court in *Nopany Investments (P) Ltd.* v Santokh Singh (HUF)[36] and of the Supreme Court in *Jeevan Diesels & Electricals Ltd. v Jasbir Singh Chadha (HUF), Rabinder Nath Saha* v *Sushma Jain*[37] and *Shri Radhakrishan Temple Trust Maithan, Agra* v *Hindco Rotatron Pvt. Ltd*.[38] Thus, service of court summons is held sufficient to constitute notice under section 106 of the Transfer of Properties Act.[39] Thus, filing of the suit and receipt of court summons *per se* has been held to be statutory notice.

Juhi Chawla Case; Imposition of Rs. 20 Lakh Costs While Dismissing Application u/s 80 CPC

In a suit filed under section 91 of the Code of Civil Procedure, 1908 by film star Juhi Chawla seeking exemption from payment of *ad-velorem* court fees due to long period for trial taken by courts to the extent of 10-15 years; and the plaintiff further sought exemption from serving pre-litigation statutory notice under section 80 of the Code of Civil Procedure, 1908; single bench of Delhi High Court felt so much offended that it preferred to dismiss the application with costs of Rs. 20 lakhs. In the suit, as discernable from the recitals of the judgment, 33 defendants were arrayed; and some matter of common interest

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33 *Shakti Vahini, supra.*
34 *Shafin Jahan, supra.*
35 *Puttuswamy, supra.*
36 *Op.cit.*
37 *Op.cit.*
38 *Op.cit.*
39 *Sky Land International Pvt. Ltd.* v *Kavita Lalwani,* RFA No. 697 of 2010, dated 25-05-2012, Delhi High Court.

was raised relating to rollout of 5G spectrum. The facts stated in the said judgment are mentioned in a manner that it is not understandable at least by the present author what exactly is the gravamen of the charge in the suit. The reason assigned by the court for imposing exemplary damages to this extent was that the application seeking exemption from notice mentioned it as "empty formality".[40]

Be that as it may, it is submitted that when the matter is not between private parties, the presiding judge should have no reason to be so much annoyed with the plaintiff carrying the reputation as that of legendary film star Juhi Chawla. Courts do not have ego, nor judges can be annoyed in person. Judges do not have any personal interest in such matters. Taking such plaintiffs with so much of hatred, in the considered opinion of the present author, seems to be totally unjustified and unwarranted in law and equity. If the facts of the matter are such that one of the private parties feel so much prejudiced that it may claim imposition of exemplary damages, things would be different. Sending back a person of high repute with so much hatred seems not to be in good taste. It would be better if such coercive steps are taken in cases relating to perjury to put the judicial house in order. In such matters, as in the present case, nominal costs would have been appropriate, if found irresistible.

It may be noted that while dismissing the application the court made observations to the effect that "[i]t appears that the plaintiffs have filed his suit to gain publicity…" It is not understandable as to why the infamous bollywood actress would seek uninvited publicity.

III

Conclusion

Various pronouncements have been made by superior courts that say in one tune that be it an objection with regard to defects in the contents of the notice or it may be denial of service of notice, such contentions must be raised by the opposite party at the first available opportunity[41] and decided by the court at the earliest,[42] otherwise such objections shall be deemed to have been waived. Based on such purposive interpretation, we have carved out a one line theorem that can be applied in all such cases where the prosecution case is going to fail for the want of notice as narrated below.

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40 *Juhi Chawla and others* v *Science and Engineering Research,* CS(OS) No. 262 of 2021, dated 04- 06-2021, Delhi High Court.

41 *Parbatibai* v *Radhika,* AIR 2003 SC 3995; *Chiranjeevi Kolluri* v *K. Chandra Menon,* 2014 (3) Civil Court Cases 175 (AP); and *Vithanlrao Narayanroa Agre* v *Surendra Kumar,* 2014 (3) Civil Court Cases 844 (Bom.).

42 *Yashoda Kumari case, supra.*

All technical objections, be they relate to service of notice or contents thereof or relating to any other aspect of statutory notices, when woven by a single string based on research and experience, would reveal that most equitable interpretation would be to treat court summons by itself as a pre-litigation statutory notice, more particularly, when the case has progressed beyond preliminary stage of the matter! Support for such one sentence proposition can be taken by reference to the judgments as discussed above.

INTRODUCTION OF 'VICTIM IMPACT STATEMENT' IN THE INDIAN CRIMINAL JUSTICE SYSTEM: AN ANALYSIS

Megha Nagpal* & Prof. (Dr.) Chandrashekhar J. Rawandale†

Abstract

Sentencing is an important decision to be taken by the Court that brings a conclusive end to the criminal trial. It is here that the Judge ascertains 'fitting' punishment for the offender. In the process of sentencing, both parties to the criminal trial participate equally. However, the victim statement at the sentencing stage is not recognised in the Indian Criminal Justice System. Victim participation in Indian adversarial Criminal Justice System is majorly confined to testifying as a witness. Crime causes harm to victim as the prime injured person who continues to suffer consequences of the convict's acts or omissions, however, he is not heard before passing sentence on the convict. Hearing the victim about the harm crime has brought to her has been argued to meet 'expressive needs' of the victim by lending a voice to her harm and desires. With support from reparative principles from the restorative justice paradigm, the present paper endeavours to analyse if victim's voice can be introduced in the process of punitive sentencing in India. The paper analyses the existing non-uniformity in application of discretion in sentencing in India. Further, the paper elicits analyses from England and the USA to understand the victim's role in sentencing decisions highlighting the safeguards emerging from their experience of victim impact evidence. The paper concludes that the Indian Criminal Justice System should be open towards integration of victim's experience of harm as a direct result of the offence for better realisation of victim's agency.

Keywords:

Victim Justice, Victim Impact Statement, Victim Rights, Victim Reparation, Indian Criminal Justice System, Criminal Procedure

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I

Introduction

Post-conviction, sentencing is a difficult decision to be taken by the court as it is here that the court decides 'fitting' punishment for the offender. The Supreme Court in *Modi Ram* v. *State of Madhya Pradesh*[1] ruled that punishment for a crime should neither be too lenient nor too harsh. The substantive law prescribes maximum punishment for offences; therefore, the discretion as to quantum of sentence of imprisonment rests with the trial court or the sentencing court, as the case may be. In this process of sentencing, both parties to the criminal trial participate equally. The prosecution presents mitigating circumstances and post the inclusion of Section 235(2) in the Code of Criminal Procedure of 1973, the convict has a right to be heard on the question of sentence before the sentence is passed on him/her. This is the opportunity with the convict to presence circumstances before the court to invoke its leniency in quantum of sentence.

Sentence to a crime is a delicate balance of mitigating and aggravating factors with reformation of the offender as an objective on one hand, and deterrence to other members of the community and retribution for the crime committed towards society yet another objective.[2] Victim participation in Indian adversarial Criminal Justice System is majorly confined to testifying as a witness. Victim, who is the prime injured person and direct person who suffered or continues to suffer consequences of the convict's acts or omissions, is not heard before passing sentence on the convict. Moreover, the system allows the prosecution to only prosecute as a fair neutral party and not represent victim's interests. In effect, the court hears aggravating circumstances limited to nature of crime and circumstances surrounding the crime from the prosecution alone. Apart from the aims of deterrence and rehabilitation, restorative justice principles aiming to resolve harm caused by the crime frequently justify inclusion of victims' voices in the criminal justice process.[3] Hearing the victim about the harm crime has brought to her has been argued to meet 'expressive needs' of the victim by lending a voice to her harm and desires.[4] Since Prosecution in Indian adversarial criminal justice system does not represent victims' personal interests but society's interests at large, the victim's voice remains unheard. Therefore, process of sentencing is devoid of human face leading to incomplete fulfilment of aims of punishment. The present paper endeavours to

[1] (1972) 2 SCC 630.
[2] See *Machhi Singh* v. *State of Punjab* (1983) 3 SCC 470.
[3] See Meredith Rossner, "Restorative Justice and Victims of Crime: Directions and Developments" in Sandra Walklate (ed.), *Handbook of Victims and Victimology* 229 (Routledge, 2017).
[4] *Id*. at 230.

analyse if victim's voice can be introduced in the process of sentencing. The research objective of this paper is to ascertain if victim can play a role at the stage of sentencing so that she can have meaningful participation in the criminal process. The paper begins with analysing the provisions in the Code of Criminal Procedure, 1973 that prevent stipulation of systemic participation of victim at the stage of sentencing. Next, the paper analyses the existing non-uniformity in the application of principles governing discretion in sentencing in India. Further, the paper draws comparisons from England and the United States of America to see the role victim plays in sentencing decisions of the courts, and to discuss certain safeguards as they emerge from the experience of the US and England in implementation of 'victim impact statement' (or VIS) or 'victim personal statement' (or VPS) Schemes. Lastly, the paper discusses possible legislative responses with a view to enhancing victim's role at sentencing stage in the Criminal Justice System in India. The comparative analyses are proposed to be doctrinal including appropriate support from decisions of the Supreme Court of India. The paper concludes that the Indian Criminal Justice System should be open towards integration of victim's experience of harm as a direct result of the offence for better realisation of victim's agency.

Current Role of Victim in the Criminal Justice System

Adversarial criminal justice system pities the State prosecution against the accused leaving the victim almost outside of the core proceedings. The trial in adversarial system is viewed as a contest between two 'equally-situated contestants each of which is striving to prevail.[5] The victim in fact, is the means to an end for the prosecution that often presents him as witness to prove the crime. Judge plays role of a referee with the parties deciding which witnesses to call and what evidence those witnesses will provide. An exception in Indian procedure is that of Court's power to call or recall any witness if his evidence appear to the Court to be 'essential to just decision of the case'.[6] Trial under the Indian Criminal Procedure begins with the Prosecution presenting its proposed allegations and supporting evidence, The Court frames charges on the basis of police report. However, if cognizance of the offence is taken on the basis of a victim's complaint,[7] the complainant leads evidence first, whereupon the Magistrate decides if to summon the accused for trial or dismiss the complaint. Most

[5] Janet Ainsworth, "Procedural Justice and the Discursive Construction of Narratives at Trial: Global Perspectives", 4 *LCM* 79 (2017).
[6] The Code of Criminal Procedure, 1973 (Act 2 of 1974), s. 311.
[7] The Code of Criminal Procedure, 1973 (Act 2 of 1974), s. 200.

criminal trials arise out of the police report which is the result of police investigation upon receipt of information relating to cognizable offence. In his trial, a crime victim has a very limited role to play. He/she is called upon as a witness for prosecution. The crime victim though may seek to assist the Public Prosecutor through a counsel.[8] After the 2009 Amendment to the Code of Criminal Procedure, 1973, No. 2, Acts of Parliament, 1974 (India), a victim may now appeal against acquittal, or inadequate compensation, or even upon conviction of accused for a lesser offence. However, a victim cannot appeal for an enhanced sentence.

II

Sentencing: Non-Uniform Exercise of Discretion

The Law Commission of India in its 47th Report on the question of how sentence ought to be determined observed:

> A proper sentence is a composite of many factors, including the nature of offence, the circumstances-extenuating or aggravating- of the offense, the prior criminal record, if any, of the offender, the age of the offender, the professional or social record of the offender, the background of the offender with reference to the education, home life, sobriety and social adjustment, the emotional and mental condition of the offender, the prospect for the rehabilitation of the offender, the possibility of a return of the offender to normal life in the community, the possibility of treatment or training of the offender, the possibility that the sentence may serve as a deterrent to crime by this offender, or by others, and the present community need, if any, of such a deterrent in respect to the particular type of offense involved.[9]

In light of the reformatory approach towards offenders, the 1973 new Code of Criminal Procedure envisages a separate stage post-conviction wherein the offender-convict is given an opportunity to seek leniency in his/her sentence by presenting to the court extenuating or explanatory circumstances surrounding him and the crime.[10]

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[8] See The Code of Criminal Procedure, 1973 (Act 2 of 1974), s. 301(2) and *Rekha Murarka* v. *State of West Bengal* (2020) 2 SCC 474.

[9] Law Commission of India, 47th Report on The Trial and Punishment of Social and Economic Offences (February, 1972).

[10] The Code of Criminal Procedure, 1973 (Act 2 of 1974), ss. 235(2) and 248(2).

Sentencing discretion rests on the gravity of crime, proportionality to crime and possibility of reform of the offender. These quintessential principles relating to sentencing have been developed through Supreme Court judgements while discussing each isolated case before, however, the same have not been applied uniformly. In *Ediga Anamma* v. *State of Andhra Pradesh,*[11] the Supreme Court awarded life imprisonment as opposed to death penalty to a woman convicted of having committed murder keeping in view the social and personal factors including her youth surrounding the convict and remarked that, "While, deterrence through threat of death may still be a promising strategy in some frightful areas of murderous crime, to espouse a monolithic theory of its deterrent efficacy is unscientific and so we think it right to shift the emphasis, to accept composite factors of penal strategy and not to put all the punitive eggs in the 'hanging' basket but hopefully to try the humane mix".[12] Being the first pertinent case under the new Code dealing with discretion in punishment, this judgement fairly reflects the path the new Code envisioned for punishment, i.e., reformation and not retribution or deterrence alone. This sentiment was refined in *Jagmohan*[13] as well as in *Bachan Singh,*[14] where in the latter judgement, the Supreme Court developed a rarest of rare theory for award of death sentence based on prominent grounds like gravity and heinousness of offence. This theory was further refined in *Machhi Singh*'s judgement[15] where the Supreme Court calls for drawing up of a balance-sheet of mitigating and aggravating circumstances surrounding the offence and offender for deciding the apt punishment.

In *Dhananjoy Chatterjee* v. *State of W.B.,*[16] the Supreme Court awarded death penalty for the offence of rape and murder of an 18-year-old girl by the security guard of her apartment upon noticing that shockingly large number of criminals go unpunished thereby increasingly encouraging the criminals and, in the ultimate, making justice suffer by weakening the system's credibility. Recently, in *Santosh Bariyar*'s judgement,[17] the Supreme Court further refrained from imposing death penalty by remarking that, "We have previously noted that the judicial principles for imposition of death penalty are far from being uniform.

… we must nevertheless reiterate the basic principle … that life imprisonment is the rule and death penalty an exception. Each case must therefore be analyzed and the appropriateness of

[11] (1974) 4 SCC 443.
[12] *Id.* at para. 24.
[13] *Jagmohan Singh* v. *State of U.P.* (1973) 1 SCC 20.
[14] *Bachan Singh* v. *State of Punjab* (1980) 2 SCC 684.
[15] *Machhi Singh* v. *State of Punjab* (1983) 3 SCC 470.
[16] (1994) 4 SCC 220.
[17] *Santosh Kumar Satishbhushan Bariyar* v. *State of Maharashtra* (2009) 6 SCC 498.

punishment determined on a case-by-case basis with death sentence not to be awarded save in the 'rarest of rare' case where reform is not possible." The court further observed that *Bachan Singh*'s judgement only propounded the theory of 'rarest of rare' and did not give any guidelines to determine infallibly what case would be rare deserving of death penalty. Additionally, on one hand we see likes of *Devendran*[18] where the object of crime; robbery, was seen as a mitigating circumstance even though it led to death so several innocent humans, and *Gentela's* case where the same circumstance was seen as a reason for deserving aggravated form of punishment. Further, capital punishment is also converted to life sentence if there is inordinate delay in deciding the clemency petition of a death-row convict. Nevertheless, the procedure endeavours to be fair for all in terms of fundamental right to life and liberty as guaranteed under Article 21, and in also in terms of the constitutional governance goal of 'equal justice' under Article 39A of the Constitution of India.

III

Victim Impact Statement in England and the United States

Conceptual Analysis

Victim Impact Statements (hereinafter 'VIS') is a tool that has been in use in criminal trials in the United States of America and England for many decades. A pertinent way in which VIS or Victim Personal Statements (hereinafter 'VPS'), as they are called in England, are used is to record the impact suffered by the victim as a result of the crime committed by the convict. In the words of Wolhuter *et. al.*, a VPS "comprises a written statement containing details of the physical, emotional, psychological and financial impact of the crime on the victim."[19] It (a VPS) may be made by any person who has been the subject of a criminal act by another person.[20] The court at the stage of sentencing uses this statement to understand the extent of harm caused to the victim and decide the fitting punishment for the criminal alongside mitigating circumstances.

The 1996 England and Wales Victims Charter announced the establishment of experimental Victim Personal Statement schemes, which would be taken in addition to a witness statement. The scheme was implemented in October 2001 and its purpose is to

[18] *A. Devendran* v. *State of Tamil Nadu* (1997) 11 SCC 720.
[19] Lorraine Wolhuter, Neil Olley, *et. al., Victimology: Victimisation and Victims' Rights* 179 (Routledge-Cavendish, New York, 2009).
[20] *Ibid*.

highlight the medical, psychological, financial and emotional harm caused by the crime. It is presented to the court after the guilt of the offender is determined but before the sentencing process ensues. Only facts are sought through this statement, thus the victim is not provided with a medium to express his or her views on the impending sentence of the offender.[21] This scheme differentiates from the American Victim Impact Statement system whereby victims are permitted to assert in the statement their opinions concerning the length or type of sentence to be conferred, which is then taken into consideration by the court.[22]

Roberts in his article evaluating VIS,[23] discussed the importance of victim impact statements and analysed the victim impact regimes evaluating their utility on the threshold of objectives of sentencing.[24] He also analysed empirical data to understand the effect VIS has on offenders, victims, courts and practitioners. He concludes that sentencing process is better off for allowing victim impact evidence.[25] Further, he says that victim impact statements lead to victim satisfaction and thus, can work and do work for a minority of victims passing through a well-administered regime. However, in order to contribute to a principled sentencing regime, victim input schemes need to stress the expressive and communicative functions of impact statements.[26]

Doak argues that inclusion of VPS Scheme in England is a positive step towards victim participation, however, he proposes that discussing victims' issues solely in terms of balance between accused/State/victim precludes a comprehensive analysis of the issues raised by incorporating a victim perspective within criminal justice and suggests focus on the concept of participation as a more fruitful approach.[27] It has also been argued that in England when discussing victim input, it is also possible to regard victims as a class and their attempts to influence the disposition of cases as distinguishable from that of the public at large.[28] If the victim can be accepted as a reflection of public attitudes towards sentencing of offenders,

[21] Sarah Moynihan, "The Voiceless Victim: A Critical Analysis of the Impact of Enhanced Victim Participation in the Criminal Justice Process", 3(1) *ISLRev* 25, 29 (2015).
[22] *Ibid.*
[23] Julian V. Roberts, "Listening to the Crime Victim: Evaluating Victim Input at Sentencing and Parole", 38(1) *Crim. & Jus.* 347 (2009).
[24] See *ibid.*
[25] *Id.* at 399.
[26] *Id.* at 400.
[27] Jonathan Doak, "Victims' Rights in Criminal Trial: Prospects for Participation", 32 *Jour. of Law & Soc.* 2 (2005).
[28] Howard C. Rubel, "Victim Participation in Sentencing Proceedings", 28 *C.L.Q.* 226, 331 (1986).

more entitled to participate than the public at large due to proximity, this participation may reflect back to relieve public dissatisfaction with the justice system.[29]

A caution for impact evidence however, emerges from Smith who has analysed the definition of 'victim' as contained the Criminal Code of England.[30] The article presents the anomalies with respect to VPS as the courts in England have accepted VPSs from parents, siblings, friends, co-workers and employers, including VISs that discuss the effect that a crime has had on a community, and even businesses and corporations. The article also argues for a restricted definition of 'victim' for the purpose of sentencing and not allowing even ancillary persons to make a statement of impact before the court.[31]

Another aspect that requires consideration is the voluntary nature of VISs and the possibility of non-participation by victims due to several reasons. A number of possible factors were cited by Fiona in the study on VISs in England, US and various other countries, regarding the low response rate including[32]: the system could do a better job of informing victims about the scheme; victims may wish to minimise their engagement with the system; the victim may believe that the seriousness of the crime did not warrant this level of engagement with the system; participation rates are also likely to be affected by the attitudes of criminal justice professionals to victim input schemes; there is no statutory duty on police, prosecutors or any other professionals to inform victims of the VPS.

Critically analysing the VPS system in England, Wales and Northern Ireland, Moynihan says that in order to accommodate enhanced participatory and procedural rights for victims, profound modification of the structural and normative parameters of the adversarial criminal justice system is required.[33] Accordingly, the challenge facing governments is to find a compromise whereby the victim's voice can be heard and is easily distinguishable within the framework of the adversarial system, whilst simultaneously safeguarding the defendant's due process rights. Perhaps the predominant question concerning victim participation is not how to circumvent the conflict of rights between the accused and the

[29] *Ibid.*
[30] Ashley Smith, "Victim Impact Statements: Redefining Victim" 57 *C.L.Q.* 346 (2011).
[31] *Ibid.*
[32] Fiona O'Connell, "Victim Impact Statements", 952-11, Northern Ireland Assembly, Research and Information Service (NIAR), Research Paper 22/12 (January 2012).
[33] *Supra* note 21.

defendant but rather how to manage the parties interests effectively, so that as many conflicting interests as possible can be recognised by the criminal justice system.

Functional Analysis

Meek in criticising the United States Supreme Court 1991 decision in *Payne* v. *Tennessee* says that although it technically is a correct decision, it leaves the states with broad discretion in deciding whether to admit victim impact evidence in a capital sentencing proceeding.[34] Admission of this evidence, according to Meek, is highly inequitable because it is irrelevant to a particular defendant's moral responsibility and personal guilt.[35] Even if it was relevant in a particular case, by its nature this type of evidence is unduly prejudicial. It encourages comparative judgments based on emotion rather than reason. It therefore has no place in a capital sentencing hearing where the defendant should be afforded every opportunity to convince the jury to impose a penalty less than death.[36]

The United States Supreme Court in *Payne* v. *Tennessee*[37] ruled that the opinion of the victim could serve to assist the court in deciding for or against the death penalty. Additionally, in the common law jurisdiction of New Zealand the Victims' Rights Act 2002 permits victims to influence sentencing. In light of these schemes in New Zealand and America, the victim impact scheme in England, Wales and Northern Ireland has been heavily criticized as providing victims with a limited means to participate in the criminal justice process.[38]

The VPS in England now has a legislative basis[39] in contrast to the humble beginnings of such introduction earlier when the aims and uses of the VPS were found in non-legislative sources including judicial directives, Crown Prosecution Service and Home Office guidance.[40]

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[34] Elizabeth Anna Meek, "Victim Impact Evidence and Capital Sentencing: A Case Note on Payne v. Tennessee", 52(5) *Lou. L. Rev.* 1299 (1992).
[35] *Ibid.*
[36] *Supra* note 34.
[37] 501 U.S. 808 (1991), 827.
[38] *Supra* note 21.
[39] See the Code of Practice for Victims of Crime in England and Wales 2020, England & Wales, *available at:* https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/974376/victims-code-2020.pdf (Last Modified November 2020).
[40] *Supra* note 32.

The aim of the VPS is to provide an account of the impact of the offence from the person most affected by the crime. The purpose of a VPS is to: give victims the opportunity to state how the crime has affected them - physically, emotionally, psychologically, financially or in any other way; allow victims to express their concerns in relation to bail or the fear of intimidation by or on behalf of the defendant; provide victims with a means by which they can state whether they require information about, for example, the progress of the case; provide victims with the opportunity of stating whether or not they wish to claim compensation or request assistance from Victim Support or any other help agency; provide the criminal justice agencies with a ready source of information on how the particular crime has affected the victim involved.[41]

As well as informing sentencing decisions, such statements can be considered at other stages such as the grant of bail. Under the VPS scheme, the statements are not completed by the victim but are taken by the police. The officer who initially interviews the victim will ask them if they wish to make a VPS, therefore the process is entirely optional.[42] There is guidance for police officers which gives advice on what the victim should include in their statement such as concerns about feeling vulnerable or intimidated, however, the officer should also explain to the victim the limitations of the scheme, for example the victim's opinion on sentencing. If the victim decides to make a statement it is transcribed at the end of a form (an MG11 witness statement) and it is added to the public file and is made available at all stages of the process.[43] The impact statement is thus argued to offer a channel for communication from the victim to the offender and from the judge to the victim and the offender.[44]

Research in England and Wales has indicated considerable variability in the proportion of victims who recalled the opportunity to make a VPS.[45] A number of possible factors were cited regarding the low response rate including inadequate information to victims about the scheme; victims' desire to minimise their engagement with the system; attitudes of criminal justice professionals to victim input schemes.[46] It is noteworthy that

[41] *Ibid.*
[42] Julian V. Roberts and Marie Manikis, "Victim Personal Statements - A Review of Empirical Research", Report for the Commissioner for Victims and Witnesses in England and Wales (October 2011), at 42.
[43] *Supra* note 32.
[44] *Supra* note 23 at 356.
[45] *Supra* note 32 at 12.
[46] *Ibid*.

there now exists a right of victim under the Code of Practice for Victims of Crime to be informed about the VPS process by the police when reporting a crime.[47] This Victim's Code is the statutory code that sets out the minimum level of service that victims should receive from the criminal justice agencies, and it applies to all agencies including the police, Crown Prosecution Service, Courts Service and the Probation Service.

In the United States of America, Victim Impact Statements are written and oral statement concerning the impact of the crime on the victim and are commonly used in sentencing.[48] At federal level, the Crime Victims' Rights Act which was enacted in 2004, gives the victim the right to be reasonably heard in any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.[49] Forty-eight states in the US guarantee victims the right to be heard[50], in some form or another at sentencing. State and federal statutes tend to vary in relation to Victim Impact Statements. In Minnesota victims have the right to make a Victim Impact Statement in sentencing, plea presentation, pre- sentence and early release proceedings. Victims may also request the sentence they feel would be appropriate.[51]

IV

Need and Rationale to Hear Victim's Voice

The Indian Criminal Justice System being adversarial in nature, the State prosecutes the accused, and he defends himself against the allegations put by the State. The accused is presumed to be innocent till the State sufficiently discharges its burden to prove his guilt. In defending himself, the accused has his rights protected, both under the Constitution and the procedural law. The State too, has its obligations written in law. In this system, however, the person who suffered injury as a consequence of the crime, is forgotten. He, the victim, is simply called to provide information as to the commission of crime. Apart from giving his statement to police and testimony during trial, the victim plays no role either in the inquiry, or investigation of the case, or the trial itself. In fact, victim's statement is also not obligatory. In addition to minimising his voice, the system seems to lack support for the victim for State is

[47] See the Code of Practice for Victims of Crime in England & Wales, 2020, England & Wales, *available at:* https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/974376/victims-code-2020.pdf (Last Modified November 2020), Right 7.3.
[48] Fiona O'Connell, "Victim Impact Statements", 952-11, Northern Ireland Assembly, Research and Information Service (NIAR), Research Paper 22/12 (January 2012), at 19.
[49] 18 U.S. Code § 3771 (4).
[50] *Supra* note 48 at 19.
[51] *Supra* note 48 at 20.

under no obligation to inform the victim the status of case and its final outcome. Only recently, India recognized victim's right to appeal,[52] however, inadequate sentence has not been made a ground for victim's appeal.

Crime is seen as a wrong against the society.[53] It is believed to collectively harm the public and considered capable to impinging on the freedom and liberty of the society. Nevertheless, the immediate impact of the crime is suffered by an individual or a small group of people. Procedurally, it bottles down to collecting of evidence by the police and conduct of trial by the Public Prosecutor in presence of accused.[54] In such a scenario, the victim is seen as an outsider and allowing this stakeholder the right to present its evidence of harm is feared to lead to contravening some fundamental protections guaranteed to the accused. The 'bifurcated structure of the adversarial criminal justice system' poses a major impediment to victim involvement in the criminal process.[55] The Indian criminal procedural law allows for deviations from a purely adversarial model of trial and yet maintains fairness in procedure by securing and balancing the aims of justice. This is evident in the power of court to call during the trial any person as a necessary witness and this power reflects facets of inquisitorial justice system. Further, Article 39A to the Indian Constitution provides 'equal justice' as a governance goal.[56]

In terms of liability, the criminality of an act is distinct from its moral character, however, as a rule, the moral atrocity and infamy of any given action is the main reason why it is treated as a crime.[57] Therefore, crime cannot be seen in isolation of its impact on the victim. The intensity of harm is dependent upon the nature of crime. Whereas the crime of theft or criminal breach of trust may bring only financial loss, the crime of murder or grievous hurt leading to loss of limb, has scope of inflicting deep personal and emotional loss. The voice of victim in sentencing decision, thus, assumes relevance.

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[52] The Code of Criminal Procedure, 1973 (Act 2 of 1974), s. 372 proviso.

[53] K.N. Chandrasekharan Pillai, *R.V. Kelkar's Criminal Procedure* 22 (Eastern Book Company, Lucknow, 6th edn., 2014).

[54] Megha Nagpal, "Victim Support in Criminal Law: Necessitating Changes in Criminal Procedure", 4(2) *SAJMS* 151, 155 (2016).

[55] Jonathan Doak, "Victims' Rights in Criminal Trial: Prospects for Participation", 32(2) *Jour. of Law & Soc.* 294 (2005).

[56] Article 39A – Equal justice and free legal aid – reads: The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.

[57] Sir James Fitzjames Stephen, *A General View of the Criminal Law of England* 2 (Macmillan and Co., London, 1890).

Traditionally, four purposes of criminal penalties have been advanced, namely, deterrence, incapacitation, retribution, and rehabilitation.[58] Victim satisfaction as a restorative justice aspect is increasingly being recognised as holding possibilities for victim reparation. In their witness and victim experience survey, Roberts and Manikis found that even though only a minority of victims participated through VPS, those who did were more likely than not to express the view that their views had been considered by courts.[59] They further lend support to the argument that victims who participate in a victim input scheme express higher levels of satisfaction with the criminal justice system.[60] The conclusion they drew from their survey is that greater participation in the VPS programme would increase overall victim welfare in England.[61]

The fact that crime causes injury and hurt to an individual human, and sometimes as a group too, and not merely the society as a collective, calls for legislature's attention to voicing the victim impact that can help achieve the governance goal of equal justice. Reasonably hearing the victim only to ascertain the extent of harm the crime caused him has tremendous potential of fulfilling the aims of punishment as it can be cathartic for the victim thereby furthering the restorative justice goals of the criminal justice system and may prevent further victimization or potential crime causation. Adversarial system has been argued to be better suited for procedural justice since the system is more effective for involving stakeholders, especially litigants and witnesses to participate in the trial process.[62] Inclusion of victim impact statement for sentencing of convict can advance the efficacy and reliability of the adversarial criminal justice system.

Inclusion of VIS in Indian Criminal Justice System shall promote the constitutional goal of equal justice and fairness in trial. Tikoo argues that concept of just desert demands comprehensive guidelines on sentencing in India.[63] Muralidhan argues that victims' deserve restitution due to State's 'culpable inaction', for example, in riots.[64] In view of reformative theory of punishment, evidence to show mitigating circumstances has been held admissible in

[58] Lawrence F. Travis III and Bradley D. Edwards, *Introduction to Criminal Justice* 279 (Anderson Publishing, USA, 2015).
[59] Julian V Roberts and Marie Manikis, "Victim Personal Statements in England and Wales: Latest (and Last) Trends from the Witness and Victim Experience Survey", 13(3) *Criminology & Crim. Jus.* 245, 258 (2013).
[60] *Ibid*.
[61] *Ibid*.
[62] See *supra* note 5.
[63] Anju Vali Tikoo, "Individualisation of Punishment, Just Desert and Indian Supreme Court Decisions: Some Reflections", 2 *ILI L. Rev.* 20 (2017).
[64] S. Muralidhan, "Rights of Victims in the Indian Criminal Justice System", available at: http://www.ielrc.org/content/a0402.pdf (Visited on February 23, 2022).

India.[65] Similar position may be granted to victim. By giving a human face to the injury resulting from offender's action, his rehabilitation is promoted. VIS allows victims to tell legal decision, either orally or in written format, or both, how the crime has affected their lives, often with the aim to bring about their emotional recovery and for many crime victims VIS delivery has an important function, from both an expressive and an instrumental perspective.[66]

Therefore, an expected safeguard for Indian law would be to restrict victim's evidence or statement to impact of crime suffered and not be victim-centric, i.e. focusing on victim's personality.

V

Concluding Remarks

To provide victim with participatory rights in the criminal process and to ensure the discretion in award of sentence is properly exercised, victim impact statement at the stage of sentencing can be explored to be made mandatory in the Indian Criminal Justice System. However, VIS at this stage should be restricted to informing the court only of the impact the crime has had on the victim and not be expanded to victim's personality traits that may be argued to lead to increased emotional trauma. Further, the legislative outcome and judicial process needs to focus on who can be called 'victim' for the purpose of hearing him or her at the sentencing stage. The aims of punishment may have differing theoretical justifications and may be invoked in a composite manner by judges in Indian Courts in deciding the apt sentence for the offender. What is relevant to recognize is that rationale for punishment must be inclusive of victim experience. The limits and extent of the victim statement need to be explored. It would not be wrong to say that the inclusion of the impact of crime on victim would in fact be an extension of the principle of 'nature of offence' as a discretionary factor to decide sentence to convict.

[65] See *Muniappan* v. *State of Tamil Nadu* (1981) 3 SCC 11; *Allauddin Mian* v. *State of Bihar* (1989) 3 SCC 5.
[66] Maarten Kunst, Giulia de Groot, *et. al.*, "The Impact of Victim Impact Statements on Legal Decisions in Criminal Proceedings: A Systematic Review of the Literature Across Jurisdictions and Decision Types", 56 *Agg. & Vio. Beh.* 1 (2021).

LEGAL MECHANISM AND CHALLENGES IN THE INHERITANCE RIGHTS OF MUSLIM WOMEN: A REFLECTION ON THE SOCIETY OF KASHMIR

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Abstract

The property rights of women have always been a matter of prestige as well as a challenge for their upliftment. The right to inherit property is one of the main forms of receiving property rights for women. However, so many challenges are attributed to this very right in the context of social, legal, and familial paradigms. In spite of the legislative intervention, the women suffer on account of various familial and social disparities vis-à-vis securing property rights in the form of inheritance. The present research paper is an attempt to assess the different dimensions involved in inheritance law and the challenges which are faced by Muslim women in different parts of the Kashmir Valley.

Keywords:

Inheritance, Muslim women, legal heirs, Kashmir, Islamic Law etc.

I

Introduction

The Law of Inheritance deals with the distribution of the estate among the legal heirs as per the rules prescribed. Inheritance laws are known as *ilm-ul-Farai* in Islam. Characterized as divinely ordained, the Islamic law of inheritance defines women's right to property of the deceased with specific roles and responsibilities for each individual. Women are considered important legal heirs in different capacities like mother, daughter, wife, sister, etc. In the Pre-Quranic Arab, all the estates were devolved into the male successors as a customary practice. There was complete

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deprivation of property rights of women. Women were recognized not more than as mere chattel. The basic law of inheritance is laid down in the Holy Quran in Surah Al-Nisa.[1] This law deals with the division of the estate of a deceased person among his or her legal heirs. In Madina, various familial and social issues confronted the Prophet like remarriage of widows, property rights of orphans, issues pertaining to guardianship, and rights of heirs, after the battle of Uhud. It is reported that a widow of one *Sayeed-ibn-rabi*, who had three daughters complained before the Prophet of Allah that the brother of Sayeed ibn Rabi has usurped the whole property (date orchards) of Sayedd ibn rabi, and had left nothing for the orphans. Against this backdrop the verses of surah Al-Nisa regarding inheritance were revealed.[2] The Prophet of Allah also emphasized forcefully the great need for acquiring the knowledge of the (*ilm-ul-Faraiz)* law of inheritance and transmitting it to others.

"Learn the laws of inheritance and teach them to the people, for they are one half of useful knowledge"[3]

"Learn the laws of inheritance with the same sincerity as you learn the Holy Quran."[4]

"Allah instructs you concerning your children: for the male is equal to the share of two females. But if there are only daughters, two or more, for them is two-thirds of one's estate. And if there is only one daughter, for her is half. And for one's parents, to each one of them is a sixth of his (deceased's) estate if he left children. But if he had no children and the parents alone inherited from him, then his mother is one-third. And if he had brothers or sisters, for his mother is a sixth, after any bequest he may have made or debt. Your parents or your children, you know not which of them are nearest to you in benefit. These shares are an obligation imposed by Allah. Indeed, Allah is ever Knowing and Wise".[5]

[1] The *Holy Quran:* Chapter 4th
[2] Syed Abul A'la Maududi I *Tafheemul Quran* 235 (Markaza Maktaba Islami, New Delhi. Edition 2011).
[3] Narration of Hazrat Abu Huraira reported by Bahiqi and Hakim in Durri Mansoor.
[4] Darmi reports the narration of Hazrat Umar.
[5] The *Holy Quran : Surah Al Nisa* : 11

II

Rules for Women as a Legal Heir under Islamic Law of Inheritance.

1. Wife

The Quran fixes the share of the Wife of the deceased as **one-eighth (1/8)** in case of the presence of a child/children of the deceased. **One-fourth (1/4)** in case of no child /children of the deceased. **1/8th or 1/4th** mutually in case of being more than one at the time of death of the husband.

2. Daughter:

The Quran awards the share of the Daughter of the deceased as **one-half (1/2)** of the share in the property in case there is no son of the deceased and the daughter is the only child of the deceased. 2/3rd mutually in case there are two or more than two daughters and there is no son of the deceased. In case there is/are a son(s) of the deceased then such daughter(s) is/are entitled to share in the ratio of 2:1 i.e two shares to son and one share to daughter.

3. Mother:

Mother of the deceased is entitled to **one-third (1/3)** of the share in the net estate in case there is no child of the deceased. The general rule is that the mother is entitled to **one-sixth (1/6)** of the share in the net estate of the deceased when there is a child of the deceased or son's child (h.l.s) or two or more brothers or sisters of the deceased or there is a brother, a sister and the father of deceased. If the deceased leaves behind a spouse and father, then the mother of such deceased is entitled to **1/3 of the residue**. If the deceased leaves only the father and mother behind, then the mother is entitled to 1/3 of the share in the net estate of the deceased.

4. True Grand Mother:

True Grand Mother is entitled to 1/6 of a share if there is no mother and no nearer true grandmother. If there is no mother of the deceased but the father's mother and mother's mother are alive, then both these grandmothers shall get 1/6 mutually. Father's mother is otherwise excluded by the father.

5. Son's Daughter:

Son's Daughter is entitled to one-half (1/2) of the share in the property of the deceased if such son's daughter is alone and when there is no son or daughter of the deceased. If there are more than two or more sons' daughters and no son or daughter of the deceased, then such sons' daughters are entitled to 2/3 mutually. If there is a daughter or higher son's daughter, but no son or son's son of the deceased then such SD is entitled to 1/6 whether one or more. If there is an equal son's son then such son's daughter becomes residuary.

6. Full Sister

Sister of the deceased is entitled to 1/2 (one-half-one) of the share (if alone) and 2/3 (if two are more) when there is no child, child of a son, father, true grandfather, or full brother of the deceased. In the case of a brother, such a sister is converted into residuary i.e 2:1 rule. In the case of the father of the deceased, the sister of the deceased is excluded. In the presence of the mother of the deceased, the sister is not excluded, provided there is no child of the deceased.

III

Laws of Inheritance in Kashmir Valley.

Customary laws

Customary laws of Jammu and Kashmir occupied inheritance matters on a large scale as compared to other matters of personal law. These customs predominantly override the elaborate rules of Muslim law regarding inheritance, wills, and legacies, and the main basis of these customs was male chauvinism and agnatic relationships. The customary practices were discriminatory in nature regarding females and a major impediment to the economic and social empowerment of women. These customary practices had their roots embedded in landlordism, feudalistic rule, and the socio-economic structure of the time. The main source of income was attached to agricultural activities. The land-owning class or landlords exploited the labor class or serfs and land tillers by paying them meagerly. All rights in the lands and other property were vested in the landlords and the laws were formulated to protect these rights. In this scenario, men were in a dominant position to usurp the property rights of women. In the year 1872 A.D. The Dogra Rulers of the State promulgated Jammu and Kashmir Laws Consolidation Regulations, 1872 which was later enacted as Sri Pratap

Jammu and Kashmir Laws Consolidation Act, (1977 Samvat Vikrami) 1920 A.D. It provides that the Law of Shariah will apply to Muslims only in the following matters:[6]

i. Marriage, divorce, dower, adoption, guardianship, minority, bastardy, and female relation,
ii. Succession, inheritance, and special property of females and partitions,
iii. Gifts, waqfs, wills, legacies, and;
iv. Caste or religious usages.

However, the above rule laid down in sec. 4(d) was subject to two exceptions regarding the application of Personal law i.e. the Courts cannot apply such personal law where:

a. Any enactment has altered or abolished the Personal law;
b. Any valid custom had modified the Personal law.

- **J and K Shariat Act, 2007**

The customs which were followed by the Muslims particularly the agriculturist class in the State, were abrogated in so far as they were inconsistent with the provisions of this Act [7] after the enactment of J&K Shariat Act, 2007.

As per Section 2, the personal law of the Muslims (which is based on Shariat) shall have an overriding effect on the customary law, and parties shall be governed by Muslim Law and not by Customary Law in the matters of intestate succession, special property of females, including personal property inherited or obtained under contract or gift or any other provision of personal law, marriage, dissolution of marriage, including talaq, illa, zihar, lain, khula and mubarat, dower, guardianship, gifts, trusts, and trust properties.

Section 3 of the Act states that the provisions of the Sri Pratab Jammu and Kashmir Laws Consolidation Act, Samvat 1977(1920A.D.) shall be repealed in so far as they are inconsistent with the provisions of this Act. This means by this enactment the customs which were being followed by the Muslims particularly the agriculturist class in the State, were abrogated in so far as they are inconsistent with the provisions of this Act.

Thus, customary laws governing Muslims in Jammu and Kashmir stand were repealed after the enactment of the Shariat Act, 2007. Before the act, the application of Muslim Personal law was

[6] Act of 1977 Svt. (1920 AD), s.4(d)
[7] The Jammu and Kashmir Muslim Personal Law (Shariat) Application Act, 2007, s.2.

not only limited to certain matters but also subject to the overriding effect of customs by virtue of the Sri Pratab Jammu and Kashmir Laws Consolidation Act, (1977 Samvat Vikrami).

Repeal of J&K Shariat Act, 2007 and Extension of Shariat Act, 1937

With the abrogation of Article 370 [8] by the Parliament of India and enactment of J and K Reorganization Act, 2019 the erstwhile J and K stands bifurcated into two union territories i.e. J&K UT and Ladakh UT. As a result many local laws applicable to Jammu and Kashmir stand repealed now by virtue of the Reorganization Act, and the Central laws are extended to Jammu and Kashmir. The Shariat (Application) Act, 1937 is one such legislation which is extended and applicable to Jammu and Kashmir[9] and has replaced Jammu and Kashmir Muslim Personal Law (Shariat) Application Act, 2007.

IV

Women Profile & Research Methodology

One needs to understand varied factors while evaluating the position of women in Kashmir vis-à-vis inheritance rights. Above all customary norms and patriarchal mindsets, their presence is felt in all periods and phases of Kashmir's society**.** Despite the legislative intervention vis-à-vis inheritance rights, the challenges and denials are enormous for women to get their due share of property by way of the right to inheritance. The multistage random sampling (purposive and simple random) was adopted for this study given as under

- ✓ Four Districts by purposive sampling.
- ✓ Two taluka/tehsil from each district by random sampling by lottery method.
- ✓ 08 tehsils as ultimate sample units.
- ✓ 15 samples from each Tehsil (8) are equal to 120 respondents.

The respondents numbering **120** were accessed by the author to know the present status of inheritance rights of women and the challenges involved. The detailed profile is as follows:

[8] By Virtue of Article 370 Jammu and Kashmir had a special status within the Constitution of India i.e. Parliament of India was competent to frame laws for the J and K regarding three matters: Defence, Foreign Affairs and Communication. Rest all the matters were within the competence of Jammu and Kashmir Legislative Assembly.
[9] Act 34 of 2019, s. 95 and the fifth schedule (w.e.f. 31-10-2019).

1. **District Wise**

District	Tehsil	Tehsil	No. of Respondents
Srinagar	A: 15	B:15	30
Budgam	A:15	B:15	30
Baramulla	A:15	B:15	30
Anantnag	A:15	B:15	30
Kashmir Valley			**120**

2. **Age Group:**

Age group	No. of Women	Percentage
18-40	87	72.5%
41-60	27	22.5%
61-80	06	05%
Above 80	Nil	Nil

3. **Marital Status:**

Marital Status	No. of Women	Percentage
Married	45	37%
Unmarried	70	58%
Widow	03	02%
Divorced	02	0.01%

4. **Educational Status:**

Education	No. of Women	Percentage
10^{th} Pass	10	8.33%
12^{th} Pass	15	12.5%
Graduates	30	25%
Masters	35	29.6%

Ph.D.	10	8.33%
No Education	20	16.6%

5. **Employment Status:**

Status	No. of Women	Percentage
Employed	55	45.8%
Unemployed	50	41.6%
House Wives	15	12.5%

6. **Income Group:**

Income Status	No. of Women	Percentage
Lower Income	11	9.1%
Middle Income	97	80.8%
Higher Income	08	6.6%

Findings of the Empirical Study

1. **Denial:** It is believed by 63% of total respondents that inheritance rights are denied to women in Kashmir. On the other hand, 24% did not agree with the proposition of denial. While 13% preferred to stay neutral.

2. **Category**: It is believed by 39% of women that working women (employed) are mostly denied their share of the inheritance. While 29% believe that Widows are denied a share of the inheritance. Unmarried daughters are denied a share according to 17% of women while 15% believe that Divorced Women are deprived of the right to inheritance.

3. **Reason:** 34% of respondents believe that the unawareness of women about their inheritance rights is the main reason for the denial of share. While 26% blame family norms and practices for such denial. Customary law is the reason for denial according to 14.5% of women. According to 7% of total respondents, it is the expenditure incurred on the marriage of women due to which women are later on denied the share of inheritance in the property. 14.5% of women blame themselves for not looking for their share and being so reluctant.

4. **Role of Family:** The role of family members remains very significant in terms of granting shares to fellow co-sharers, especially women. However, the position seems very dismal. 73% of total respondents are of the opinion that sons /brothers play the major role in denying the women

(daughter/sister) the share of inheritance from the property of their deceased father or mother. On the other hand, 16.5% blame even fathers for denying the share of daughters directly or indirectly. 6% of respondents blame daughters and sisters who deny it to fellow women while 4% even blame mothers who deny their share of the inheritance.

5. **Social Taboo:** A Muslim Woman demanding a share of inheritance from the deceased parents' or deceased husbands' property even if she is aware of her right is seen as a social taboo and rebuked by society according to 80% of women. Even if the share of inheritance is given to the women it is considered as 'charity rather than a right' by more than 60% of women.

6. **Relinquishment:** There is another dimension of women not receiving their share of the inheritance and thereby jeopardizing their right to inherit. It is revealed that 68.9% of women (in the capacity of sister**)** relinquish (waive) their share in favor of their brothers because they don't want to spoil their relations with their brothers. They are under this fear that in case their in-laws or husbands may subject them to cruelty at least they have a cushion of brothers to save them. So they don't want to spoil their relations with their brothers by taking their share which is otherwise due to them. 21% believe that relinquishment is out of love and affection only while the remaining 10% believe that it is out of social insecurity and social compulsion. Out of total respondents, 71.7% believe that it is married working women who top in relinquishing their share; divorced women constitute 10.6% while unmarried daughters also constitute 10.6% in relinquishing their share. 7.1% of women believe it is widows who relinquish their share.

7. **Consequences:** Since inheritance and succession constitute an essential component of the institution of family structure, therefore it needs to be dispute free. However, 45.8% of women strongly agree that denial of inheritance rights to women is not only a serious threat to the family structure but has also increased family disputes. While 36% strongly agree that lack of awareness and denial of rights results in social and economic backwardness among Muslim women in Kashmir.

8. **Legal Mechanism:** The J&K Shariat Act, 2007 governed the inheritance matters in J&K before it was replaced by the Shariat (Application) Act, 1937 after the abrogation of Article 370. However, 44.1% of women plead ignorance about the Act of 2007 stating that they don't have any knowledge about the said law. On the other hand, 36.4% have knowledge about the said law. 19.5% claim that they have never heard about this Act. In other words, we can say 63.6% of women are unaware of the legal mechanism involved.

9. **Settlement in the Court:** At the outset, women are reluctant in filing the case in court for reclaiming their share against co-sharers, mostly brothers. However, if the property dispute vis-à-vis share in property as a result of inheritance lands in court for the settlement it still gets tough for the women to get a speedy settlement of the issue. Out of the total number of women who have approached the court for the settlement of the issue; 43% believe that it takes more than five years to settle the matter; 09% believe the duration is two years.

10. **Possible Measures:** According to 63% of respondents inheritance cases shall be disposed of within a year time in the Court of law if the suit is filed. Moreover religious platforms, Seminars, and Public Meets shall be used to aware people regularly of the issue. 8% believe that mutation transfer shall be done by revenue officials within a month after the death of a person and for that rules may be made by the State or Central Government.

V

Conclusion

From the above study it can be concluded that even though Islam has placed a dignified position for women in family and society at all levels. Particularly the Holy Quran has guaranteed the much-valued right to inherit the estate of the deceased to women fifteen centuries back by clearly stating the principles of inheritance of property. But still, Muslim Women in present times continue to be treated as per discriminatory customary laws, traditional prejudices, and patriarchal family norms in the matters of inheritance. It is seen in Muslim societies that many women are deprived in terms of inheriting property after the death of their parents. Kashmir valley is one such example. Awareness level at the grass root level both of the right to inherit as well as legal mechanisms among women in particular is not satisfactory. The female folk in the Valley seem to be reluctant in talking about their shares in the property. Expenditure incurred on the marriage of Muslim Women in the society is also cited as a reason to deprive them of the right to inherit. As a result of the denial of inheritance rights, a woman has to suffer throughout her life; she struggles to remarry after being divorced because of the financial crisis. She has to depend on her parents or brother and in such a situation she often surrenders or waives her inherited property to them as a price for her social security. With the non-implementation of inheritance laws and denial of inheritance rights, there is a serious threat to family structure and family relations. The impression one gets from the above study is that even women with very good educational and

professional status are also victims of this denial. Working women take lead in relinquishing their share, and so are widows. The existing discrimination among men and women at the social and economic level will be eradicated if the Muslim families follow the principles of distribution of Inheritance as per their religious norms.

GENDER DIVERSITY IN THE BOARDROOM: A CASE OF INDIA

Dr. Arti Aneja*

Abstract

The issue of gender diversity has been persisting for a long time. With various efforts being made both at the global and national level, India has received some success. Though the indicators are good, there is still a long way to go. This article attempts to show how gender diversity at boardrooms facilitates corporate governance and where does India Inc stand in relation to the world. Further, it shows how the legal provisions have been complied with and how the overall position of women in the corporate sphere are being changed by this provision. This article is an effort to show progress towards increasing the number of women on corporate boards. In addition, it also seeks to identify the various reasons and factors which impact the gender diversity both at the top and lower levels of organization and the tools which can help mitigate the difference. Part-I is Introduction understanding the need and importance of the issue at hand whereas Part-II will highlight the importance of women in corporate governance and also list out the legal provisions regarding the appointment of women on the board of companies in India. Part-III will discuss the effect of quotas and other similar tools and mechanism and also the progress made in India, further it will also highlight the major reasons why the issue of gender diversity is still prevalent and what are the recent statistical trends globally. Part-IV attempts to suggest certain measures such as mentoring, incentives etc. that can take things forward for India Inc followed by Part-V i.e., Conclusion.

Key Words: Gender Diversity, Companies Act, Women Empowerment, Gender Gap, Directors.

I

Introduction

The Preamble of India promises Justice to all, political, social, and economic. Equality is not a universal phenomenon but still a much desirable one, especially when it comes to gender. Women around the globe have been suppressed due to some cultural factor or the other. However, it must be noted that almost all the celebrated cultures and histories have regarded women as sacred, pious, and powerful. In India, for e.g. Woman figures and

deities were personified as the possessor and giver of everything, right from knowledge, money, power, etc. Women had closer to divinity status in ancient India. With Laxmi being the goddess of wealth, all men would bow to her, worship her, and please her. The trend continued and even during the medieval ages, there have been many women leaders. Right from Kunti of Mahabharat to Laxmi Bai of Jhansi and Razia Sultan of Delhi, women have proven their power and ability to rule. However with the evolution of modern social and political institutions women gradually lost their indulgence with those institutions. The same goes for economic institutions as well. There have been many efforts since then to restore the position of women in society by adopting various legal tools such as reservations. However, very little has been done to restore the position of women in economic institutions. This has resulted in a huge gap of gender diversity in corporations thus keeping the women not only underrepresented but also they are potentially unutilized. Corporate Governance, today, is as significant as political governance. The issue of gender diversity has been persisting for a long. With various efforts being made both at the global and national level, India has received some success. Though the indicators are good, there is still a long way to go. Thus it becomes desirable for us to ensure that women take an active part in corporate governance so that the resources occupied by corporations are not disposed only at the will of men alone when women are also the co-sharers. It is only then in a true way that we shall be able to secure justice, not only social and political but economic too.

II

Realizing the Need of Gender Diversity in Boardrooms

"Recently stakeholders are putting more emphasis on gender diversity. The idea has drawn attention worldwide on the basis of the view that by adding diverse directors can increase the performance of the board. A growing stream of research explains that diversity on corporate boards not only leads to an effective decision process but also to good governance which helps in increasing the wealth of shareholders."[1] It has been argued by many that having women on top increases the legitimacy and motivation of the female

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[1] Adeel Mustafa, Abubakr Saeed, Muhammad Awais and Shahab Aziz, *Board-Gender Diversity, Family Ownership, and Dividend Announcement: Evidence from Asian Emerging Economies*. Journal of Risk and Financial Management 2020, 13, 62; doi:10.3390/jrfm13040062

workers at lower hierarchies. Studies have found that women possess effective communication skills and play a good role in monitoring teams that work under them.

The maximization of shareholders' wealth is the ultimate goal of any corporation. Shareholders are very peculiar about the share value and the dividend policy. Various studies have found positive impacts of gender diversity on the decision-making and overall growth of organizations. For example, a recent study by Benjamin and Biswas[2] found that the '*board gender diversity has a positive impact on the dividend policies of firms*', however, it is subject to CEO duality. Similarly, another study[3]shows that '*board gender diversity facilitates corporate governance and favors dividend policy'*. Further, the relationship between gender diversity and dividend policy is strong when females have ownership in a firm. An early study "*on board diversity found that companies with the highest percentage of women on their boards outperformed companies with the least number of women on their boards by 53% on return on equity, 42% on return on sales, and by 66% on return on invested capital"*[4] Many studies have been conducted till date with mixed findings however the overall effects of gender diversity remain positive on the decision making and corporate governance.

The importance of gender diversity in boards has remained in discussion globally for a while and much literature has emerged on it. Countries and Corporations alike have felt the need to encourage diversity at the board to reap its benefits. As discussed later part many countries have adopted a target-based approach to gender diversity and studies have found that these efforts fruited into better results.

Realizing these trends in corporate jurisprudence and governance the Parliament of India added a provision in the Companies Act, 2013 mandating it for a certain class of companies to have at least one women director. The proviso to Section 149(1) of the Companies Act

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[2] Benjamin and Biswas, Board Gender *Composition, Dividend Policy and Cost of Debt: The Implications of CEO Duality* (2017). 8th Conference on Financial Markets and Corporate Governance (FMCG) 2017, Available at SSRN: https://ssrn.com/abstract=2903142 or http://dx.doi.org/10.2139/ssrn.2903142

[3] Dezhu Ye, Yi Liu, Jie Deng and Szewczyk, Does board gender diversity increase dividend payouts? Analysis of global evidence (2019) Journal of Corporate Finance, Volume 58, 1-26, ISSN 0929-1199, Available at https://doi.org/10.1016/j.jcorpfin.2019.04.002 and https://www.sciencedirect.com/science/article/pii/S09.

[4] Akshaya and Yamini, *Women In Boardrooms: Formulating A Legal Regime For Corporate India*, *Journal on Governance, Vol. 1 No. 6, 2012*

reads as "*Provided further that such class or classes of companies as may be prescribed shall have at least one woman director."* The said prescription is made under rule 3(i) of the Companies (Appointment and Qualifications of Directors) Rules, 2014 wherein it is laid that every listed company or every public company having paid-up share capital of Rs. 100 Crore or more or turnover of Rs. 300 crore or more shall appoint a Women Director. It is further provided that in case any vacancy arises of women director then the same needs to be filed within three months or not later than next Board meeting.

The Companies Act, 2013 also provided for a penalty on the companies that did not comply with the requirements of the Act. Though there is no specific punishment for the non-appointment of a woman director, it can be brought under Section 172 of the Companies Act. Section 172 provided 'punishment for contraventions of any of the provisions of this Chapter (Chapter XI of the Act) and for which no specific punishment is provided therein, the Company; and every officer of the company who is in default shall be punishable with fine which shall not be less than Rs. 50,000 but which may extend to Rs. 5,00,000'. Further, if the compliance is not made for six months then an additional penalty of Rs. 1000/- per day will be imposed. A similar provision was also made by SEBI which stands at Rs. 5000/- per day.

This initiative was also followed by the SEBI in year the 2015 by amending the SEBI (Listing Obligations and Disclosure Requirement) Regulations. In terms of Regulation 17, it was made mandatory for listed companies to have at least one woman director on their boards. It laid down that "The composition of board of directors of the listed entity shall be as follows...board of directors shall have an optimum combination of executive and non-executive directors with at least one woman director and not less than 50% of the board of directors shall comprise nonexecutive directors." These Regulations however were further amended in year the 2018 wherein a new proviso to Regulation 17 (1)(a) was been inserted which required the Board of directors of the top 500 listed entities shall have at least one independent woman director by April 1, 2019, and the Board of directors of the top 1000 listed entities to have one independent woman director by April 1, 2020.

In October 2017 upon the recommendations of the Kotak Committee, the appointment of at least one independent woman director in all listed companies to help to torn traditional gender inequality and proceed for gender balance to enhance the Boardroom effectiveness.

In May 2021, SEBI has presented Environmental, Social and Governance (ESG) related disclosure requirements. Under the Business Responsibility and Sustainability Report (BRSR), top 1000 listed entities are bound to present a social disclosure related to diversity aspects of the workforce.

Initially, India Inc was hesitant towards the new rule, however gradually due to market trends and legal actions these requirements were complied with taking India to 12th position worldwide in terms of having women on the board of directors. However, it must be noted that the goal is still farfetched and we as a community need to make more efforts to improve gender diversity notwithstanding any legal requirement.

III

Analysing the Progress and Identifying the Postholes

India is not alone in tackling the issue of gender diversity. Many efforts have been taken globally. Countries have developed their own methods to tackle the issue. Many countries like France, Germany, India, Italy, the Netherlands, Norway, and South Korea adopted a target-based approach towards resolving the issue and have legislated quotas for women on boards of companies.[5] On the other hand countries like the USA and UK have adopted a disclosure-based approach. In the USA the capital market regulator i.e. Securities and Exchange Commission requires companies to disclose their Gender Diversity Policy explaining how it applies to the board recruitment process. [6] Whereas in the UK the "*system demands that listed corporations comply with the following, the "search for board candidates should be conducted, and appointments made, on merit, against objective criteria and with due regard for the benefits of diversity on the board, including gender." "Thus, corporations are expected to have women on the board of directors. If they do not,*

[5] The Quota Legislative Strategy for women directors – Global Overview. (2020). Corporate Women Directors International (CWDI)
[6] Item 407(c), Regulation S-K, Securities Act, 1933.

then they are required to publish a statement explaining why they were unable to achieve diversity on their board, including with respect to gender."[7]

Despite these efforts, however, the issue seems quite unresolved. As per the recent Global Gender Gap Report 2022 of the World Economic Forum (2022), it might take us another 132 years to achieve the gender parity globally at the current rate of progress. The World Economic ranked India at 135 out of 146 countries in its Global Gender Gap (GGG) index for 2022. As reported by the EY India Report[8] on Diversity in the board Room: Progress and the way forward, around October 2022, 95% of the top 500 Nifty Companies have one women board member. The private players have actually made significant efforts to comply with the requirement whereas the PSUs (Public Sector Undertakings) still trail behind. "*MNCs have a higher women representation in the board of directors at 19%, while PSUs trail behind at 11%. From the 777 women directors on board, 71% (548) are independent directors. Of the 13 companies that do not have any women directors, 12 are PSUs. Just eight of the 71 PSUs in S&P BSE 500 have boards that comprise more than 20% women."*[9]

However this is only in compliance with the letter of law, the spirit is still lagging behind somewhere. Most of the companies seek to appoint women as Independent Director and they are kept away from the executive functions. Further many of those appointed in executive functions are related to the promoters and family. Hence though India Inc has responded well to gender diversity, the cultural gap still needs to be addressed. As reported by Forbes India,[10] "*Women hold 17% of board positions in corporate India, but only 11% in leadership roles"*. This was based on the Egon Zehnder Global Diversity Report 2020

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[7] Akshaya and Yamini, Women In Boardrooms: Formulating A Legal Regime For Corporate India, *Journal on Governance, Vol. 1 No. 6, 2012*

[8] *Diversity in the board Room: Progress and the way forward*, 2022 Published by EY Report on *available at:* https://www.ey.com/en_in/news/2022/10/womens-representation-on-indian-boards-has-tripled-in-10-years [Last accessed on: 17/10/2022]

[9] Jayshree P. Upadhyay, Regulatory nudge brings in gender diversity in board rooms: IiAS, May 25, 2020 *available at:* https://www.livemint.com/companies/news/regulatory-nudge-brings-in-gender-diversity-in-board-rooms-iias-11590406703442.html [Last accessed on: 17/02/2022]

[10] DIVYA J SHEKHAR, Women hold 17% of board positions in corporate India, but only 11% leadership roles. December 02, 2020 *available at:* https://www.forbesindia.com/blog/missrepresent-women-gender-sexuality/women-hold-17-of-board-positions-in-corporate-india-but-only-11-leadership-roles/#:~:text=The%20Egon%20Zehnder%20Global%20Diversity,leadership%20posts%20in%20company%20boards. [Last accessed on: 17/10/2022]

wherein it indicated that "only 11 percent of committee chairs are held by women, while the number stands at 27.3 percent globally". Hence even though India Inc has made considerable progress in recent years, efforts are still required to meet the global standards.

In February 2022, the Deloitte Global has released 'Women in the Boardroom: A global perspective' as a part of the Deloitte Global Boardroom Program. The report highlighted the representation of women in the Board of listed companies spread across 51 nations. The report took a comprehensive view of the women representation in the board room and showed a progress toward increasing number of women in corporate board though the progress at a snail's pace. Given below are few interesting findings from the report from a global perspective[11]:

- In global context 19.7%of the women are on the board, with 6.7% of the women holding board chairs.
- 5% of women that are CEO and 15.7% of the women are playing a role of the CFO.
- Top industries with the highest percentage of Women on boards are 21.3% from life sciences & healthcare, 21.2% from financial services and 20.8% are from consumer business.
- Highest women presence in board committees of these companies are in the governance board committee by 26.4%.But when we look at the women chairing these board committee, there are 23.7% women only who are chairing governance and risk board committee.
- The average tenure of women in the board as a member is 5.1 years, in comparison to 7.6 years of male board members.
- The average age of women in the board as a member is 57.2 years, in comparison to 60.3 years of male board members.
- Percentage of board seats held by women globally, France with 43.2%, Norway with 42.4% and Italy with 36.6% respectively.

With the enactment of Indian Companies Act, 2013, Indian regulators have set up comprehensive framework to enhance women participation in the board in mandatory way. Given below are few important findings from the report from a Indian perspective:

[11] *Women in the Boardroom: A global Perspective, 7th Edition(2022)* Published by Deloitte Global Boardroom Program. *available at:* https://www2.deloitte.com/sg/en/pages/risk/articles/women-in-the-boardroom-global-perspective-seventh-edition.html [Last accessed on: 17/10/2022]

- In Indian context 17.1%of the women are on the board, with 3.6% of the women holding board chairs.
- 4.7% of women that are CEO and 3.9% of the women are playing a role of the CFO.
- Top industries with the highest percentage of Women on boards are 21.5% from life sciences & healthcare, 18.4% from Technology, Media & Telecommunications and 18% are from consumer business.
- Highest women presence in board committees of these companies are in the Nominating board committee by 18.7%.But when we look at the women chairing these board committee, there are 18.8% women only who are chairing Nominating and compensation board committee.
- The average tenure of women in the board as a member is 5.1 years, in comparison to 8.1 years of male board members.
- The average age of women in the board as a member is 57.4 years, in comparison to 61.1 years of male board members.

Status of Top five Countries			
Percentage of Board Seats held by Women			
Country	**Percentage in Year 2021**	**Percentage in Year 2018**	**Change between 2018-2021**
France	43.2	37.2	**6%**
Norway	42.4	41.0	**1.4%**
Italy	36.6	29.3	**7.3%**
Belgium	34.9	30.5	**4.3%**
Sweden	34.7	33.3	**1.4%**

Source: Women in the Boardroom: A global Perspective, 7th Edition(2022)

It needs to be noted that Gender Diversity is not only important in the boardroom but also at the various levels of an organization. It is only when we focus on gender diversity at the lower levels of the organization that we will have a sufficient pool of candidates to choose from for appointment at the board. If women are less at the lower level it will continue to encourage the promoters' family members to occupy the board. Hence it becomes necessary to identify the key factors that affect gender diversity at the corporate level so as to explore possible solutions to address the same. Though there are many socio-cultural factors that directly or indirectly affect gender diversity in the organization an attempt is

made here to discuss more the socio-economic factors which require immediate attention. There are many factors such as Workforce participation, Leadership, Pay Gap, Hence it must be noted that the goal is still farfetched and we as a community need to make more efforts to improve gender diversity notwithstanding any legal requirement.

Workforce Participation

The work participation rate of women in India is dismal. It is found that only about 25% of the women actively engage in the labor market as against 82% of the men which is one of the lowest participation rates in the world. *"Women do not participate in same numbers as men for the workforce due to personal reasons, culture, care work, physical inabilities, etc. Currently there are only 24% women competing in the workforce pool in India. Closing in on this gender gap issue and equalling out the workforce sex ratio can increase India's GDP between 16% (lowest expectation) to 60% (highest expectation) by 2025. Equal participation of women in the workforce can increase the global GDP by 26% (highest expectation) or 11% (lowest expectation)"*[12]. Further, It is found that at the entry-level the gender diversity is good however as we get higher up the ladder it starts to fade in favor of men. According to the data from the Global Gender Gap Report 2022 by the World Economic Forum, only 36.9% women hired into leadership role. The agony is further added to by the pandemic of Covid-19. A study[13] conducted in six countries suggested that women are 24% more likely to lose their jobs permanently due to the pandemic as compared to men. Hence significant steps are required not only to encourage women in commerce but also to retain them especially when the focus of world leaders has shifted from these issues due to the pandemic.

Leadership

"It is not possible for a company to pick up any woman from the organization and put her on the board, said Aparna Jaswal, Additional Director - Cardiology and Electrophysiology,

[12] Bharathi & Kaveeswarar, *Cultural Impact on Women Entrepreneurship in India and Its Effect on GDP Contribution and Growth*, Asian Journal of Research in Business Economics and Management, Vol. 7, No. 6, pp. 92-103 at 97. (2017)

[13] Dang, H.H. & Nguyen, C.V. (2020, October). Gender inequality during the COVID-19 pandemic: Income, expenditure, savings, and job loss. IZA Institute of Labor Economics.

at Fortis Escorts Heart Institute & Research Centre." [14] "As per data from the World Economic Forum report *the female estimated earned income in India is a mere one-fifth of male income. Women in the country account for only 14 percent of leadership roles and 30 percent of professional and technical workers."*[15] In the same interview with the Hindu Business Line Mrs. Jyotsna Uttamchandani, Executive Director, Syska opined that it is not only difficult to find women as directors alone but also for any other work. She added, "Even if companies are trying to balance the gender diversity, are we women actually putting ourselves out there to be selected?". Shalini Warrier, Executive director, Federal Bank also remarked that irrespective of the fact that women tend to perform better in studies, males turn out to be more confident due to various socio-cultural factors. Hence even women should come forward breaking the barriers to take charge of the leadership roles. Despite some Progress, the Gender Gap Is Still Wide at Senior Levels.[16] It was found that[17]as of August 2020 only 13 women were appointed CEOs for future 500 companies by Forbes and on top of it, they were white. Hence sufficient efforts are required to be made at both local and international levels to encourage more and more women for their leadership roles and create leading examples for others to take inspiration from.

Participation in Household/unpaid work

It is common in most societies that women often indulge in the household or related work. 'On average across the globe, women spend 4 hours and 22 minutes per day in unpaid labor, compared to only 2 hours and 15 minutes for men.'[18] On average, more than 600 million provide unpaid care on a full-time basis as against 40 million men. Reports also suggest that due to the pandemic women are now spending about 15 hours extra a week

[14] Annapurani V, *Women on board: The prolonging case of gender equality in India*, (2020) *available at:* https://www.thehindubusinessline.com/companies/women-on-board-the-prolonging-case-of-gender-equality-in-india/article30997846.ece [Last accessed on: 17/10/2022]
[15] Ibid.
[16] Beghini, V., Cattaneo, U., & Pozzan, E. (2019, March 7). *A quantum leap for gender equality: For a better future of work for all*.
[17] Hinchliffe, E. (2020, August 10). A new low for the Global 500: No women of color run businesses on this **20.** year's list. *Fortune*
[18] Women in the Workforce – Global: Quick Take, 11/02/2021 *available at:* https://www.catalyst.org/research/women-in-the-workforce-global/ [Last accessed on: 17/10/2022]

towards unpaid work.[19] These unpaid caregiving responsibilities mostly fall on women preventing them from taking up paid employment. Hence even though the education gap has reduced the women still lag behind in organizations due to these issues.

Other Socio-cultural and economic factors.

Apart from the above factors, women are also prevented due to various factors such as Pay Gap. Though in a civilized world we talk about equal pay for equal work, the sad reality is that women tend to get paid lower than their male counterparts. The pandemic especially has aggravated the situation. Apart from these, other factors such as social security, inter-personal skills, and awareness campaigns, lack of associations, etc also tend to obstruct achieving gender diversity in economic organizations.

In addition to the factors discussed above there are many other factors which contribute to the lack of gender diversity which shows that how despite the progress made around the globe, the picture still seems to be inflated one. Many factors if taken into account would show as to how we still have a long way to go in achieving gender diversity in true sense. Many reports show how due to long prevalent discrimination women tend to have lower levels of experience at industry level and hence despite their elevation they lack the necessary decision making. Further as more companies seek to appoint women only to secure compliance with the company laws, it renders women only a nominal head as the decision power lies only with the executive members and this is the most common case in India. Even we were to make women executive directors also, the role remains supervisory and we may be still likely to have very less number of women CEOs as the pool of women is very less to choose from.

Moreover, having women on top doesn't mean that they will necessarily prioritize to have more and more women at the organization over other strategic matters. At this juncture, it is also important to note that in countries, including India, allows one person to have more than one directorship. Hence it is very well a possibility that a women director in one company also holds directorship in other companies. Although this may give us desirable

[19] Krentz, M., Kos, E., Green, A., & Garcia-Alonso, J. (2020, May 21). *Easing the COVID-19 burden on working parents*. The Boston Consulting Group (BCG).

data from law enforcement and compliance point of view, it presents shows how the spirit of law remain unfulfilled. Hence, it is clearly the case that how even with quota system we may not be able to achieve what we seek to. Nonetheless, it is not to discourage the progress, though little, that we have made but only to highlight the issues that still needs to be addressed. Thus in the next section it is discussed as to how, apart from legal solution, we can also introduce some managerial solutions that can actually help us accomplish and fulfill the spirit of law.

IV

EXPLORING THE WAY AHEAD

As already discussed in the previous sections, the issue of gender diversity is dependent on many factors such as workforce participation, literary gap, leadership, pay scale, social stigma, law, and order, etc. Most of these factors are socio-economic in nature. Thus, it is only by addressing these factors that we can allow gender diversity to flow more naturally. However, as a progressive nation, we must also employ tools that can accelerate the process of such naturalization. It can be observed that across the globe, many efforts have been taken to address the problem and that these efforts have shown positive results as well. Thus a holistic approach needs to be adopted towards the same. For e.g. India has not only adopted the quota-based approach but also incorporated the same in its disclosure requirements and clause 49 of Listing Agreement also. However it is noteworthy to mention here that while the mechanisms such as the quota system or the disclosure system are the measures to be taken by the government only it becomes imperative for us to identify the various methods apart these methods that can be adopted by non-governmental organizations and corporations for the promotion of gender diversity in the corporate arena that contribute in the goal of achieving gender diversity. These methods or tools are as discussed below:

Mentoring

Mentoring is very common practice especially in big corporations. It is done in the form of trainings, supervision and ad hoc programmes and companies promote mentoring even on unofficial level. Mentoring can be an effective tool to address the issue of gender diversity as well. As per Mr. Abhay Gupte, Senior Director, Deloitte Touche Tohmatsu India Private

Limited, "With the legal and regulatory push in the form of the Companies Act, 2013 and Revised Clause 49 of the Equity Listing Agreement, many Indian companies have started introducing women directors to their boards. However, as most of these women are first-time directors, they will need to participate in appropriate training and onboarding programs facilitated by the nomination and remuneration committee and supported by the full board."[20]

Hence it is needless to elaborate the importance and significance of mentoring in a corporate context. Further, as the lack of gender diversity is highly due to socio-cultural factors it becomes important to us how these behaviours can be influenced to make organizations more gender neutral. *"*Mentoring relationships can provide mentees with "reflected power" insights into organisational politics and access to information that is typically provided in the "old boys network". Much of this career development is fostered through "informal" mentoring processes, and it is this developmental support which women often lack."[21] That's why many companies are focusing on mentoring programs for women. Mentoring also helps women to gain more confidence, know the unspoken rules of the and also to challenge prevalent stereotypes and biases in the organization. "Many women directors from India were of the view that companies should be looking within their companies to nurture and to promote women who have the skills, competencies, and desire to manage and lead these large companies. Such in-house programs can empower a larger set of women to take on positions from which they can lead an organization."[22] Furthermore, Mentoring should not remain limited internally but it must also be collaborative so that the existing culture can be influenced more to accommodate gender diversity. Another step that can be taken is to establish and strengthen institutions specifically dedicated to the promotion and encouragement of gender diversity. These can be in form of Associations, Institutes, and Committees, etc. These institutes can help run programs and training and mentoring for the women directors and spread

[20] Women in the boardroom: A global perspective – 4th edition, by The Deloitte Global Center for Corporate Governance.
[21] Joan Eveline, *Mentoring for gender equality and organisational change*, Employee Relations, Vol. 28 No. 6, 2006 pp. 573-587
[22] Women In Boardrooms: Formulating A Legal Regime For Corporate India, *Journal on Governance, Vol. 1 No. 6, 2012*

awareness. It is noteworthy to mention here that the around "*63% of emerging female leaders selected to participate at a large ASX listed company were promoted during the program or within a year of participating,* further, 6*7% of female participants at a global professional services firm were promoted to Partner since starting the program*"[23] as the result outcome of the McCarthy Mentoring programs in year 2015. Hence in India also given the distance between men and women such mentoring programs can be of significance in balancing them.

Financial initiatives

Financial Initiatives can also have a positive impact on gender diversity in boards. Today the concept of Gender Lens Fund is innovated in financial markets. These funds are financial initiative taken up by the gender-sensitized investors especially to invest in companies with high gender diversity and female ownership. As per a study "In 2019, total publicly available equity and fixed income offerings in gender lens investing reached over USD 2.4 billion in asset under management".[24]

As per the Sustainability Yearbook[25] 2020 of S&P Global, Gender lens investing is where the investor is encouraged to invest in companies that have women on their boards. Many Investment banking companies are also joining this trend. In fact, in November 2019, a company named Fox Gestion d' `Actifs launched its Valeurs Feminines Global Fund, which invests only in publicly-listed companies whose CEOs are women. Since 2015 at least 15 such funds are launched. Apart from these funds, even companies like Morgan Stanley has asked its analysts to introduce gender scores in their investments. Similarly in 2018 BlackRock said that they expect that the companies they invest in must have at least two women on their board. They further encouraged the Russell 1000 companies to address the issue of lack of gender diversity at their boards. These initiatives have lead to considerable progress in the gender diversity in boardrooms of large-cap companies in developed markets. Efforts however are being taken for small-cap companies in developing

[23] Your gender diversity strategy, (2015), *available at* https://mccarthymentoring.com/your-gender-diversity-strategy/ [Last accessed on: 17/10/2022]
[24] Smucker, M. (2019) How Are Gender Lens Funds Performing? CFA Institute
[25] Gender equality in the workplace: going beyond women on the board, The Sustainability Yearbook, S&P Global (2021)

markets also. For example as per a report released in year 2019, among the 61 companies listed on the Nairobi Securities Exchange around 12% had women CEO's which was considerably better than the Fortune 500 companies which had only 7% hence many investment funds are considering to include these companies in Gender Lens Funds hoping that it would make phenomenal change especially in developing markets. Hence while take other steps towards achieving the goal of gender diversity we must also come up with financial initiatives not only in terms of investment but also in terms of relaxation such as easing taxation requirements which would accelerate the process.

Apart from the two measures discussed above there are many solutions that can be taken on governmental level which may support these initiatives and also encourage more and more corporations to take care of gender diversity for e.g. NITI Ayog has taken a very progressive step by launching a unified access portal to bring women from across the country with the object to raise the number of women entrepreneurs. This Women Entrepreneurship Platform (WEP) platform is based on three pillars of Ichha Shakti (Will Power), Gyaan Shakti (Knowledge) and Karma Shakti (Hard work). It is to say that more of these initiatives should reach the women of India so that India Inc can realize its unexplored potential. In addition the law enforcement agencies can also contribute by ensuring that strict and timely actions against the defaulters are taken to act as deterrence to such violations of law. Ultimately, we believe, that the real and significant change will come only when the markets are matured enough to naturally have gender diversity than an enforced one.

V

CONCLUSION

"India is distinctive: on the one hand, women CEOs lead some of the largest banks in India, a phenomenon that is a rarity even for Wall Street while on the other hand, it ranks abysmally low in women's economic participation."[26] This article has attempted to show how gender diversity at boardrooms facilitates corporate governance and where does India Inc stand in relation to the world. It has further listed out various socio-economic factors

[26] Women In Boardrooms: Formulating A Legal Regime For Corporate India, *Journal on Governance, Vol. 1 No. 6, 2012*

that affect the participation of women in the workforce and eventually boardrooms. However, there are many socio-cultural and socio-political issues that come along in the way. This article has suggested certain measures such as mentoring, taking up of financial initiatives, organizing seminars or workshops which are already being taken in other jurisdictions and can find relevance with India Inc too. In addition programs taken by the NITI Ayog such as WEPs should be encouraged. Because legal tools are not sufficient to bring about a social change, it must come from within the society. Hence it becomes desirable for us to ensure that women take an active part in corporate governance so that the resources occupied by corporations are not disposed only at the will of men alone when women are also the co-sharers. It is only then in a true way that we shall be able to secure justice, not only social and political but economic too.

Impact of Good Governance on Development: A Critical Appraisal

Dr. Anju Sinha*

"Good governance is ensuring respect for human rights and the rule of law; strengthening democracy; promoting transparency and capacity building in public administration"

Kofi Annan[1]

Abstract

Theoretically, the notion of Good Governance has been a matter of public discussion for over several decades now. An overwhelming majority of institutions around the world today hold the idea of Good Governance as a deeply embedded part of their practices. However, regardless of the consensus built around the notion, the idea perhaps remains elusive, as there is a gap between the exact meaning it holds and how to achieve the same. When we think of good governance, concepts such as rule of law, accountability, efficiency and effectiveness are some of the few that stand synonyms to it. Good Governance further requires both, a thorough political will and strong institutional reformation to support the winds of change. The present paper aims to understand the idea of Good Governance, try to define it and elaborate on the essentials required to achieve the same. The idea will be discussed from several dimensions including both, the State and the Institutions along with the socio-economic factors that aid the same.

I

Introduction

We are currently living in an era in which there is a day particularly dedicated to celebrating "Good Governance," and countries all over the world are evaluated based on parameters of a "Good Governance Index." This idea did not arrive at this point in time over the course of a single day. It can be traced back to Kautilya's Arthashastra, where the author devotes a significant amount of space to discussing welfare management. Major financial organizations such as the Bank Group, International Monetary Fund, and the Public North American Free Trade Agreement (GATT) were established just at the 1944 Bretton Woods Conference. These institutions' primary goals included the redistribution of wealth alongside economic growth and the satisfaction of fundamental human

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needs. They implemented aspects of good governance such as improving and modernizing government institutions, eliminating corruption, and bolstering the instruction of law. As an outcome of the lack of a universally accepted definition of "Good Governance," the concept is used with a great deal of latitude but also encounters challenges on the operational level. It is encased in a variety of criteria by a wide variety of organizations, and these parameters are determined by its requirements and the goal of achieving good governance[2].

In order to accomplish equity, transparency, involvement, the capacity to respond, responsibility, and the law system, a significant portion of the discourse on the promotion of ethical democratic oversight has focused on the factors that make organizations and conventions more effective and efficient. The ideal nation is determined by the intended outcome, which differs from scenario to situation. The systems of governance, which include the state sector and benefit systems, is primarily determined with the enhancement of efficiency, the provision of essential services and equitable access to those offerings, the openness to the perspectives of citizens and the participation of citizens in activities that affect them. These measures include enhanced personnel practices, economic transparency, a reduction in corruption, an increase in citizen participation, and increased responsibility[3].In addition, performance standards shall have been the subject of debate in the fields of education[4], health[5] finance[6] as well as other industries of advancement. Aimed objectives in respectively functional structure generally reflect newly emerging authoritative characteristics relevant to all government activities, notably openness, responsibility, truthfulness, equitable, effectiveness, performance and responsiveness.[7]

The additional broad oversight matter relates to ideas of democratic governance of law, such as right-based assertions to fairness, involvement in the activities of public substances, electoral

[2] Ritika Semwa, "Good Governance: Avenue To A Fair Legal System" *Uttarakhand Judicial & Legal Review,* pg 130, available at http://ujala.uk.gov.in (visited on May 21,2022).
[3] Some pertinent UN resolutions including General Assembly res. 50/225, 55/61, 66/209 and Economic and Social Council res. 2011/22.
[4] UNESCO, Overcoming Inequality: Why Governance Matters,2009 available at https://en.unesco.org (visited on May 21,2022).
[5] David Breuer (ed.), *Governance for health in 21st Century* (World Health Organization,2012).
[6] Report of the Secretary-General, strengthening of institutional arrangements to promote international cooperation in tax matters, including the Committee of Experts on International Cooperation in Tax Matters, E/2011/76 (New York,UN 2011) available at https://digitallibrary.un.org(visited on May 21,2022).
[7] See, for example, The Dakar Framework for Action: Education for All,2000 available at https://www.preventionweb.net/publication/dakar-framework-action (visited on May 27,2022).

honesty, ideological significant mainstream, freedom of speech, and self-governing media independence[8]. These assertions comprise demands for parity of the sexes, adolescence participation, and inclusion of underrepresented collections. Real execution requires an informed and energized reach and impact in publicly accountable, effective government. Free and diversified media is measured as crucial in achieving goals as the skill to quickly access data held by governmental agencies. The UN Summit of 2005[9] and UN Summit of 2010[10], for Heads of State and Government, affirmed the dedication to open and egalitarian governance systems.

Governance has become a 'keyword'[11] within international relations and development circles. 'Poor' or 'bad' governance is progressively acknowledged as the core reason of critical issues affecting billions of humans. Poor governance is generally characterized with behaviors such as bribery, media propaganda, lack of regard for human constitutional rights, random invitation of the rule, real or threatened political turmoil, and the like, though this is rarely articulated.[12] a lack of accountability, a lack of openness, etc. Governance entails "presences", the law and order, security, comprehensive reporting, accountable state lawmakers, civil rights, or an allowed press. Moral governance is usually joined with 'democratic,' additional term in the modern terminology, and condemnation of poor governance is typically absorbed at the national, corporate governance[13].The troubles of troubled areas, such as semi Africa or the Island nations, were once almost exclusively framed as economic, but they are now diagnosed as political because poverty is considered a result of poor governance, thus economic development became the primary object for securing good governance.[14] Leadership became a fundamental principle of not only the

[8] General Assembly Resolution 59/201available at https://undocs.org/A/RES/59/201(visited on May 27,2022).
[9] UN World Summit, 14-16 September 2005, New York, available at https://www.un.org › environment › newyork2005 (visited on April 15, 2022).
[10] UN Millennium Development Goals Summit, September 20-22, 2010, New York, available at https://www.un.org › environment › newyork2010 (visited on April 15, 2022).
[11] R.Williams, (Revised ed.) *Keywords: A Vocabulary of Culture and Society*, (Oxford University Press, New York,1985).
[12] R.L.Doty, *Imperial Encounters: The Politics of Representation in North–South Relations*, (University of Minnesota Press, Minneapolis,1996).
[13] E.Swyngedouw, "Governance innovation and the citizen: the Janus face of governance-beyond-the-State", *Urban Studies* 42 (11), 1991– 2006 (2005).
[14] A.Leftwich, "Governance, democracy and development in the Third World" 1993, *Third World Quarterly* 14 (3), 605–624 (1993), A.Leftwich, "Governance, the state, and the politics of development". *Development and Change* 1994, 25 (2), 363–386(1994), A.Leftwich, "Politics in command: development studies and the rediscovery of social science". *New Political Economy* ,10 (4), 573–607(2005).

envisioned geographical regions of the globe - large expanses of a color denoting "bad governance" – but also of microcosm of progress. Governance is now an ideology and set of performance that permeates the realms of growth and capital rule, from the lordly declarations of influential great leaders to a file image that field patrol security personnel for advancement of quasi organizations to assess their schemes. Governance is a recurrent, perplexing, symbolically and materially potent figure in international relations discourse. Given that political factors are placed at the forefront of development, those who are political commentators or who understand the approach, know that both financial and partisan dynamics need to be considered. They may perceive governance as a welcome respite from the dominant liberal economics of several theories and practice conceptions of the people facing certain circumstances in the world's largest poor nations.[15].They anticipate that the abundance of governance-related reports, policy papers, and journal articles will permit a comprehensive assessment of 'politics of advance' (not just politics or development). This newfound emphasis on politics is grounds for optimism since it appears to permit discourse and action on distributive concerns and proposes a fresh entrance point for hard work to address patterns of social disparity and barring.

II

Good Governance and Ethics

Ethics is the effort to direct human action, and it assists people in living a good life by helping guide people based on the moral precepts. In the present, ethics is defined as norms of morality that govern what individuals should do. Typically, these standards are expressed in terms of perks, obligations, societal advantages, fairness, or specific qualities. In the current environment, greater emphasis is being placed on the importance of ethics in government. As a result of the expansion of democratic republics in a number of nations across the globe, the morality of government has become a central concern. The overarching purpose of ethics is to ensure good governance by emphasizing ethical concepts, practices, and behaviors. Governance could be defined as the way an organization thinks about its own, and the processes and systems it employs to achieve its goals. Leadership is also interested in the relationship between organizations, the relationships between organizations and individuals, as well as the ways people have power in the governance system. The task of implementing the social compact in a just and equitable manner is among the most

[15] B.Fine, "Economics imperialism and the new development economics as Kuhnian paradigm shift?" *World Development,* 30 (12), 2057–2070(2002).

important duties of governance. The transition to liberalization and market reforms, including new administrative structures, is a complex and difficult process that requires a highly skilled, well-informed, and compassionate administration.[16].

If we trace the idea of Good Governance and ethics back to prehistoric times in India, the concept of Ram Rajya comes to mind. Ram Rajya till date stands as an "ideal" form of government. Be kind and do good was a rule of thumb that was applied to all aspects of monarchy, whether they were personal or professional, and the political structure was not an exception to this rule. Standing synonyms to the ideas of being kind and doing good, we have the infamous work of Kautilya, the Arthashastra, advising those in positions of authority to treat their subjects with compassion. More and more people in modern India are gaining education, becoming more progressive, and becoming aware of the rights that they are entitled to. As a result, discussions about ethics in governance are grabbing the attention of everyone who is interested in good governance. To provide excellent governance with a primary concern for moral principles, practices, and behavior is the overarching goal of morality as a general concept. These are the kinds of moral principles that are instilled in a person by parents, instructors, religion, society, and the surroundings of place of employment. The importance of morality and legal principles in the establishment of good governance cannot be overstated.

Following are the different approaches that can be taken to enhance the moral principles that are present in authority:

(i) Principle of Selflessness: State officials should make judgments purely based on public interest. They should not seek economic or other forms of material gain for oneself, their domestic, or for groups.

(ii) High Integrity: The pouches of political workplace must not take financial or other commitments from the outside individuals or groups that could affect their execution of official responsibilities.

[16] D.Argyrias, D. "Values for Public Service: Lessons Learned from Recent Trends and the Millennium Summit", *International Review of Administrative Sciences,* 69(4): 521–34(2003).

(iii) Objectivity: Purely performance decisions should be taken while handling public affairs, counting making public schedules, granting agreements, and nominating persons for reward and recognition.

(iv) Accountability: Owners of government positions should be as transparent as possible regarding their actions and decisions. They should document the reasoning behind their decisions as well as restrict access to information once the greater public attention clearly requires it.

(v)Honesty: Political officeholders are obligated to disclose any vested interests that interfere with their official obligations and to settle any ensuing conflicts in a way that keeps the public attention.

(vi)Leadership: Those who occupy community office must sponsor and support these ideas via their management and example**.**

(vii)Sense of belongingness with the Public: To enact ethics in democratic oversight, political reps such as gram panchayat members, Block Panchayat members, Mazdoor Perished representatives, Local councilors to the general populace councils, MLA's and MPs should promote inclusion with the voters of one ‘s respective constituencies, attend them periodically, and address their concerns. There must be no impediment to communication between the parties.

(viii)Responsible and Responsive Civil Servants: Each Ministry is led by a high-ranking bureaucrat who serves as a conduit between both the public and government. These high-ranking officials are tasked with providing the appropriate feedback on the public's problems to the minister in charge, as well as recommending lawful, workable solutions. If possible, they may also suggest amending the law to adequately address the issue.

(ix)Friendly relation with people: Governance would be modified into good governance if there were cordial ties between the administration and individuals at all levels. People will feel as though they are part of the administration and will have a better understanding of the party's position if a harmful demand could be met due to technical constraints.

III

Good Governance and Human Rights

Several different venues have, in a somewhat unclear manner, emphasized the immense significance of sound governance to the maintenance of peace, advancement, and democratic institutions. Individuals are granted the ability to live their lives independently and with dignity when new administrative strategies are implemented. With respect for human rights, there can be

no such thing as good governance. The two circumstances are complementary to one another, and the majority of the underlying ideas that underlie either circumstance is the same. Ideologies of human rights provide a list of guidelines that should be followed by governmental, political, and social actors in their acts. Human rights also follow the substance of better administrative operations; these may result in the advancement of governmental scenarios, projected policies, financial distribution, and other sorts of acts. In addition, human rights follow the content of better admin operations. The general population is incapable of respecting and preserving human rights in a sustainable manner in the non-appearance of good governance. In the context of the management of a country's social and economic resources, "governance" refers to the manner wherein governments use their authority[17].

Good authority is the efficient, trustworthy, equitable, clear, and responsible exercise of government authority by all of its branches. Governance is essential to the effective application of human rights. Human rights as well as better governance are inextricably linked[18].

In today's world, consequently, the concept of human rights is closely associated with the "Government" or a prepared community with a government. Civil liberties refer to the connection between a state and the Individual, such as the person's freedom to political participation, the freedoms the individual should have, and the person's rights in the State with regard to the supply of basic requirements, such as health and education. The symbiotic connection between human rights and better governance can be drawn from the concepts contained in numerous human rights agreements and national foundational texts.

The international law of human rights produces four tiers of responsibilities for a Nation which take on for adhering to an administration of rights specifically the responsibility to respect, protect, promote and accomplish those rights[19]. Inability in performing even one of those four responsibilities creates a defilement of these rights. State parties are required by the obligation to respect to refrain from interference with the enjoyment of rights; they should regard right-holders,

[17] N.J Udombana, "Articulating the Right to Democratic Governance in Africa", *Michigan Journal of International Law* 24,1209-1287(2003).
[18] Seminar on Good governance Practices for the Promotion of Human Right, jointly organized by the Office of the United Nations High Commissiner for Human Rights and the United Nations Development Programme, HR/SEL/GG/SEM/2004/BP.2, Seoul, 15-16 September, 2004 available at http//www.ohchr.org/English/issues/development/governance complitation forside_02html) (visited, on July 20, 2021).
[19] *Ibid.*

their freedoms, independence, assets, and freedom of action. The Nation has the responsibility of defending human rights of every individual and a guarantee against the misuse or negligence of basic rights. The nation is obligated to protect right bearers avoiding rights defilements by their groups via lawmaking and other effective remedies. It necessitates complete human rights protection, mainly of the ones that are minority against political, economic and social interferences. Having effective laws and principles is essential for this, in order to allow people to be able to spontaneously comprehend their liberties as well as rights. The Nation needs to ensure that people have the ability to implement their liberties and rights, such as, by raising awareness and endorsing broad mindedness, etc. The responsibility to gain fulfillment requires National Parties to take appropriate judicial action. Budgetary, legal and other measures in the direction of the complete comprehension of rights[20]. Therefore, numerous tools of human right instruments burden the Sate with these obligations and the states are obliged to move as expeditiously and effectively as possible towards the implementation of these obligations.[21] Since 2000, the Commission on Human Rights, in form of its resolutions,[22] has recognized the significant characteristics of Decent Domination as; transparency, responsibility contribution and awareness (to the requirements of the individuals). This is the basis of upright supremacy and a basis as such is a prerequisite for the human rights campaign comprising the right to development. Few additional important features for good governance include; Independence of Judiciary; Removal of Corruption; Gender Equality etc.

IV

Good Governance: Global and National Perspective

Governance is a process through which parts of a community exercise authority and power to influence and enact choices and policies pertaining to community life, financial growth, and communal progress. Government is a narrower definition than domination. Governance requires

[20] *Ibid.*
[21] *Ibid.*
[22] Resolution 2000/64 available at https://www.refworld.org/docid/3b00f28414.html (visited, on July 20, 2021).

interaction between formal and civil society institutions.[23] Despite Article 2(7) of the UN Charter[24], the pressure on states to breach sovereignty and engage in the affairs of other nations has intensified. In international organizations and forums, the status and validity of sovereign rights are being questioned. Since the United Nations, its governance environment has undergone a major transformation, there is a considerable lot of variety in the definition of governance, as the viewpoints of the international organizations listed below demonstrate.

- **World Bank**: Leadership is the exercise of control over a nation's social and economic resources. The Economic Forum has recognized three key aspects of ascendency:
  i. any kind of party-political system;
  ii. the mechanism through which power manages a nation's capitals;
  iii. the measurements of management agencies toward plan, develop, and tool rules and to carry out their duties[25].
- **UNDP:** On all levels, leadership is considered as the financial, political, and administrative control of a nation's affairs. It consists of the procedures, procedures, and organizations by which persons and groups fast their choices, exercise their lawful rights, fulfil their obligations, then arbitrate their disputes[26].
- **OECD**: Governance is the exercise of political influence and power in relation to the role of a communitarian resource in fostering social and economic development. This broad term encompasses the government's role in forming the economic climate as well as determining the sharing of income, as well as the nature of relationship between the governed as well as the government[27].

Governance refers to how the government should operate. It refers to both the decision-making process and the mechanism for putting the choice into action. It is frequently recognised that the quality of government is determined by the states. The definition of governance has evolved over

[23] Our Global Neighborhood: Report of Commission on Global Governance (Oxford University Press, February 1995).
[24] UN Charter, Chapter 1, Article 2(7): Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.
[25] Governance - *The World Bank's Experience: Development in practice,* p xiv (World Bank Group, Washington, D.C. 1994).
[26] UNDP, *Governance for Sustainable Human Development*, 2-3 (UNDP, New York 1997).
[27] OECD, *Participatory Development and Good Governance*, 14(OECD, Paris 1995).

time as governments have changed. In today's globe, the majority of countries are based on the concept of a "welfare state." It is a form of government in which the state ensures full participation of its citizens in order to promote the common good and support the individual's optimal growth and development while also safeguarding social interests. This progression has resulted in the concept of 'Good Governance,' which is an umbrella term that encompasses the society's fundamental principles in terms of economic, political, and socio-cultural challenges. It also includes essential human rights and responsibilities that must be upheld by an accountable and transparent administration.

The concept of good governance is not new to Indian civilization. While examining the state of affairs in the Indus Valley, it can be observed that the ruler or leader was bound by dharma, which supposed to guarantee the population regarding excellent governance the "Raja dharma" was just the law and order or code of conduct that was considered more important than just the sovereign's will. Even in the most well-known Indian epics, like the Bhagavad Gita and the Sutra, the kings always adhere to the guiding characteristics of effective government, which are commonly cited in a range of circumstances. Arthashastra, a book written by Kautilya[28] is a treasure chest filled with uncommon nuggets of knowledge. The Arthashastra devotes considerable attention to the subjects of statecraft as well as state administering, both of which remain to get a substantial impact on contemporary society. [29] The term "Artha" refers to material health of the individuals active on the land, whereas "Shastra" describes in what way the state should be administered in instruction to serve the best benefits of the people. Safeguarding, welfare, and wealth of the government and its citizens, which is the ruler's primary concern, are the fundamental tenets of Kautilya's strategy and serve as its foundation. Given that it is based on the basic concepts of effective governance, responsibility, and fairness, these same perspectives and principles presented by Kautilya in this Shastra are relevant and enticing to individuals from different walks of life around the globe.[30]

The Kautilya in his book (Arthashastra) speaking of the King or the ruler expressed the following thoughts regarding good governance:

[28] Kautilya was minister to the renowned King Chandragupta Maurya.
[29] Subhash C. Kashyap, *Concept of Good Governance and Kautilya's Arthashastra,* (Indian Council of Social Science Research,2003).
[30] *Ibid*.

A king with depleted treasury will eat into the very vitality of both citizens and country people. Either on the occasion of opening new settlements or on any other emergent occasions, remission of taxes shall be made.[31].

At the same time for a king, who impoverishes his people or angers them by unjust will also lose their loyalty'. Kautilya further stated

"*The king should hear at once all urgent matters and not postpone them, for postponement makes them more difficult and sometimes even impossible to settle. The king shall be active in the management of the economy. The root of wealth is economic activity and lack of it brings distress. In the absence of a fruitful economy, both current prosperity and future growth will be destroyed. A king can achieve his objective and abundance of riches by undertaking productive economic activity.*" [32]

Kautilya's Arthashastra devotes considerable attention to the subjects of statecraft as well as state administering, both of which remain to get a substantial impact on contemporary society.[33] Safeguarding, welfare, and wealth of the government and its citizens, which is the ruler's primary concern, are the fundamental tenets of Kautilya's strategy and serve as its foundation. Given that it is based on the basic concepts of effective governance, responsibility, and fairness. Good control is a public participation form of government in which those who are tasked with adaptable happening behalf of the persons are motivated to do their best by a desire to serve the people, meet their needs, and make their job more inhabitable, satisfying, and enjoyable. This is the core concept underlying the notion of good governance. The system should be effective and responsive to the needs, ambitions, backstory, and credo of the people involved, and those selected to operate the system should be bestowed with the persona and skills essential, as well as energized by the spirit of government service. These are the prerequisites for effective governance [34].

Mahatma Gandhi advocated for "Ram Rajya," based on the principles of effective governance. This implied that he aspired for India to become a welfare state, where the necessities of the poor and oppressed, the welfare of the slave, and their advancement through native industry sectors

[31] R. Shamasastry, *Kautilya's Arthashastra* ,61(Mysore Printing and Publishing House Mysore,1915).
[32] *Ibid* 62.
[33] See Subhash C. Kashyap, *supra* note 29.
[34] *Ibid.*

would become the cornerstone. Special provisions were included in Indian Constitution[35] in order to empower weaker and backward classes after the country attained its independence. The events of the last seventy-five years in India have made it perfectly clear that the goals of good governance are the process of expansion of economic opportunities, the obliteration of poverty, and the efficient delivery of the services at the grass roots. Every citizen must be granted autonomy and availability of information for effective governance to function effectively. Citizens must also have the opportunity to just have their views heard and considered, to participate in the numerous decision-making processes involved in democratic accountability, and to make substantive contributions. The important characteristics of good governance are that the power and its organizations are accountable, efficient and effective, participatory, clear, receptive, consensus-oriented and equitable. In the 1997 World Growth Report, state effectiveness was highlighted as a crucial precondition for growth in the economy, the eradication of hunger and poverty, and sustainability. According to the World Bank, indicators of effective governance include democratic institutions, transparency, and personal responsibility; these are the main metrics used to evaluate the effectiveness and ability to respond of government administrations.[36] Right to Information & E-Governance are two significant initiatives for empowering common people and improving the efficiency of government operations:

(i) Right to Information

In a democratic system of government, the focus is on the citizens themselves. Each citizen may participate in public life, democratic accountability, and society. Article 19 of the Indian Constitution[37] guarantees all citizens the right to free speech. The basis of the constitutional requirement is freedom of speech. Article 19(2) of an international covenant on civil and political rights (ICCPR)[38] requires its members to guarantee access to information. India is among the nations that have accepted this responsibility. On October 12, 2005, the Right to Information Act

[35] See Constitution of India,1950, Article 14,15,16,17and 21.
[36] Chinmayee Satpathy, "Initiatives and Challenges of Good Governance in India good Governance", *Yojana*,51-53 (January 2013).
[37] Constitution of India,1950, Article 19(1) a: all citizens shall have the right to freedom of speech and expression. In the Preamble of the Constitution also, liberty of thought and expression has been given to people of India.
[38] International Covenant on Civil and Political Rights, 1966, Article 19(2): Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

was enacted, marking a fundamental change in Indian democracy as well as usher in a new epoch of women's rights for the average Indian citizen. It permits inspections, evaluations, reviews, and evaluations of govt decisions and actions to ensure compliance with the principles of public involvement, integrity, and justice. The greater the public's access to information, the more effectively the government can meet community needs. The right to information helps promote administration's openness, transparency, as well as accountability by expanding public access to public records. In the absence of data, the average person is incapable of exercising his rights and obligations or making choices that have been in his greatest advantage. To promote openness and responsibility, the public has a right to request government information.

(ii) E-Governance

In an era of rapidly advancing data and communiqué technologies, e-governance is the procedure of efficiently delivering enhanced programming and services. These technologies herald the arrival of new opportunities for global socioeconomic transformation. Nations hope to maximize their potential as well as usher in an era of economic and social growth by transitioning from the more traditional governance structure to an electronic governance system. This will be achieved by undergoing structural transformation. E-governance does have a direct effect on the citizens of a nation, who can glean the benefits of technology by interacting directly with the various government services. It began to introduce facets of governance, including the approaches, abilities, and mindsets of the country's citizens. E-governance is indeed a process that needs renewed commitment, ideological will, and sufficient resources in terms of developing an e-governance system that will recover the efficiency and effectiveness of the government's current policies and practices. Nonetheless, e-governance necessitates these elements. Polity has the possibility to modernize the interaction between the administration and the community and private segments. It also lays the groundwork for improved national policies, elevated provision of services, and increased participation with the country's citizens[39].

To enhance the reach of essential and ancillary services that are facilitated by, both, the government and public sector undertakings, the Government of India has made great strides in

[39] *Ibid.*

computerization of departments. In 2006, to ensure greater accessibility and access to all persons equally, the Government of India rolled out the National E-Governance plan. It is implemented via Common Service Centers and aims to provide greater outreach and reliability of services required. Efficiency and transparency are the other two dimensions it aims to cater to. The idea is to integrate, cooperate and collaborate the information that is currently spread across several departments, and at various levels of Centre, States and Local Government.

V

Challenges to Good Governance

Supporting human development necessitates democratic rule via politically aware institutions that strengthen the power and voice of the people and ensure the responsibility of decision-makers.[40] In the last early 20th century, increasing importance of competent governance was a recurring theme in the popular and scholarly literature regarding progress. An increasing amount of evidence indicates that leadership quality is associated with growth and development differences[41]. This is due to the fact that the state can efficiently allocate resources to the people in order to improve the wellbeing of the populace. In other terms, it is the method by which a nation's sovereignty is exerted in the administration of its resources for its advancement. Governance and its influence on growth are at the heart of all policy disputes between policymakers or specialists. It is considered that through all institutional mechanisms, the government will be able to effectively distribute resources to the people in order to enhance the welfare of the populous.[42]In pursuing a genuine effort for the overall development of the economy, a thorough overview of the formal environment is urgently required. Governance and development management are interdependent. In accordance with UNDP,[43]The effect of good domination is that it "gives priority to the poor, advances the cause of women, sustains the environment, and produces employment and other means of subsistence." In other words, it is the way in which power is exerted in managing the social and

[40] S.Fukuda-Parr and A. K. Shiva Kumar (eds) "Rescuing the Human Development Concept from the Human Development Index: Reflections on a New Agenda" *Readings in Human Development* (Oxford University Press, U.K. 2003).

[41] H.Ramachandran, "Governance and People's Participation: Vision 2020" Report Plus Background Papers, Planning Commission, Government of India, New Delhi, available at https://niti.gov.in (visited, on July 25, 2022).

[42] The World Bank, *Governance and Development* (The World Bank Publication, Washington DC, 1992).

[43] *Supra* note 26.

economic resources of a country for its growth[44]. But at the same time criminalization of politics and corruption are the significant impediments to good governance:

(i) ***Criminalization of politics***

Public policy is negatively impacted by the crime of the party-political structure and the unholy alliance of lawmakers, political officials, and corporations. Respect for the political elite as a whole is declining. The legitimacy of an Indian State is gravely imperiled by unlawful elements. The terror in Jammu & Kashmir and its intermittent but frequent spread to other areas of India, the insurgency in the southeast, and the rapidly growing base of a Naxalite organization just on Indian subcontinent represent a significant threat to democratic governance. There is, thankfully, a national accord on terrorism, and that it is the responsibility of a Indian government to tackle this threat vigorously. The majority of the insurgency in the north-east is now restricted to Nagaland, Manipur, & Assam, where democratically elected individual states are combating it with the help of the national government. Recently, there has also been a political resolve to combat Naxalites. The process of discussion alone would bring about the ultimate resolution, but the government must be strong in order to satisfy the core obligation of protecting the lives and fortunes of its citizens. A big number of criminals and large monsters are entering state assembly legislatures and the national Parliament, posing a more subtle threat to the democratic administration of India. It appears a political landscape is developing in which involvement in legislatures or the House is viewed as an intention to advance private gain and make money. Such forces have also found a place in the Council of Ministers, and in this age of partnerships, a Party Leader or Prime Minister cannot take firm action lest the government fall. On the verge of extinction is the Gandhian ethic of modest living and unselfish dedication to public causes. Rule of men is meant to replace the adage, "no matter how great you are, the rule is above you."

The public and the media are not passive viewers of this occurrence. As a result of the judicial accountability process, some politicians and officials have been imprisoned. However, new methods to circumvent legal procedures have also been devised. Offenders facing prosecution are sometimes released on bond or even allowed to walk free. During the time between the accused's

[44] ADB Annual Report, Asian Development Bank (ADB), Manila (1998) available at https://www.adb.org/documents/adb-annual-report-1998 (visited, on July 25, 2022).

bail application and trial, the physician invariably discovers a significant ailment that permits the defendant to avoid the anguish and pain of jail by being committed to a five-star hospital.

(ii) Corruption

Commonly, the high level of incompetence in India is viewed as a key problem to refining the excellence of ascendency. While personal greed is the most obvious cause of corruption, institutional incentives as well as a weak mechanism for penalizing the guilty have led to India's corruption epidemic. A system of command - and - control that is convoluted and opaque, a governmental monopoly on service delivery, an undeveloped legal structure, a lack of data, and a restricted idea of citizen rights have all contributed to corruption in India. To enhance public awareness and strengthen anti-corruption organizations, a diligent programmer is required. There is corruption within a frame. Consequently, fundamental improvements to the filing system, regulatory limits, and the accessibility of services spending review could empower community members with the information essential to hold companies accountable. Following six strategies can be followed to minimize corruption and for involving individuals in the formulation, execution, and evaluation of economic policies and initiatives:

***(a) Information Availability*:** A well-informed populace is necessary for citizen participation. To better understand the issue, options, possibilities, and potential solutions, it is essential to give individuals accurate, impartial information. While providing information appropriate disclaimer and allocation of substance in areas such as economic, social, and financial data, sourcing and consensus award, authorities' security, audits, and growth programs and projects should be provided. Superiority of data, particularly its accessibility should be enhanced and awareness should be increased through media and marketing.

***(b) Consultations*:** Whenever it comes to the creation and implementation of programs and policies, authorities and funders are increasingly seeking public participation. It is a recommended practice to brand consultations a two-way procedure, allowing those referred to receive the advice and the way their thoughts were considered or why they were not acknowledged. This feedback may consist of an explanation as to why their suggestions were rejected. It is also vital to guarantee that the consultations include vulnerable and marginalized groups, a comprehensive geographic reach, and the use of minority languages. This will assist ensure the inclusiveness of consultations.

(c) ***Collaboration in the decision-making process:*** The genesis of a balanced and nuanced decision-making process requires collaboration. Most successful teams around the world follow a shared, collaborative decision-making approach. The same is rooted in the foundation of consensus building, that is, coming to an agreement of a team of individuals. It is credited with promoting both, a positive work environment and better implementation of the solutions so derived.

Authorities and competent authorities should invite residents to participate in the policy making process. The most notable findings are anticipated to be better responsiveness in decision-making, greater sustainability & legitimacy and greater access and involvement in existing programmers.

(d) Citizen and beneficiary responses: This is analogous to how the private sector gauges, how satisfied their customers are with their services through customer satisfaction surveys. Applications in the field of development include things like the usage of citizen progress reports, community scorecards, short messaging service-based feedback collecting from citizens, and focus group discussions, among other things. The most important results that are anticipated are, among other things, an improvement in the services' diversity and inclusion, quality, access, delivery schedule, transaction costs, and targeting; a decrease in the number of bribes paid; and an increase in the services' overall financial and operational performance.

(e) Citizen-led monitoring**:** Despite the fact that this sort of participation and the collecting of feedback share some of the same technologies, the emphasis is on something entirely different. The primary objective here is to boost accountability by means of continual monitoring, though the primary goal of recipient collecting is to enhance openness and ensure that beneficiaries are happy with the service they receive. In addition to citizen and public scorecards, some more instruments include social auditing, surveys tracking public expenditures, participatory audits, and so on. The primary effects have been a less corrupt government, improved openness, transparency, and accountability, and decreased instances of corruption.

(f) Grievance redress mechanisms**:** As a result of the detail that safeguarding rules compel implementation activities to have them in place, these are becoming more widespread among development projects. This is driving the trend. They have to be monitored regarding usage, settlement rates, and the levels of satisfaction among those who have filed complaints for them to be effective. The provision of a variety of channels is essential in order to make them accessible.

VI

Conclusion

In a nutshell, good governance requires effective participation in public policymaking, the rule of law, and an independent judiciary, as well as a system of institutional checks and balances, including horizontal and vertical separation of powers and functional oversight bodies. It relates to the political and institutional processes and outcomes that are necessary to achieve the goals of development. The true test of 'good' governance is the degree to which it delivers on the promise of human rights: civil, cultural, economic, political and social rights to its citizens. Equally citizens are required to give due concern about the effective functioning of the governance. To bridge the gap between the citizens and the State, the requirement lies in accountable and transparent governance that is devoid of any prejudices and biases.

Today, our nation is making great strides towards development and growth, however a realignment of our strategies affording greater primacy to the Gandhian values[45] can aid the ultimate objective of good governance. This has the potential to enhance the efficiency of state machineries ultimately providing greater healthcare facilities, literacy that culminates to higher per capita income and longer average lifespan. For good governance to be successful, every citizen must adhere to the values of patriotism, non-violence and an adherence to the truth. Money and muscle power should be weeded out of the system and upholding moral principles should gain priority. Our rich cultural heritage provides vast knowledge for us to learn for the same.

Following are some suggestions that can be put in place:

1. Greater focus should be on proper policy implementation with execution and not merely roll out of policies. Delays and gaps in implementation hampers effective access to such policies and reduces the overall idea of Good Governance.
2. A robust and thorough governance index, at both national and state levels that factors in the present political institutions and is developed to provide greater insight to the determinants of good governance.

[45] Antodaya (uplifting of the poorest, most deprived groups of people) was a mission close to the Mahatma Gandhi's heart,his idea of development was of *Sarvodaya*, the development of all through *Antyodaya*.

3. Unlike the Western models where the governance indicators focus more towards marker system efficiency, Indian indicators should focus more on ensuring equitable and inclusive development.
4. Such indicators must be used to focus on two purposes. Firstly, it should be an adequate reflection of the quality of the governance persisting, along with the desired levels of output. Secondly, it must both monitor and aid improvements and progress in governance standards over time.

GENDER EQUALITY AND THE AGE OF MARRIAGE IN INDIA

Mehpara*

Abstract

Child marriage has been a major social malpractice which has not only caused the women to suffer in terms of their physical, economical and social well being but has also made the society to face the consequences. Though India has legal framework to prevent the menace of child marriages, the same still continues to happen across many parts of our country as the framework lacks proper implementation and overriding effect upon personal laws. The Prohibition of Child Marriage (Amendment) Bill, 2021 is tabled before the Parliament with an aim to further amend the Prohibition of Child Marriage Act, 2006 to make it more effective. The Bill gives the Act an overriding effect over the personal laws but the Bill does not seek to amend various other laws which give implied justification to child marriage in India. In totality, the Bill does not seek to bring any substantive change in the pre-existing framework against the child marriages in India. This article seeks to provide the historical background of legislative efforts to the curb the evil of child marriages in India; discusses other laws giving implied justification to child marriages; critically evaluate the Prohibition of Child Marriage (Amendment) Bill 2021 and suggest further amendments to the Prohibition of Child Marriages Act 2006.

Keywords:

Child marriage, Gender equality, Personal laws, Prohibition of Child Marriage Act, 2006, The Prohibition of Child Marriage (Amendment) Bill, 2021

I

Introduction

Marriage is the conjunction of two individuals which marks the beginning of a social union. As defined in Encyclopedia Britannica, "marriage is a legally and socially sanctioned union, usually between a man and a woman, that is regulated by laws, rules, customs, beliefs, and

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attitudes that prescribe the rights and duties of the partners and accords status to their offspring (if any)."[1] A child is not capable to understand the rights and duties arising from such a union, therefore child marriage should not be legitimate marriage in the eyes of law. As rightly said by Member of Parliament Suresh Prabhu in the Lok Sabha during debate on the bill[2] that child marriage is "a connivance/conspiracy plotted by others who would reap benefit out of this and, therefore, the people who are entering into marriage, instead of beginning a new blissful life, are actually going to have a tortuous journey ahead of them."[3] Child marriage in our country is prohibited by law but permitted by the society.

The victim of such marriage is the girl child who is mentally and physically abused in such a union and is deprived of her health, education, economic independence and her right to live with dignity. Reports indicate that 65 percent of girls in our country are married before the age of 18 years.[4] As per the findings of 2001 census, around 35 percent girls are married between the age group of 15 to 18 years and 3 lacs girls under the age of 15 gave birth to at least one child.[5] In India, maternal mortality rate is amongst the highest in the world where around 1.25 lacs women die every year due to pregnancy and other related complications.[6] India still has to go a long way in achieving its marriage age goal for girls which is 18 years as per the Prohibition of Child Marriage Act, 2006 (hereinafter referred as 2006 Act).[7]

In December 2021, Prohibition of Child Marriage (Amendment) Bill, 2021 (hereinafter referred to as 2021 Bill) to amend the provisions of 2006 Act was presented in the Lok Sabha. The statement of object of the 2021 Bill states that the present legal framework does not efficiently protect the Constitutional mandate of gender equality in terms of marriageable age among men and women.[8] The reasons laid down by the legislatures for the 2021 Bill are: to provide for a uniform age of marriage for both boys and girls which would be 21 years if the bill is passed; to achieve the constitutional goals of gender equality and to prohibit all forms of

[1] Encyclopaedia Britannica, *available at*: https://www.britannica.com/topic/marriage (visited on February 20, 2022).
[2] Bill No. 163 of 2021.
[3] Lok Sabha Debates, *available at*: http://loksabhaph.nic.in/Debates/result14.aspx?dbsl=6955 (visited on January 10, 2022).
[4] *Ibid.*
[5] *Ibid.*
[6] *Ibid.*
[7] The Prohibition of Child Marriage Act, 2006, s. 2
[8] Statement of Objects and Reasons, The Prohibition of Child Marriage (Amendment) Bill 2021.

discrimination against women; to safeguard the health of females as there are more chances of maternal mortality and miscarriages in cases of early marriages; to achieve the goals of sustainable developments and to honour the obligations under the Convention on the Elimination of All Forms of Discrimination against Women 1979 (hereinafter referred to as CEDAW). Last but not the least, increasing the marriageable age of girls to 21 years would ensure better educational and employment opportunities for females. Under the existing law the age of marriage of a girl is 18 years and that of a boy is 21 years. The rationale behind keeping the age of marriage for a boy as 21 years lies in the patriarchy. Men are expected to be the bread earner of the family. The matrimonial responsibility of establishing a home and providing maintenance to the wife and children is primarily on the shoulders of the male. Thus, the marriageable age of men was chosen to be 21 years. At 21, normally a person completes his graduation and is suitable for a decent job. The whole emphasis of the ongoing debate on the bill is that the marriageable age of girls is increased to 21 years. The whole object of the bill is to achieve equality for women by making their marriage age equal to that of men. We should not forget that we still are a country where 30 percent of girls are married before the age of 18 years. In certain states such as Jharkhand, this percentage is more than 30.[9]

The objectives of the 2021 Bill are laudable. Every civilised society aims to achieve gender equality goals. On the other hand, the solution provided by the 2021 Bill is to increase the marriageable age of girls to 21 years for fulfilment of the above goals. Can we achieve this objective of prohibiting child marriages in our country just by increasing the marriageable age of girls to 21 years when the status of such marriages under the 2006 Act is same as the 2021 Bill? There is a lack of discussion about the status of such marriages which is valid (voidable for limited period) under the 2006 Act and also under the 2021 Bill. We should think of a new mechanism of enforcing the already existing law. It is not pragmatic to raise the marriageable age to 21 when we haven't yet achieved the target of marriage age for all girls which is 18 years under the already existing mechanism. The legislature has failed to understand the complexity surrounding the child marriages in India. The 2021 Bill is appreciated and accepted by our society as a means to eradicate all forms of discrimination against the women by raising the marriageable age of girls from 18 years to 21 years.

[9] Editorial, "30% women married under age 18" *The Indian Express*, March 3, 2022.

The 2006 Act is a secular law but remains silent if it has overriding effect on the personal laws. The legislations governing the age of marriage of parties, such as the Indian Christian Marriage Act, 1872; the Parsi Marriage and Divorce Act, 1936; the Muslim Personal Law (Shariat) Application Act, 1937; the Special Marriage Act, 1954; the Hindu Marriage Act, 1955; and the Foreign Marriage Act, 1969 do not lay down uniform minimum age of marriage for men and women. The bill, if passed, will have an overriding effect on all the personal and statutory laws relating to marriage. The bill explicitly declares the overriding effect of the 2006 Act over all the personal laws. The step taken would ensure a uniform civil law on the age of marriage in India without consulting the National Commission for Minorities. In *Lily Thomas v Union of India*[10] the Supreme Court advised the Law Commission of India to consult the National Commission for Minorities for giving effect to Article 44[11] of the Constitution which says that the state shall take efforts to secure a Uniform Civil Code for the citizens throughout the territory of India.

II

History of Legislative Initiatives to prevent Child Marriages

To prevent the practice of child marriage, the Child Marriage Restrain Act, 1929 was enacted by the then Imperial Legislative Council. The law lacked effectiveness in restraining the evil and was repealed[12] by the 2006 Act. The 2006 Act was passed on the recommendation of the National Commission of Women to prohibit the highly pernicious practice of child marriage in India by enhancing the quantum of punishment and making all offences under the Act as non-bailable and cognisable.[13] Under the 2006 Act, Child Marriage Prohibition Officers (hereinafter referred to as CMPO) were to be appointed for preventing such marriages and also for creating awareness and sensitising people on the issue. Under the 2006 Act underage marriages became voidable at the option of contracting party being a child.[14] As per Section 3 of the 2006 Act, the option of annulling such marriages by the child is only available till two years after attaining

[10] AIR 2000 SC 1650.
[11] The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India
[12] *Supra* note 7, s. 21.
[13] *Supra* note 7, s.15- non-bailable.—notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), an offence punishable under this Act shall be cognizable and non-bailable.
[14] *Supra* note 7, s. 3.

majority.[15] Section 12 of the 2006 Act provides three grounds for declaring child marriages void.[16]

Since child marriages are still not fully eradicated from the society, the legislature intends to amend the provisions of the 2006 Act through 2021 Bill. The major objective of the 2021 Bill is to achieve the goals of gender equality by increasing the age of marriage for girls from 18 to 21 years. The three major changes intended by the bill are: to increase the age of marriage for girls to 21 years; to have an overriding effect of the act over all existing laws including personal laws; to increase the limitation period for annulling child marriage from 2 years after majority to 5 years after majority.

There is an international Convention on Consent to Marriage, Minimum Age for Marriage, and Registration of Marriages, 1962. The signatory state parties have to undertake responsibility to fix minimum age of marriage and such a law shall override their customary practices and local laws.[17] The said Convention under Article 3 makes registration of marriages compulsory by the state parties.[18] India is not a party to this convention. However, India is a party to CEDAW. Under Article 16.2 of CEDAW, states parties shall make provisions for compulsory registration of marriages. India expressed its reservation to the provision of compulsory registration of marriages stating that India is a country of vast and varied cultures and religions with low literacy rate.

III

The Prohibition of Child Marriage Act, 2006

The Prohibition of Child Marriage Act, 2006 (hereinafter referred to as 2006 Act) repealed the Child Marriage Restraint Act, 1929. There was a growing demand to make the provisions of the 1929 Act more effective. The National Commission for Women[19] recommended certain amendments in the 1929 Act which included appointment of CMPOs, making punishments under the Act more stringent; to declare marriages performed in

[15] *Ibid.*
[16] *Supra* note 7, s.12.
[17] The Convention on Consent to Marriage, Minimum Age for Marriage, and Registration of Marriages, 1962, art. 2.
[18] All marriages shall be registered in an appropriate official register by the competent authority.
[19] National Commission for Women, Annual Report (1995-96).

contravention of the act to be void and to make offences under the act cognisable. Almost all of these recommendations were accepted by the legislature except that child marriages were not declared as void. The National Human Rights Commission also made recommendations for comprehensive amendments to the 1929 Act.[20] In order to give effect to these recommendations, the government instead of bringing desired amendments to the 1929 Act, repealed it and passed a new law titled Prohibition of Child Marriage Act, 2006, which came into force on January 10, 2007.[21] The 2006 Act provides that child is a person who, if a male has not completed 21 years of age and if a female has not completed 18 years of age.[22] The Act defines child marriage as a marriage in which either of the contracting party is a child.[23] Section 3 of the 2006 Act makes child marriage voidable at the option of the party to the marriage who was a child at the time of marriage. The legal action under this Section may be initiated at any time but before the child filing the petition completes two years of attaining majority.[24] Provisions for the maintenance and residence of the female contracting party are made under the 2006 Act until her remarriage.[25] Section 12 of the Act declares child marriages to be void only under three circumstances: where the child being a minor (i) is taken or enticed out of the keeping of the lawful guardian; (ii) by force compelled, or by any deceitful means induced to go from any place; or (iii) is sold for the purpose of marriage and made to go through a form of marriage or if the minor is married after which the minor is sold or trafficked or used for immoral purposes.

Apart from this any child marriage performed in contravention of the injunction orders are to be considered *void ab initio* under Section 14. Section 15 provides that the offences under the Act shall be cognisable and non-bailable. Punishments for contracting child marriages were made more stringent.[26] Under Section 16, CMPOs are appointed by state governments. This is a unique feature of the 2006 Act as for the first time such special officers were appointed and their duties include: to prevent child marriages; to increase awareness against the evil which results from child marriages; and to sensitise the community on the issue of child marriages.[27]

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[20] National Human Right Commission Annual Report (2000-01).
[21] Act no. 6 of 2007.
[22] *Supra* note 7, s. 2 (a).
[23] *Supra* note 7, s. 2 (b).
[24] *Supra* note 7, s. 3 (3).
[25] *Supra* note 7, s. 4.
[26] *Supra* note 7, s. 9-11.
[27] *Supra* note 7, s. 16.

The applicability of 2006 Act is ambiguous in terms of various marriages of different communities and religion. Customs and personal laws of various religious groups in India allow marriage of minor girls and the 2006 Act does not specify whether it prohibits all the child marriages that are sanctioned by religious laws. Section 1(2) of the 2006 Act says that it applies to all citizens of India within and beyond India. The 2021 Bill intends to give 2006 Act an overriding effect over all the laws relating to marriage including personal laws and customs.

IV

Legitimacy of Child Marriage under other Laws

The laws on child marriage have been amended numerously however, the sincerity on the part of legislature is lacking. This is evidenced from the very fact that child marriages are still not declared void per se and also nothing has been done to bring a simultaneous amendment in other laws that recognise such practice.

Exception to the definition of rape under Section 375 of Indian Penal Code, 1860 (hereinafter referred to as IPC) expressly provides that sexual intercourse of man with his wife under fifteen years of age is not rape, thus ruling out the possibility of marital rape when the age of wife is above fifteen years. This exception to rape technically validates the marriage of a girl before 18 years of age as required by 2006 Act.[28]Under the Indian Majority Act, 1875, eighteen years is the age of majority but the non-obstante clause excludes marriage, divorce, dower and adoption from the operation of the same. Resultantly, age of majority of an individual in above listed matters is governed by personal laws of various religious groups. This saving clause silently endorses child marriages which are solemnised in accordance with the personal law and customs.

Another legislation giving implied validity to child marriages is the Dowry Prohibition Act, 1961. The words 'if the dowry was received when the woman was minor' used in Section 6(1)(c) reflects the implied legislative recognition to the child marriages. Code of Criminal Procedure, 1973 also contains a provision which shows the legislative endorsement to the

[28]*Supra* note 7, s. 2.

practice of child marriage. Under Section 125, it is mandatory for the father of the minor married female child to provide maintenance to her in case her husband lacks sufficient means to maintain her.

The additional ground for divorce by a Hindu wife under Section 13(2)(iv) to the Hindu Marriage Act, 1955 added by way of the Marriage Laws (Amendment) Act, 1976 indicates the silent approval of child marriages amongst Hindus.[29] The option of puberty provides a special ground for divorce to a woman who gets married before attaining fifteen years of age and who annuls the marriage between the age of 15 and 18. Section 6(c) of the Hindu Minority and Guardianship Act, 1956 provides who shall be considered as the natural guardians of a Hindu minor in respect of the minor's person and property. As per this, the husband of a Hindu minor girl shall be considered her natural guardian. This is a cruel example how not only child marriages are given implied legitimacy but also a Hindu minor is made dependent upon her husband in matters of guardianship and her estate. This compels a Hindu minor to continue remaining in the child marriage as exercising the option of nullifying the child marriage may devoid her of her property.

The implied legislative endorsement and acceptance which confers validity to minor's marriage in all of the above mentioned laws frustrates the very purpose and object of the 2006 Act to restrain and to prevent the child marriages.[30] Thus, even after the passing of the 2006 Act along with the 2021 Bill, there shall still be certain loopholes as these other legislations are weakening since they do not actually prohibit child marriages. It can be said that though the practice of child marriage has been discouraged by the legislations but it has not been completely banned. There has to be a comprehensive amendment not only to 2006 Act but also including but not limited to all of the above enumerated laws validating and supporting it.

V

Critical Evaluation of the Prohibition of Child Marriage (Amendment) Bill 2021

[29] The provision reads: “that her marriage (whether consummated or not) was solemnised before she attained the age of fifteen years and she has repudiated the marriage after attaining that age but before attaining the age of eighteen years.”
[30] *Court on its Own Motion Lajja v State*, 2012 (193) DLT 61.

The bill to amend the existing law on child marriage was presented in the Lok Sabha on 20th December 2021. This Bill is seen to tackle the issues of women in a wholesome approach, as a measure for empowerment of women, gender equality, increasing the participation of female in labour force, and make them self-dependant and to empower them to take decisions themselves.[31] The statement of purpose and objective says we cannot claim progress unless women progress on all fronts including their physical, mental and reproductive health. It is indeed true that we cannot progress as a nation until our society progresses and our society cannot progress until our women progress. So for the advancement and betterment of any society or nation, women need to be treated with dignity and equality and to be protected against any forms of exploitation. The 2021 Bill is trying to achieve the Constitutional mandate of equality by increasing the marriageable age of girls from 18 years to 21 years. In India there is no uniformity in the marriageable age of a boy and a girl. For a boy the age of marriage is 21 years and for girls it is 18 years under 2006 Act[32] Women are protected by the law under Section 11(1) of the 2006 Act from undergoing imprisonment for promoting or participating in child marriages. Such protection is harmful for the objective of eliminating the menace of child marriages in India. The amendment does not address this issue which is a cause for promoting practice of child marriages. The above mentioned provision of the 2006 Act assumes that women in a family do not play an important role in the promotion of child marriages while it is not true since many a times women are instrumental and a guiding force in child marriages and can object to such marriages effectively bringing to halt the practice of child marriage. The 2021 Bill does not seek to amend this provision.

The three significant changes sought to be brought by the bill include: to bring women at par with men in terms of marriageable age; declare that provisions of the 2006 Act shall have overriding effect over every other law, custom, usage or practice governing the parties; and In Section 3 of the 2006 Act, in sub-section (3), for the words "two years", the words "five years" shall be substituted.

The existing law on child marriage i.e. 2006 Act is a secular law but is silent on its overriding effect on the personal laws. The legislations relating to age of marriage of parties,

[31] *Supra* note 8.
[32] *Supra* note 7, s.2.

such as the Indian Christian Marriage Act, 1872; the Parsi Marriage and Divorce Act, 1936; the Muslim Personal Law (Shariat) Application Act, 1937; the Special Marriage Act, 1954; the Hindu Marriage Act, 1955; and the Foreign Marriage Act, 1969, do not lay down uniform minimum age of marriage for men and women. The bill if passed will have an overriding effect on all personal and statutory laws relating to marriages in India. The 2021 Bill explicitly declares the over ridding effect of the 2006 Act over all the personal laws. The step taken would ensure a uniform law on the age of marriage in India without consulting the National Commission for Minorities. It is noteworthy to mention that in the case of *Lily Thomas v Union of India*[33] the Supreme Court advised the Law Commission of India to consult the National Commission for Minorities for giving effect to Article 44[34] of the Constitution of India.

Members in support of the 2021 Bill believe that the 2021 Bill will facilitate the transition of girls from being a victim to remaining as a citizen as the Constitution has enshrined and envisioned for them.[35] The objectives of the 2021 Bill are laudable but the same cannot be achieved by merely increasing the age of marriage of girls from 18 to 21. The 2021 Bill makes no changes in the enforcement mechanism, the duties and responsibilities of CMPOs remaining the same.

As regards the CMPOs, it is also worth mentioning that these are not appointed timely and many districts don't have a CMPO. Due to the vacant posts, one can easily imagine the level of enforcement of 2006 Act. Also, CMPOs are assaulted when they try to intervene and prevent child marriages. The famous case of Anganwadi worker Shakuntla Verma from Madhya Pradesh is worth mentioning over here. She was assaulted as a consequence of her efforts to stop multiple child marriages in May 2005.[36] The 2021 Bill do not make arrangements for providing special facilities and funds to enable CMPOs to prevent child marriages, their protection from such brutal retaliation, evaluation of efforts of state governments to prevent child marriages such as number of child marriages prevented, efforts undertaken to rehabilitate the victims of such marriages, legal education and assistance provided to such victims to make them aware of their rights, number of vacant posts of CMPOs etc.

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[33] AIR 2000 SC 1650.
[34] The State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India
[35] *Supra* note 3.
[36] T. K Rjalaksmi, "Costly Intervention" *Frontline*, July 15, 2005.

VI

Conclusion

The 2021 Bill is seen as a measure to secure the goals of gender equality, female education, female health and also sustainable development by increasing the age of marriage of girls from 18 to 21 years under all laws including personal laws. Person above 18 years is an adult to enter into legally enforceable contract; he/she can select the government of the country by exercising the right to vote, open bank account, and buy property in his/her name. Therefore, for achieving uniformity in the age of marriage, the boy's age for marriage can be brought down to 18 years. In majority of the countries around the globe the age of marriage lies between 18 and 20 years for both male and female.

Women are protected by the law under Section 11 of the 2006 Act from undergoing imprisonment for promoting or participating in child marriages. Such protection is harmful for eliminating the menace of child marriages in India. Violation of the 2006 Act is a cognisable and non-bailable offence and both man and woman should be equally booked for it. The 2021 Bill has over looked such provisions.

The above goals focussing upon women empowerment could be achieved by proper implementation of the existing laws. The state governments should appoint CMPOs in all districts who should not only prevent child marriages but should also create awareness amongst the people and sensitise them towards the evil which results from such marriages. The problem is deeply enrooted in our society and the solution should be at grass root level. The Panchayati Raj Institutions should also be made part of the process of implementation so that they may create awareness in the society against malpractices and could become an effective institution in this regard. The media can also play a significant role towards creating awareness and sensitising people towards this problem. The parties involved in such prevention shall also be incentivised for their work which will further improve the prevention.

It is very important that Section 3 of the 2006 Act is amended to make child marriage *void-ab initio*. The issue in the case of *Pinninti Venkataramana v State*[37] was where both the parties to the marriage or either of them are below the marriageable age set out in Section 5(iii) of Hindu

[37] AIR 1977 AP 43.

Marriage Act, 1955, is such a marriage *void ab initio* and is no marriage in the eyes of law? The court held that such marriages are perfectly valid in the eyes of law.

Child marriages are made voidable at the option of contracting party being a child but not completely void. Making such marriages voidable does not in fact help in most cases as girls on attaining majority do not have the agency or adequate support from their families to approach the court and go for annulment of the marriage. Further, girls are ostracised and stigmatised upon exercising their right to annul the marriage and it becomes almost impossible for them to get married again. If reality of the society majorly remains the same, the likelihood that minor girls will now decide to nullify their child marriages, which would probably be consummated by the time she attains maturity and chooses to approach the courts, seems very unlikely.

As discussed above, 2006 Act does not render a child marriage as void but only declares it as voidable, though it leads to an anomalous situation where on the one hand child marriage is treated as offence which is punishable under law and on the other hand, it still treats this marriage as valid, i.e. voidable till it is declared as void. The remedy lies with the legislature which should take adequate steps by not only incorporating changes under the 2006 Act but also bringing amendments in various other laws noted earlier. It is true that making such marriages *void ab initio* will create an imbalance in the society but that will only be for a short while. In the long run, the society will be aware of the child marriage being void ab initio and this will act as the biggest deterrent against this social evil.

Registration of marriages is still optional and has not been made compulsory in many states. If implemented thoroughly, it would discourage parents from getting their minor children marrying since a statutory or official document ascertaining their age would establish the illegitimacy of child marriages. This would tackle the sensitive issue of child marriages upheld by the customary and personal laws. The society shall be made aware of the fact that ascertaining of marital rights such as maintenance, custody of children, alimony, conjugal rights etc. by courts of law is only possible if the courts recognise the marriage in dispute as valid one. If adjudged invalid, the rights of the parties are jeopardised.

Thus, even after the passing of the 2021 Bill which would amend the 2006 Act, there will remain certain lacunas and loopholes; as this legislation along with certain others would still

remain weak as they do not actually prohibit child marriages. It can be said that though the practice of child marriage has been discouraged by the legislations but it has not been completely banned. There has to be a comprehensive amendment not only to the 2006 Act but also to other laws validating and supporting it in implied manner. We need more awareness and sensitisation towards the problem than a law on increasing the age of marriage of girls. For achieving these larger goals sensitisation of our society and law implementing agencies should be done simultaneously.

CHALLENGES TO INDIA'S FISCAL FEDERALISM: AN EVALUATION

Abstract

Dr. Rajesh Kumar*

The fiscal aspect of a federal structure determines the overall success of its inherent objectives. The mere presence of the resources sharing mechanism does not guarantee the achievement of its constituent goals. The implementation of the framework determines the overall direction in this regard. Considering the experiences of the Indian constituent mechanism, the present fiscal federalism has been challenged by multiple issues such as central domination in the taxation powers; horizontal and vertical imbalances; centralised tilt in the inter-governmental transfers; institutional issues; manipulation of Grants-in-aid mechanism; mismatch in the functional responsibility and fiscal capacity; gaps in local governance and fiscal resources; rising States' indebtedness; loan mechanism and related issues; issues concerning the Centrally Sponsored Schemes; and the challenges concerning the GST regime, etc. The present research paper has covered the analysis of these challenges and has also discussed the possible way out of these issues.

Keywords:

Fiscal Federalism; Constituent Mechanism; Grants-in-aid; Accountability; and GST Regime etc.

I
Introduction

Federalism provides a platform, where the common aspects of regional and national interests can be ascertained. It also provides the mechanism through which the conflicting aspects can be harmonised.[1] Initially, the constituent framework for India was expected to be a loose federation which was visible in the clauses of the objective resolution of the Constituent

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[1]Robin Broadway and Anwar Shah, *Fiscal Federalism: Principles and Practices of Multiorder Governance* 5 (Cambridge University Press, New York, 2009).

Assembly (hereinafter used as CA).[2] But the framing of the Constitution of India was simultaneously marred by the tragic events of the partition of the Country. This affected the overall thinking and understanding of the CA members regarding the position of the Centre.[3] During the deliberations, the fiscally strong Centre became a resolve of the CA. The members of the CA deliberated a lot about this aspect and ultimately agreed to the fact that the Centre's financial position must be superior to the States'. This observation has also been substantiated by the statement of Dr. B.R. Ambedkar on this aspect. He explicitly said that India should remain united and for that purpose, a strong Central Government is required.[4]

However, the Constitution has an inherent strong centralising bent but it does not exclude the States' role in fiscal matters. The Constitution has specifically determined the exclusivity of the fiscal jurisdictions and thereby provided fiscal autonomy to each the levels. The problem arises when the Constituent mechanism is used for scoring political goals. The political manipulations and discriminations cause many issues in the smooth functioning of fiscal federalism in India. Considering the importance of this aspect, the present research paper has tried to analyse the issues namely: central domination in the taxation powers; horizontal and vertical imbalances; issues with the inter-governmental transfers; institutional issues; manipulation of Grants-in-aid mechanism; mismatch in the functional responsibility and the fiscal capacity; local governance and fiscal resources; States' indebtedness; loan mechanism and related issues; issues concerning the Centrally Sponsored Schemes; and the issues related to the GST regime, etc. The upcoming section has analysed these concerns in detail.

II
Challenges

This section has widely analysed the allegation of discrimination, manipulations, encroachment, and undue interference by the Central level in the resource distribution among the States. The following sub-sections have looked into the factors that are causing issues with the smooth functioning of fiscal federalism in India.

[2]Para 3 of the Resolution says, "Wherein the said territories, whether with their present boundaries or with such others as may be determined by the Constituent Assembly and thereafter according to the Law of the Constitution, shall possess and retain the status of autonomous Units, together with residuary powers, and exercise all powers and functions of government and administration, save and except such powers and functions as are vested in or assigned to the Union, or as are inherent or implied in the Union or resulting therefrom."
[3]T M Thomas Isaac, Lekha Chakraborty *et.al.*, "Challenges to Indian Fiscal Federalism" LIV:9, *EPW*33 (2019).
[4]II, *Constituent Assembly Debates*, 35.

a. Central Domination in the Taxation Powers

The Centre-State fiscal relations are guided by three main factors i.e., Constituent provisions, political leadership, and level of economic development. The Constituent mechanism is found with inherent domination by the Central level. However, the Constitution has made exclusive categorisation of taxation matters.[5] Further, to avoid any conflict regarding double taxation, no entry of taxation has been put under the Concurrent List. The mere observation of the Constitutional scheme of fiscal aspect, explains that the Central position is very strong and has elastic taxing powers but on the other hand, the States were placed with the heavy burden of the functional responsibilities but with inelastic taxation powers.[6] However, the objective of such an arrangement is well known i.e., for ensuring the equal and equitable development of all the regions so that the Central role can determine the flow of resources towards those who are in the dire need of them.

The taxation powers are arranged in such a manner that the resources which are placed in the domain of either exclusively in the Central jurisdiction or having an impact on the inter-state relations have been kept under the Union legislature. But the purely regional subjects of taxation, have been put under the State's control.[7] The validity of such tax efforts is usually determined by analysing the origin of the concerned legislation. In such examinations, the Judiciary generally applies its interpretative tools to decide the constitutionality of such tax legislation. The judiciary has invented the tools such as liberal and harmonious construction rule, plenary powers of legislature rule, ancillary and incidental powers rule, pith and substance rule, and doctrine of colourable legislation, etc., to determine the validity of the Central and State legislations. The Union's power of taxation has been covered under the Entries of Union

[5]Jonathan Rodden, Gunnar S. Eskeland *et.al.* (eds.), *Fiscal Decentralization and the Challenge of Hard Budget Constraints* 249-251 (The MIT Press, Massachusetts, 2003).
[6]*Ibid.*
[7]*Ibid.*

List. The taxation scope under Entries 82 to 92B[8], 96[9], and 97[10] of the Union List, exclusively empowers the Union to levy taxes/fees on these matters. These entries provide most of the major heads of the revenue and the proceeds of their taxes exclusively fall within the domain of the Union and resultantly provide an edge to the central level in terms of fiscal strength. All the major sources of tax revenue, such as income tax, customs duties and corporation tax, etc., have been given to the exclusive control of the Union. On the other side, Entries 45 to 63[11] and 66[12] of the State List empower the State legislature to impose taxes on these subjects and the scope of the State revenue is itself of limited capacity. The overall revenue generation elasticity under the abovementioned entries is also very limited. The States' unwillingness to the imposition of taxes for political reasons also affects their fiscal condition.

[8]Entries 82 to 92B are as follows: 82. Taxes on income other than agricultural income.; 83. Duties of customs including export duties.; 84. Duties of excise on tobacco and other goods manufactured or produced in India except— (a) alcoholic liquors for human consumption; (b) opium, Indian hemp and other narcotic drugs and narcotics, but including medicinal and toilet preparations containing alcohol or any substance included in sub-paragraph (b) of this entry.; 85. Corporation tax.; 86. Taxes on the capital value of the assets, exclusive of agricultural land, of individuals and companies; taxes on the capital of companies.; 87. Estate duty in respect of property other than agricultural land.; 88. Duties in respect of succession to property other than agricultural land.; 89. Terminal taxes on goods or passengers, carried by railway, sea or air; taxes on railway fares and freights.; 90. Taxes other than stamp duties on transactions in stock exchanges and futures markets.; 91. Rates of stamp duty in respect of bills of exchange, cheques, promissory notes, bills of lading, letters of credit, policies of insurance, transfer of shares, debentures, proxies and receipts.; 92. Taxes on the sale or purchase of newspapers and on advertisements published therein.; 92A. Taxes on the sale or purchase of goods other than newspapers, where such sale or purchase takes place in the course of inter-State trade or commerce.; 92B. Taxes on the consignments of goods (whether the consignment is to the person making it or to any other person), where such consignment takes place in the course of inter-State trade or commerce.

[9] Entry 96 provides, "Fees in respect of any of the matters in this List, but not including fees taken in any court."

[10] Entry 97 provides, "any other matter not enumerated in List II or List III including any tax not mentioned in either of those Lists."

[11]Entries 45 to 63 are as follows: 45. Land revenue, including the assessment and collection of revenue, the maintenance of land records, survey for revenue purposes and records of rights, and alienation of revenues.; 46. Taxes on agricultural income.; 47. Duties in respect of succession to agricultural land.; 48. Estate duty in respect of agricultural land.; 49. Taxes on lands and buildings.; 50. Taxes on mineral rights subject to any limitations imposed by Parliament by law relating to mineral development.; 51. Duties of excise on the following goods manufactured or produced in the State and countervailing duties at the same or lower rates on similar goods manufactured or produced elsewhere in India: — (a) alcoholic liquors for human consumption; (b) opium, Indian hemp and other narcotic drugs and narcotics, but not including medicinal and toilet preparations containing alcohol or any substance included in sub-paragraph (b) of this entry.; 52. Taxes on the entry of goods into a local area for consumption, use or sale therein.; 53. Taxes on the consumption or sale of electricity.; 54. Taxes on the sale or purchase of goods other than newspapers, subject to the provisions of entry 92A of List I.; 55. Taxes on advertisements other than advertisements published in the newspapers and advertisements broadcast by radio or television.; 56. Taxes on goods and passengers carried by road or on inland waterways.; 57. Taxes on vehicles, whether mechanically propelled or not, suitable for use on roads, including tramcars subject to the provisions of entry 35 of List III.; 58. Taxes on animals and boats.; 59. Tolls.; 60. Taxes on professions, trades, callings and employments.; 61. Capitation taxes.; 62. Taxes on luxuries, including taxes on entertainments, amusements, betting and gambling.; and 63. Rates of stamp duty in respect of documents other than those specified in the provisions of List I with regard to rates of stamp duty.

[12] Entry 66 provides, "Fees in respect of any of the matters in this List, but not including fees taken in any court."

However, the distribution of the above-mentioned revenue powers is only for normal times. The Constitution also empowers the Union to enter into the exclusive domains of the States. Article 249[13] (i.e., the power of Parliament to legislate with respect to a matter in the State List in the national interest), 250[14] (i.e., the power of Parliament to legislate concerning any matter in the State List if a Proclamation of Emergency is in operation), 251[15] (i.e., the provision related to the inconsistency between laws made by Parliament under articles 249 and 250 and laws made by the Legislatures of States), 252[16] (i.e., the power of Parliament to legislate for two or more States by consent and adoption of such legislation by any other State), 253[17] (i.e., Legislation for giving effect to international agreements), etc. provides for such conditions. These provisions are contextual and must not be employed in absence of the conditions described in the Constitution. But in practice, it is evident that misuse of these special

[13] Article 249 provides that, (1) Notwithstanding anything in the foregoing provisions of this Chapter, if the Council of States has declared by resolution supported by not less than two-thirds of the members present and voting that it is necessary or expedient in the national interest that Parliament should make laws with respect to1[goods and services tax provided under article 246A or] any matter enumerated in the State List specified in the resolution, it shall be lawful for Parliament to make laws for the whole or any part of the territory of India with respect to that matter while the resolution remains in force. (2) A resolution passed under clause (1) shall remain in force for such period not exceeding one year as may be specified therein: Provided that, if and so often as a resolution approving the continuance in force of any such resolution is passed in the manner provided in clause (1), such resolution shall continue in force for a further period of one year from the date on which under this clause it would otherwise have ceased to be in force. (3) A law made by Parliament which Parliament would not but for the passing of a resolution under clause (1) have been competent to make shall, to the extent of the incompetency, cease to have effect on the expiration of a period of six months after the resolution has ceased to be in force, except as respects things done or omitted to be done before the expiration of the said period.

[14] Article 250 provides that, (1) Notwithstanding anything in this Chapter, Parliament shall, while a Proclamation of Emergency is in operation, have power to make laws for the whole or any part of the territory of India with respect to 2[goods and services tax provided under article 246A] or any of the matters enumerated in the State List. (2) A law made by Parliament which Parliament would not but for the issue of a Proclamation of Emergency have been competent to make shall, to the extent of the incompetency, cease to have effect on the expiration of a period of six months after the Proclamation has ceased to operate, except as respects things done or omitted to be done before the expiration of the said period.

[15] Article 251 provides that nothing in articles 249 and 250 shall restrict the power of the Legislature of a State to make any law which under this Constitution it has power to make, but if any provision of a law made by the Legislature of a State is repugnant to any provision of a law made by Parliament which Parliament has under either of the said articles power to make, the law made by Parliament, whether passed before or after the law made by the Legislature of the State, shall prevail, and the law made by the Legislature of the State shall to the extent of the repugnancy, but so long only as the law made by Parliament continues to have effect, be inoperative.

[16] Article 252 provides that, (1) If it appears to the Legislatures of two or more States to be desirable that any of the matters with respect to which Parliament has no power to make laws for the States except as provided in articles 249 and 250 should be regulated in such States by Parliament by law, and if resolutions to that effect are passed by all the Houses of the Legislatures of those States, it shall be lawful for Parliament to pass an act for regulating that matter accordingly, and any Act so passed shall apply to such States and to any other State by which it is adopted afterwards by resolution passed in that behalf by the House or, where there are two Houses, by each of the Houses of the Legislature of that State. (2) Any Act so passed by Parliament may be amended or repealed by an Act of Parliament passed or adopted in like manner but shall not, as respects any State to which it applies, be amended or repealed by an Act of the Legislature of that State.

[17] Article 253 provides that, notwithstanding anything in the foregoing provisions of this Chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body.

provisions not only disturbs the constitutional foundation of the federal design of India but also increases the stress on the already overburdened fiscal condition of the States.

No doubt the Constitution itself has created a strong centralised bent in sharing the revenues but that has been done to ensure the development of those regions whose resource generation capacity is inherently limited. The constituent mechanism has been very aptly designed but the problem lies with its implementation which most of the time has been given the least importance. Thus, it can be observed that the improper implementation of the Constituent mechanism is creating a situation where the distribution of the taxation powers themselves is becoming a cause of concern for the smooth Centre-State relations.

b. Imbalances: Horizontal and Vertical

In a multilevel government system, the distribution of the finance, function, and functionaries determines the success of the assigned role and responsibilities. If the particular level of government does not have the required funds for the assigned obligations, then it is going to create fiscal imbalances in the system.[18] The consequent fiscal imbalances are of two types i.e., vertical fiscal imbalances and horizontal fiscal imbalances. The vertical imbalance results in a situation where the revenue does not match the assigned expenditure liabilities for different levels of the government. It is a kind of structural issue in a multilevel system. On the other hand, horizontal imbalances are the result of a situation where the sub-national or regional governments do not have corresponding revenue capacity compared to their functional responsibilities.[19] At present, States are responsible for providing social welfare services but most of the financial resources excluding the revenue from the Goods and Services Tax (GST) are under the monopoly of the Centre. The resource transfers from the Centre to States are mixed in the objectives of the fiscal devolution and the measures for equalisation. Thus, it is creating vagueness about the overall outcome of the revenue transferred by the Centre. The transfer system is unable to cure the fast-spreading disparities among the States. However, post-Fourteenth Finance Commission recommendations, the Centrally Sponsored Schemes (CSS), have been restructured. Nevertheless, their expected effectiveness and efficiency is not visible on the ground.[20] The present intergovernmental finance system in India is marred by

[18]Subrat Das and Sona Mitra, "Restructuring Centrally Sponsored Schemes: A Brief Note on the Recent Policy Measures" *CBGA* 3 (2013).
[19]*Ibid.*
[20]Serdar Yilmaz, Farah Zahir (eds.), *Intergovernmental Transfers in Federations* 275 (Edward Elgar Publishing, Northampton, 2020).

excessive vertical imbalances. The States revenue is comprised of two kinds of revenue receipts i.e., revenue from its own sources and the transfers from the Centre. Between the 2015-20 period, 54% of the revenue of the States came from their resources and the remaining 46% was the transfers from the Centre.[21] Even among the States, there are wide differences in the percentage of revenue generated from their resources. For example, States like Haryana, Maharashtra, Telangana, Delhi, etc. have more than 70% of the contribution from their revenues. On the contrary, States like Bihar, Himachal Pradesh, and the north-eastern States depend on Central transfers for most of their revenue. Further, in most States, the share of their non-tax revenue ranges between 6-16% of their total revenue.[22] Thus, it shows that the States have no option but to remain dependent on the Central transfers and more importantly on assistance in the form of grants-in-aid and other equalisation measures. The lack of a mechanism to ensure fiscal prudence at the State level is also leading to the wastage of resources. This further enhances the horizontal imbalances among the States and ultimately widens the fiscal disparities.

The dependency factor reduces the concern for expenditure efficiency and fiscal responsibility. Resultantly, it creates vagueness regarding the outcome of welfare measures. In addition to this, the residual power of taxation is also with the Union. Thus, without a Constitutional amendment, it is not possible to increase the tax autonomy of the States.[23] The levy of cess is also another cause of concern that is causing disadvantages to the States' fiscal autonomy. The Union can levy cess and is constitutionally not obligated to share its proceeds with the States. The States' inability to tax non-agricultural income is also creating a hindrance to their sound fiscal position. Besides the limitations on the States' power of taxation, the States are also to blame for their limited efforts in the full exploitation of the taxes such as property tax or professional taxes, etc. All this causes a large gap in the vertical fiscal imbalances. Thus, collectively, it can be observed that the lack of clarity and predictability of the fiscal share of the States as well as manipulative equalisation measures of the Union are causing grave stress on the Centre-State financial relations.

c. The issues of Intergovernmental Transfers

[21] Suyash Tiwari and Saket Surya, "Report on State of State Finances" 9-10 (PRS India, 2021), *available at*: https://prsindia.org/policy/analytical-reports/state-state-finances-2020-21(last visited on Dec. 15, 2021).
[22] *Ibid*.
[23] *Supra* note 20 at 276.

In a federal system, the mechanism of inter-governmental transfer is a means to achieve fiscal equalisation among the regions with disparities.[24] Generally, these measures are aimed to achieve the following objectives: to enhance the fiscal autonomy of the subnational governments; to ensure revenue adequacy at the subnational level so that they can perform their assigned responsibilities; to bring equity among the differently situated regions; to enhance the predictability of the States' development-related planning; the unconditional grants help in ensuring the efficiency in the utilisation of the disbursed fiscal support; to encourage fiscal prudence and discourage inefficient practices; to ensure the access of common minimum facilities across the regions, etc.[25]

However, theoretically, this mechanism looks like a solution to many problems of the federal system. But, when it was put into execution then the real issues were observed. No doubt, the transfer system has an inherent objective to resolve the fiscal problems caused by the inadequate resources available to the regional units. But looking at India's experience over the last more than 70 years, it can be observed that most of the time these instruments have been devoted to serving political interests. There has been an allegation by the States that these instruments are being used as arm-twisting tools. At present, the statutory transfers are fixed by the formula of the FC and are not bound by any conditionality of the Central Government. But transfer through this channel is not sufficient and States require extra revenue to continue their welfare and development-related initiatives. This increases the importance of the discretionary transfers that are in complete control of the Central government. Whenever there is a difference between the political parties in power at the Centre and the States then the inherent fallout of this discretionary support can be witnessed.[26] The alleged manipulation of these resources may provide political mileage at that time but in the long run, it is bound to create a fiscally irresponsible and inefficient system at the subnational level. The States ruled by the opposition parties frequently make such allegations and many a time found with the substance behind it.[27] Thus, unless and until there are established mechanisms for the sharing

[24] Rakhee Bhattacharya (ed.), *Regional Development and Public Policy Challenges in India* 143 (Springer, New Delhi, 2015).
[25] *Ibid.*
[26] PTI, "SP alleges discrimination against UP by Centre",*The Statesman*, August 11, 2016, *available at*: https://www.thestatesman.com/india/sp-alleges-discrimination-against-up-by-centre-159392.html(last visited on Dec. 12, 2021).
[27] Special Correspondent, "Shah's 'Yaas' Meeting with CMs: Mamata alleges discrimination", *The Hindu*, May 24, 2021, available at:https://www.thehindu.com/news/cities/kolkata/shahs-yaas-meeting-with-cms-mamata-alleges-discrimination/article34635303.ece (last visited on Dec. 13, 2021).

of these resources, the Central role would remain contentious and the issues related to the intergovernmental transfer would keep on boiling.

d. Institutional Issues

Considering the importance of intergovernmental transfers, the Constitution of India adopted a well-elaborated mechanism for this purpose. Before 2015, the intergovernmental transfers used to operate through three institutional channels i.e., Finance Commission (FC); Planning Commission (PC); and Central Ministries.[28] The FC used to recommend revenue sharing through the following three ways: share in the central taxes (based on some formula); General Purpose Grants (based on the post-devolution non-plan current deficit); and Specific Purpose Grants. The PC Used to provide additional support through- special grants for national programs; special central assistance; and normal central assistance by way of Block Plan Grants for State plans. The Central Ministries used to transfer through Specific Purpose Non-Plan Grants; Matching Specific Plan Grants for the CSS or Central Plan Schemes; and the Non-Matching Plan Grants. But due to the structural changes in the intergovernmental transfer now the transfer takes place through the following two channels: (1) Statutory Transfers through FC (formula-based tax devolution and statutory grants-in-aid); (2) Discretionary transfers through Central Ministries (transfer through the matching grants for the CSS and specific purpose grants).[29]

However, the elimination of the PC and its replacement with NITI Aayog (as a think tank only) left only one institution to deal with the transfers of resources from the Centre to the States. Currently, the status of FC is temporary. It has no permanent secretariat and it works only for the duration when it is mandated to give its five-yearly recommendations. After the submission of its report, there is no existence of the FC. It creates a vacuum in the financial aspect of the Indian federation. The NITI Aayog's newly assigned role is keeping it limited to a platform of deliberation and evaluation of the developmental initiatives. But its role in fiscal sharing has not been defined, consequently, now the discretionary transfers from the Central level are regulated by the finance ministry. The Aayog recommends it to the nodal department and then it is considered by the Ministry. The present institutional arrangement is lacking the required well-established fiscal role and connected responsibilities. For example, after the FC makes its

[28] Naseer Ahmed Khan (ed.), *Challenges and Issues in Indian Federalism*2-4 (Springer, Singapore, 2018)
[29] ADB, "Strengthening India's Intergovernmental Transfers: Learning from the Asian Experience" 10 (December 2020),*available at*: https://www.adb.org/sites/default/files/publication/662116/strengthening-indias-intergovernmental-fiscal-transfers.pdf(last visited on Dec. 15, 2021).

recommendations, it has nothing to do with the evaluation of the implementation of the suggestions. Further, NITI Aayog being a non-constitutional and non-statutory body has been given more weightage than the Constitutional body of FC. It is a sheer violation of the fiscal system expected by the framers of the Constitution. The rising role of NITI Aayog creates an impression that it might end up in the same way as happened with the PC. The need of the hour is that there should be proper coordination among the institutions involved in the Centre-State relations and these institutions must have some role in the fiscal distribution as well as in the periodical appraisal of the resources disbursed by them. But in reality, there is hardly such a mechanism in existence. The present institutional mechanism, instead of bringing synchronisation in the Centre-States relation, is working in an aloof manner. Consequently, the resources are not being applied for the assigned purpose and this is causing the same issue i.e., regional disparities. With the updation of new roles, it is alleged that NITI Aayog is becoming a new symbol of the 'centralisation of ideas'. It is also submitting all the policy reviews to the government. Its way of putting a stamp on every initiative of the Central Government is creating it into another super-organisation which the erstwhile PC used to enjoy. It is also alleged that the Aayog is dealing with all the policy formation but gives little thought to the logistic problems and inherent bottle legs.[30] The above analyses show that the Constitutional bodies have very little space in the regular monitoring of the fiscal aspects of Indian federalism. On the other hand, the central executive and its institutional legs have a great influence on the overall mechanism of fiscal management. The constant demand for making the FC a permanent body or ensuring statutory backing to the NITI Aayog has rarely been given any serious thought. Resultantly, the institutional structure is merely a garb to support the existing central bent even in matters of fiscal relations. Other institutions (i.e., Inter-state Council, Zonal Councils, North-eastern Council, etc.) involved in the Centre-States relations have rarely been given any serious fiscal role to play. Thus, the overall institutional fabric requires a new functional synergy to suit the demands of the present time.

e. Manipulation of Grants-in-aid: Statutory vs Discretionary Grants

[30] Sanya Dhingra, "NITI Aayog at 6- some ideas to 'ambitious' but Modi think tank has many reforms up its sleeve",*ThePrint,available at*: https://theprint.in/india/governance/niti-aayog-at-6-some-ideas-too-ambitious-but-modi-think-tank-has-many-reforms-up-its-sleeve/577426/ (last visited on Dec. 10, 2021).

The Constituent mechanism allows two types of grant mechanisms i.e., statutory grants[31] and discretionary grants[32]. Under statutory grants, only the FC is empowered to suggest the grants and their related mechanism. But in respect of the Grants under Article 282, the concerned government has complete freedom to decide the sphere as well as conditions to provide such grants. The term 'public purpose' has a very wide connotation and can cover almost all the functional spheres of the government. Moreover, Article 282, itself gives the freedom that while providing grants under this Article, the categorisation of the Seventh Schedule will not be applicable. However, this provision was incorporated to assist the regions which are situated in disadvantageous conditions. But over the years it is experienced that the Central government is using this provision as an arm-twisting measure against the States ruled by the opposition parties. Another issue it creates is that a significant share of the central transfers to the States passes through this channel. For example, the funding share of the Central Government in all the Centrally Sponsored Schemes (CSS) is channelized through this provision. As per the budget estimates for 2021- 22, around 22% of the total transfers to the States are being set to be through the channel

[31]Article 275 provides for the Grants from the Union to certain States. It says, "(1) Such sums as Parliament may by law provide shall be charged on the Consolidated Fund of India in each year as grants-in-aid of the revenues of such States as Parliament may determine to be in need of assistance, and different sums may be fixed for different States: Provided that there shall be paid out of the Consolidated Fund of India as grants-in-aid of the revenues of a State such capital and recurring sums as may be necessary to enable that State to meet the costs of such schemes of development as may be undertaken by the State with the approval of the Government of India for the purpose of promoting the welfare of the Scheduled Tribes in that State or raising the level of administration of the Scheduled Areas therein to that of the administration of the rest of the areas of that State: Provided further that there shall be paid out of the Consolidated Fund of India as grants-in-aid of the revenues of the State of Assam sums, capital and recurring, equivalent to— (a) the average excess of expenditure over the revenues during the two years immediately preceding the commencement of this Constitution in respect of the administration of the tribal areas specified in [Part I] of the table appended to paragraph 20 of the Sixth Schedule; and (b) the costs of such schemes of development as may be undertaken by that State with the approval of the Government of India for the purpose of raising the level of administration of the said areas to that of the administration of the rest of the areas of that State. [(1A) On and from the formation of the autonomous State under article 244A,— (i) any sums payable under clause (a) of the second proviso to clause (1) shall, if the autonomous State comprises all the tribal areas referred to therein, be paid to the autonomous State, and, if the autonomous State comprises only some of those tribal areas, be apportioned between the State of Assam and the autonomous State as the President may, by order, specify; (ii) there shall be paid out of the Consolidated Fund of India as grants-in-aid of the revenues of the autonomous State sums, capital and recurring, equivalent to the costs of such schemes of development as may be undertaken by the autonomous State with the approval of the Government of India for the purpose of raising the level of administration of that State to that of the administration of the rest of the State of Assam.] (2) Until provision is made by Parliament under clause (1), the powers conferred on Parliament under that clause shall be exercisable by the President by order and any order made by the President under this clause shall have effect subject to any provision so made by Parliament: Provided that after a Finance Commission has been constituted no order shall be made under this clause by the President except after considering the recommendations of the Finance Commission."

[32]Article 282 provides for the expenditure defrayable by the Union or a State out of its revenues. It says that "the Union or a State may make any grants for any public purpose, notwithstanding that the purpose is not one with respect to which Parliament or the Legislature of the State, as the case may be, may make laws."

of CSS.[33] On the one side, the grants under Article 282 form a substantial part of the overall transfer to States and on the other, it gives exclusive power to the Centre to decide the conditions for the utilization of these grants.

However, the Grants under Article 275 (also called statutory grants) are free from any sort of interference by the Central Government and are determined by the recommendation of the FC only. The unconditional usage of these grants provides the States autonomy to apply as per their needs. On the contrary, the grants under Article 282 devoid the States from exercising their discretion in their application. Due to their different condition, the States have their varying priorities but the conditions attached to the CSS do not take care of these priorities and undermine the constitutional fiscal delineation. Considering the scale of States' functional liabilities, it can be assumed that States cannot deny the acceptance of the terms attached to the CSS.[34] Consequently, States are bound to change their priorities to suit their plans as per the wishes of the Union Government's sector-specific plans. The overall framework of the CSS is creating a big dent in the federal spirit ingrained in the Constitution.

The federal mechanism of India has itself made a strong central position but misuse of the contextual provisions further dampens the spirit of the federal fiscal framework. For example, the States in 2018-19 had only 37.3% resources but their expenditure liabilities were 62.4%. To bridge this vertical gap, the Constituent mechanism through various channels allows the flow of extra revenues for the States. Article 282 channelizes a substantial part of those transfers. However, the purpose of this provision is to eliminate the disparities across the States. But the political manipulations and discrimination make it one of the sources of tension in Centre-State fiscal relations. On this issue, the Apex court has also observed that Article 282 enables the Union and the States to make grants for public purpose and that can be done irrespective of their legislative competence. Given the usage of this provision, the introduction of the CSS through this channel is not per se unconstitutional.[35] The judicial pronouncement has further strengthened the stand of the Union government. In the given situation, the predictable rules in the framing of the CSS can pave the way for fair conditions for the utilization of the funds through these channels.

[33]Ritwika Sharma, Mayuri Gupta*et.al.*, "Why Article 282 needs a rethink as Centre and States battle for money", *ThePrint*, July 20, 2021, *available at*: https://theprint.in/opinion/why-article-282-needs-a-rethink-as-centre-and-states-battle-for-money/699173/(last visited on Dec. 05, 2021).
[34]*Ibid.*
[35]*Bhim Singh* v. *Union of India* (2010) 5 SCC 538.

f. Mismatch of Functional Responsibility and Fiscal Capacity

The present constituent mechanism provides for an arrangement where the Union government has been assigned most of the avenues for raising revenues while the State Governments are expected to carry out most of the development-related functions. To make this mechanism sustainable, the Constitution provides for the devolution of resources from the Centre to the States. The regional units being close to the governed are required to perform all the administrative and welfare-related obligations. In the performance of the assigned responsibilities, States' fiscal capacity is inadequate.[36] To fill this gap, the two channels discussed in the preceding sections are employed by the Union government. The experience of the past 70 years shows that the transfers through the FCs have not been sufficient to make the States perform their functions smoothly. The additional resources through the instruments of-public purpose grants under Article 282 and borrowings under Article 293[37] has been employed from time to time.

With the abovementioned background of the functional responsibilities and the sources of the required fiscal support, it can be observed that for the present issues at the fiscal front of the federal both levels deserve equal blame. Many times, the Central transfers are found with attached terms that might not be suitable for the concerned States' developmental needs. But to get the funds, the States are compelled to accept those terms. Similarly, due to political opportunism, the States rarely behave prudently in managing their resources. The Centre alleges that the States usually do not follow the required principles of sound fiscal management. However, States also allege that the Centre discriminates in the devolution of fiscal resources. The important thing is that at both levels there is an urgent need to follow the rule-based and outcome-oriented approach. The rising deficit of the Centre and the States is compelling them to look for more avenues to generate resources. This compulsion causes a great impact on the

[36]Geoffrey Brennan, Jonathan J. Pincus, "Fiscal Equity in Federal Systems" 6:3 *Review of Law and Economics* 348 (2010).

[37] Article 293 provides for the borrowing by States. It says that, "(1) Subject to the provisions of this article, the executive power of a State extends to borrowing within the territory of India upon the security of the Consolidated Fund of the State within such limits, if any, as may from time to time be fixed by the Legislature of such State by law and to the giving of guarantees within such limits, if any, as may be so fixed. (2) The Government of India may, subject to such conditions as may be laid down by or under any law made by Parliament, make loans to any State or, so long as any limits fixed under article 292 are not exceeded, give guarantees in respect of loans raised by any State, and any sums required for the purpose of making such loans shall be charged on the Consolidated Fund of India. (3) A State may not without the consent of the Government of India raise any loan if there is still outstanding any part of a loan which has been made to the State by the Government of India or by its predecessor Government, or in respect of which a guarantee has been given by the Government of India or by its predecessor Government. (4) A consent under clause (3) may be granted subject to such conditions, if any, as the Government of India may think fit to impose."

priorities in their expenditure. For example, the recent pandemic has caused the contraction of GDP at both levels and consequently it affected the revenue mobilisation at both levels.[38] Thus, it can be observed that the mismatch between assigned resources and correlated responsibilities provides a space for tension between the Centre and the States as well as among the States.

g. The Local Governance and Fiscal Resources

Local governance is a subject of the State List. Till the introduction of the 73rd and 74th amendments, the federal structure of India had only two tiers. But with the abovementioned amendments, the third tier of the federal structure was created. The overall functioning of the local government is under the general regulation of the States Government. But the Central government also plays an important role in ensuring the development of the concerned local region.[39] The Central Government through various schemes (i.e., CSS) and national programs enters this domain. As discussed above that the CSS and their funding through Article 282 plays an important role in the exclusive sphere of the States. States allege that in the name of development, the Central Government is creating obstacles in their efforts. Similarly, the Central government alleges that the States are not allowing the local bodies to enjoy the constitutional autonomy provided by the 73rd and the 74th amendments.

The problem is not with the Constituent arrangement but with the way it is exercised. The Constitution has empowered the local bodies to generate their revenues and States are required to fill the gap if there is any. Besides the States, the Central role has also been accepted by this mechanism. But the issue is at two levels i.e., states are not giving the required autonomy; and lack of willpower with the local bodies to generate their resources by way of taxation and fees, etc. but due to the limited revenue generation by the local bodies they are dependent on the States' grants.[40] On many occasions, the Central schemes are not implemented by the States due to political differences.[41] Thus, the issues in Centre-State relations are inevitably going to affect the development of local governance.

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[38]Opinion, "Why Fiscal Prudence in a Pandemic Year?", *BusinessLine*, June 14, 2021, *available at*:https://www.thehindubusinessline.com/opinion/why-fiscal-prudence-in-a-pandemic-year/article34815104.ece (last visited on Dec. 07, 2021).

[39]*Supra* Note 3 at 39.

[40] *Ibid.*

[41] PTI, "TMC govt not implementing central schemes as there is no 'cut money' says PM Modi as Mamata Banerjee Skips event", *The Economic Times*, January 12, 2020, *available at*: https://economictimes.indiatimes.com/news/politics-and-nation/tmc-govt-not-implementing-central-schemes-as-there-is-no-cut-money-says-pm-modi-as-mamata-banerjee-skips-event/articleshow/73215559.cms?from=mdr(last visited on Nov. 30, 2021).

h. The Issue of States' Indebtedness

The Constitution has assigned various roles to the State governments and to perform these functions, the non-debt sources of revenue are not sufficient. To fulfil the gap, the States usually resort to borrowing from the Centre and market. Generally, it is considered that borrowing per se is not bad provided it is used for productive purposes. But most of the time it is found that the actual usage of the borrowed sum is not employed for the productive purpose.[42] Due to this, over the years the States' debts have gone beyond their repaying capacity and created a situation of debt trap for some of the States. In this pandemic time, the states with a history of large revenue deficits have crossed the 40% of their Gross State Domestic Products.[43]

The present state of the States' indebtedness has gone through various phases such as the comfortable phase (before 1997-1998); a phase of sharp deterioration and fiscal stress (1997-98 to 2003-04); a phase of significant improvement (2004-05 onwards) etc. The phase of improvement was a result of the restriction imposed by the FRBM Act in the early 2000s. The majority of the States adhered to the debt target set by the Thirteenth FC.[44] But States may again face the problems of fiscal stress if they continue to follow the unhealthy practice of farm loan waivers. Additionally, the recent Covid-19 pandemic has again caused a serious dent in the fiscal health of the States and their dependency on Central support has again increased a lot. It is also necessary to understand that Article 293 does not allow the States to borrow unrestrictedly. The States' borrowing must comply with the conditions set under this Article. The problem of indebtedness arises only in those situations when the State neither repays its loans nor adopts prudent budgetary measures. The ignorance of prudent fiscal practices and wasting resources on populous measures lead to the weak fiscal condition and ultimately invite the Central intervention either through policy measures or by way of fiscal support. In both situations, the concerned State's circumstances invite the Central role in its excluded sphere and would ultimately result in the allegation on each other. The issue of ineptness not only affects the concerned State's capacity but also disturbs the harmony of the Centre-State relations. The funds which could have been utilized for the States devoid of resources would

[42]Balbir Kaur, Atri Mukherjee, *et.al.*, "Debt sustainability of states in India: An Assessment" 5393-94 *Indian Economic Review* (2018).
[43]Prasanta Sahu, "Many States have debts hovering around 40%", *Financial Express*, January 24, 2022, *available at*: https://www.financialexpress.com/economy/many-states-have-debts-hovering-around-40/2413768/(last visited on Jan. 25, 2022).
[44]*Supra* note 42.

be diverted to save another State from the debt trap. Thus, it disturbs the fiscal equilibrium and invites a Central role that otherwise would not have been there.

i. Loan Mechanism: The Inequitable Conditions

The Union's revenue base is very wide and strong but comparing the kind of responsibilities it is taking care of, it can be observed that strong fiscal capacity is inevitable for the performance of its responsibilities. The Centre's functional responsibilities such as assistance providing to the States, taking care of defence, external affairs, expansion of the means of communication and transportation among the States, accommodating the regional interests of industrialisation and strategic industries, taking care of the assimilating welfare measures, and similar other allocated responsibilities, etc., are of wide amplitude and requires access to the corresponding heads of revenue. In this regard, besides having access to elastic sources of revenue, the Union has also been enabled to borrow unlimited sums from the reserve bank of India and also through other similar means (i.e., G-Securities). But in respect of States, they do not have such freedom to borrow the required extra sum. For that, the States are required to accept the conditions imposed by the Central level. Besides this, the States also need permission from the Union to borrow from the market.

However, these provisions were incorporated to keep the fiscal health of States in sound condition. The Constitution expected a little dependency of the States on the Union but the way constituent design has been implemented, it can be observed that it's a pure case of misuse of the mechanism for political opportunism. If the prevalent practice is observed it can easily be commented that political affiliation is the determining factor in providing easy access to these revenue resources to the States. But recently the Union government allowed some States (i.e., Andhra Pradesh, Telangana, Goa, Karnataka, and Tripura) to borrow from the open market. It was done to enable the States' borrowing for the GST compensation.[45]

The weak fiscal position of the States has also been propelled by the inauguration of the era of planning. During the last 70 years, Central loans to the States have been increasing by leaps and bounds. The situation has reached such a level that now the States are complaining that

[45]Indivjal Dhasmana, "Credit for reform: Centre allows 5 states to borrow Rs 9,913cr extra",*Business Standard*, September 25, 2020, *available at*: https://www.business-standard.com/article/economy-policy/centre-allows-five-states-to-borrow-additional-rs-10-000-cr-from-market-120092401247_1.html#:~:text=The%20central%20government%20on%20Thursday,enable%20states%20to%20borrow%20extra.(last visited on Apr. 20, 2021).

much of their annual tax revenue is consumed by the payments made towards the loans and interests given by the Centre.[46] Considering the graveness of this issue even the Eleventh Finance Commission had recommended that it is high time that some concrete steps are taken under Articles 292 and 293 so that fiscal responsibility can be ensured. It had further recommended that Parliament and respective State Legislature may consider fixing a limit on their total borrowings as well as guarantees given by them.[47]

j. Centrally Sponsored Schemes and Related Concerns

The system of the CSS is a creation of a mixed and planned economy. It has been part of the equalisation measures at the Central level to ensure the availability of common minimum facilities to all citizens across all the States.[48] The objective of the CSS is a pious one but in practice, it has been adversely affecting the fiscal balance of Indian federalism. The mechanism of the CSS has been criticised due to the following reasons:[49] a) The CSS has increased excessive centralisation in the fiscal architecture of India's federalism. Its origin is based on the understanding that the Central government is constitutionally superior and obligated to provide assistance and aid to the States for their weak sectors as well as in a time of urgency. b) The CSS system requires the States to make some matching contribution towards the particular CSS. The State's contribution depends on the economic capacity of the concerned State and its categorisation by the Central Government. This requirement creates a situation for the economically weaker States that to receive Central assistance for the particular CSS they have to divert funds from their State plan schemes. This indirectly affects the States' autonomy and compels them to ignore their developmental priorities. c) Most of the CSS are based on the concept of 'one size fits all'. This approach leaves no option to the States who already have better facilities for which the particular CSS has been designed. On many occasions, the design rigidity of the CSS create the situation that they are unable to utilize the fund devoted to the concerned CSS. d) Many times, the Central Government transfers its share to an independent nodal agency for the implementation of the CSS, and States are also required to do the same. In such a mechanism, the funding would bypass the State Treasury System and consequently, it would remain outside the purview of the State Legislature, and thereby it would not be under the mandatory audit of the Comptroller & Auditor General (CAG) of India. In such cases the

[46]M.P. Jain, *Indian Constitutional Law* 760 (Wadhwa and Company, Nagpur, 5th edn., 2003).
[47]Government of India, "Eleventh Finance Commission's Report" 107 (2000).
[48]*Supra* note 36 at 360.
[49]*Supra* note 18 at4-5.

audit is done by the State empanelled Chartered Accountants.; e) over the years the number of CSS has gone very large. It causes a serious challenge to the already limited resources of the States. However, after the Fourteenth Finance Commission recommendation, the number of the Schemes has been restructured and brought down in numbers. But still, they require fine-tuning. f) The large number of CSS also required sufficient human resources at the State level. To keep their fiscal deficit in control, the States usually keep their human resource less than their requirements. Moreover, the funds from the CSS do not allow the States to make recruitment for the implementation of the concerned CSS.[50] With the above-mentioned issues, it can be observed that the CSS system instead of helping the States in their developmental efforts, is creating excessive stress on their finances.

k. The GST Regime and Connected Issues

India incorporated the GST regime in the year 2017. It is introduced to provide a single indirect tax system for the whole country. It was aimed to provide the following benefits to the taxpayers:[51] easy compliance; uniformity in the tax rates and the organisational structure; removal of the cascading effects; reduction in the transaction costs and thereby improvement in the competitiveness; cost reduction in the locally manufactured goods and services to benefit the manufacturers and exporters, etc. Similarly, the regime is aimed to benefit the Centre and the States in the following manner:[52] introduction of a simple and easy-to-administer system; to provide better control on leakages; ensure higher revenue efficiency. etc. Further, the regime has been introduced while keeping the federal character in mind. To maintain the federal principles intact, the regime has been categorised into three components i.e., Central GST (CGST); State GST (SGST); and the Integrated GST (IGST).[53]

No doubt, the GST regime is one of the significant economic reforms that is going to create a big impact on Centre-State relations. It was a long-due reform and is expected to take federal relations on a new trajectory. But the experience of the last 4 years shows the signs of strain it has created in the centre-State relations. Since the initiation of this reform, The GST Council has been constantly trying to rationalise tax rates and as a consequence the effective average tax from 14.4% (2017) to the present 11.6%. The reality behind the scene is that only a few

[50] *Ibid.*
[51] "Goods and Services Tax: One Country, One Tax, One Market", *available at*: https://dor.gov.in/sites/default/files/GST_FAQ.pdf(last visited on Dec. 20, 2021).
[52] *Ibid.*
[53] *Ibid.*

States have managed to achieve their revenue targets. To bridge this gap, the compensation cess was introduced to provide compensation to the affected States. The ongoing fiscal losses to the States have further been strained by the Covid-19 pandemic.[54] Another issue is related to the difference in the States' abilities to improve compliance and plug the leakages. The revenue in a concerned State depends on the level of economic activities in that State. For instance, if a State has a limited presence of economic activities then the revenue through the GST would also remain low. Here, the challenge is to enable the States to undertake fundamental economic reform so that their growth can be boosted and that could result in higher revenue generation.[55] But the States are not ready to initiate this constructive disruption. The functioning parameters of the GST Council (GSTC) are also considered a straining factor for Centre-State relations. At present, the voting rules for any decision of the GSTC require that decision must be taken by a majority of not less than three-fourths of the weighted votes of the member present. And in this, the Central Government has a weightage of one-third of the total votes cast and the States collectively have a weightage of two-thirds of the total votes cast.[56] It means for deciding any contentious matter the Central Government requires support from only fifty percent of the total States. Thus, in this way, the Central Government can undermine the wishes of half of the States.[57] The recent issue of delays in the GST compensation also widened the fissure in the existing state of affairs of Indian fiscal federalism. With the low income and high debt of the States, the Centre-State relations are bound to face some heat in this pandemic (Covid-19) time.[58] The States, especially those ruled by the opposition are furious about the Centre's response regarding the GST compensation. To resolve the issues of compensation the Centre has allowed the States to market borrowings but the States want that the entire borrowing should be accommodated by increasing the borrowing limit. The States alleges that the borrowing would result in the mortgaging of the future. The States' grievances are quite reasonable as the Covid-19 pandemic has already stretched their resources and they are not allowed to have any share from various cesses and surcharges levied

[54]Vivek Singh, Karan Bhasin, "Variation in the GST experience of States may have a big message", November, 16, 2020, *available at*: https://www.livemint.com/opinion/online-views/variations-in-the-gst-experience-of-states-may-have-a-big-message-11605536097609.html(last visited on Dec. 12, 2021).
[55]*Ibid*.
[56] Article 279A (9) provides that every decision of the Goods and Services Tax Council shall be taken at a meeting, by a majority of not less than three-fourths of the weighted votes of the members present and voting, in accordance with the following principles, namely: — (a) the vote of the Central Government shall have a weightage of one-third of the total votes cast, and (b) the votes of all the State Governments taken together shall have a weightage of two-thirds of the total votes cast, in that meeting.
[57]*Supra* note 3 at 37.
[58]Govind Bhattacharjee, "GST Council: A Breach of Trust" 3 *Centre for Multilevel Federalism* (2020).

by the Centre on the items such as education, diesel, petrol, social welfare, or health, etc.[59] The denial of compensation to the States and allowing them to borrow from the market may pass the legality test of the Centre's decision but it is going to create a serious issue of the trust in Indian federalism. The States' sacrifice was based on the expectation of making India a unified market but it was based on the promise to compensate the losses of the States, which remains unfulfilled.[60] It is also argued that on the one hand GST regime is causing the loss of autonomy of the States and on the other hand it would be curbing the States' ability to change the tax rate. The States' powers to introduce new taxes or to provide exemptions to any tax under the GST regime have also been eliminated. At present States are free to levy taxes (VAT) only on those items excluded from the GST regime. Thus, With the GST regime, the States' autonomy has been converted into joint decision-making. And the joint decision-making as discussed above can easily be managed by the Central Government.[61] Thus, the GST regime has no answer to the individual State's grievance connected to its weak economic conditions. Cumulatively, the above-discussed issues related to the GST regime are also causing strains to the Centre-State financial relations.

III

Conclusion and way forward

The fiscal aspect of federalism plays the role of the lifeblood of the whole federal design. Considering the catalytic role of the financial aspect the present paper has evaluated the issues straining fiscal federalism in India. The issues, namely: central domination in the taxation powers; horizontal and vertical imbalances; issues concerning the intergovernmental transfers; institutional issues; manipulation of the mechanism of Grants-in-aid; mismatch in the functional responsibility and the fiscal capacity; issues concerning the local governance and the fiscal resources; the issue of States' indebtedness; issues concerning the loan mechanism and role of inequitable conditions; the CSS and related concerns; The GST regime and connected challenges; etc., has a wide-ranging effect on the smooth functioning of the Centre-States financial relations.

[59] *Id.* at 5.
[60] *Ibid*.
[61] RBI, "GST: Issues and Perspectives", *available at*: https://rbidocs.rbi.org.in/rdocs/Publications/PDFs/04ISP_120517FA4C3E57138B4B338FF03E9CC99AD4BD.PDF(last visited on Dec. 20, 2021).

The above analysis presents that the States are inherently in a weak fiscal standing and they need periodical support from the Central level. However, the Constitution has provided a well-designed mechanism to deal with this aspect. The problem is with the misapplication of this design. It is high time that the space for political opportunism and political discrimination should be restricted to the nominal level. The Constituent domain exclusivity is not sufficient for the sound fiscal health of the States; additional Central assistance is the sine qua non for that. The support mechanism has been designed to ensure the flexibility of the initiatives so that a tailored approach can be adopted by each level of the federal structure. But political opportunism has engulfed this. In this whole fiscal mismanagement, the States are also equally responsible. The ignorance of prudent fiscal mechanisms and running after the populist measures is another factor that needs to be weeded out. The predictability in intergovernmental transfers is the need of the hour to ensure the certainty of the long-term development planning initiatives.

However, the purpose of the grants-in-aid was to fill the required fiscal gaps but given the scale of transfers made through the discretionary grants (under Article 282), it can easily be observed that it is being used to compel the States to fall in line as per the Centre's directions. The scope of statutory grants under Article 275 should be enhanced substantially and goal of the Article 282 should be made for the specialised purpose only.

The role of the CSS and their attached conditions also make it clear that the concerned State can get the required funding only if it is ready to accept implicit conditions. There should be a mechanism to fine-tune the CSS conditions as per the State-specific needs. Further, to continue the pace of development, the States are required to begin the long-term development initiatives, and to fund them they usually go by the mechanism of Loans from the Centre and also borrowings from the market. In this respect, the introduction of the outcome-oriented approach should be adopted so that they can avoid the debt trap. This would enable the States to avoid coercive conditions from the Central level.

The issues connected to the introduction of the GST regime are touching the very foundation of Centre-State relations. Under the present mechanism, the States have lost their power to enact any tax legislation which is affecting the subjects that have been covered under the GST regime. But they can look for new avenues for revenue generation. Higher economic activities would not only help the concerned States to have higher tax revenue but would have a catalytic effect on other aspects of the States' socio-economic conditions. The present GST regime does

not allow the individual States to make any change in the tax rate but the collective potential of the States can compel the Centre to take certain decisions. As discussed above that in any decision of the GSTC, the central vote share would be one-third and all decisions would be taken by the two-thirds majority. And if the Centre can get the support of fifty percent of States then it can make any change to the tax matters covered under the GST regimes. Thus, the GTSC's organisational and functioning style requires fine-tuning so that States role in decision-making is not ignored.

The above-analysed fiscal issues are of catalytic nature. The presence of any one of the issues has the potential to create more problems in Centre-State relations. The existing issues in the Centre-State relation have further been transformed into grave ones in the backdrop of the Covid-19 pandemic. The pandemic has almost grounded the economies of many States thereby other issues have become strangulating factors for Centre-State relations. The Centre's inability to provide the States with their due GST compensation has further enhanced the gravity of the situation. However, the Central government has provided States with stimulus packages but this support has also attached conditions that affect the States' fiscal autonomy. Thus, with the above-given analysis, it can be observed that the challenges at India's federal front require a tailored approach to deal with them as per their gravity. The tailored approach must be based on above discussed area-specific initiatives. The above-discussed workable suggestions have the potential to ensure the achievement of the goal of fiscally cooperative federalism. Considering the presence of fiscal aspects in every part of the Indian federation, special attention to this aspect would certainly result in chain effects.

ABORTION LAWS IN INDIA: A MATTER OF CHOICE

Sameera Khan*

Abstract

Abortion has been one of the most sensitive topics around the globe. Access to Safe Abortion has been construed as a basic Human Right under the International Human Rights Law. There has been a lot of debate surrounding abortion laws in the recent times. There have been a number of organizations who have opposed the practice of abortion since it denies the foetus a chance to live. Abortion laws in Poland and the state of Texas in USA have been controversial in the recent times with widespread protests against them. Abortion is a complex process and there are number of considerations that must be kept in mind before legislating on the subject. A woman should have the right to freely make her life choices which include the right to decide if she is ready to have a child and the right to whose child she wants to bear. India is one of the largest democracies in the world and prides itself on protecting the rights and freedom of its citizens. However, abortion remains a controversial subject with the laws related to abortion constantly under the scanner. A detailed study of the implementation and impact of the laws related to abortion in India has been undertaken in this research paper. It will also look at the societal factors which affect the laws related to abortion and the access of women to abortion. The Medical Termination of Pregnancy (Amendment) Act, 2021 has been studied in detail in order to understand its impact on the right of the women to abortion in India. It further evaluates how the lack of awareness regarding the laws related to abortion further create issues for women who suffer as a consequence of the same. The research paper also seeks to provide suggestions as to how the laws related to abortion in India can be improved along with increased social awareness to provide women with their due rights.

Keywords: Abortion, Right to Life, Right to Choice, Consent, Womanhood, Social Awareness, Medical Termination of Pregnancy (Amendment) Act, 2021.

I

Introduction

"We are not going back. We are not returning to the days of back-room abortions, where countless women died or were maimed. The decision about abortion must remain a decision for the women, her family and a physician to make, not the Government."

Bernie Sanders[1]

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[1] "Bernie Sanders on Women's Rights", *Feelthebern.org,* 2020, *available at,* https://feelthebern.org/bernie-sanders-on-womens-rights/ (Visited on February 27, 2022).

Abortion had been legally restricted in nearly every nation around the globe by the end of the 19th Century. The primary sources of such laws were the imperial countries of Europe—Britain, France, Portugal, Spain, and Italy—who imposed their own laws forbidding abortion on their colonies.[2] There were multiple reasons behind the prohibition of abortion:

- The medical system was not fully developed at that point. Abortion was a dangerous process which led to the deaths of a large number of women who attempted to carry out abortions.
- In several societies, it was considered as a sin and an immoral act. Therefore, the prohibition also served the purpose of acting as a deterrent.
- The main importance was given to the protection of the life of the foetus in most circumstances.

As technical advances were made in societies the laws related to abortion were also eased out. The erstwhile Soviet Union was the first country that reformed its law related to abortion. It was done through a decree on women's healthcare in the year 1920. This influenced reforms related to abortion across the globe and many countries have decriminalized abortion. It has now become one of the safest medical procedures if done following the proper guidelines as laid down by WHO.[3] It has been found that in countries where the legal grounds which allow for abortion are important, the number of deaths due to unsafe abortion are also fewer.[4] The grounds generally include risk to life, pregnancy as a result of rape, anomaly in the foetus, risk to physical and mental health of the mother and more. In the countries where the provisions for abortion are liberal, the number of deaths has been amongst the least.

However, the move from criminalization to partial or complete decriminalization has been slow. This is due to the fact that pregnancy is one of the major ways through which society exerts control over women's life. There are some societies that are of view that *"women should accept all the children God gives."* The foetus is often prioritized over the life of the woman and the right of the unborn foetus to live is often used as an argument to justify the penal provisions related to abortion.

However, women across the globe have been fighting for the right to their bodily autonomy and the right for access to safe abortion. Their argument is mainly based on the premise that

[2] M Berer, "Abortion Law and Policy Around the World: In Search of Decriminalization. Health and human rights", 19(1), 13–27 (2017).
[3] World Health Organization, *Safe Abortion: Technical and Policy Guidance for Health Systems* (2014).
[4] W Van Lerberghe and World Health Organization, *Primary Health Care: Now More than Ever* (2008).

the decision to give birth to the child or not must be of the woman. The state must provide them with the means to safely carry out abortions if there is a need for the same. In an era of freedom and individuality, it is miserable to comprehend that women still are fighting for their rights to personal and bodily autonomy.

II

Meaning and Concept of Abortion

Abortion has been defined by Encyclopedia Britannica as, *"the expulsion of a foetus from the uterus before it has reached the stage of viability (in human beings, usually about the 20th week of gestation). An abortion may occur spontaneously, in which case it is also called a miscarriage, or it may be brought on purposefully, in which case it is often called an induced abortion."*[5] It can be simply defined as *'termination of pregnancy.'* The practice has been used by women throughout history to get rid of an unwanted child. It has been used in different ways and sometimes the consent of the women was considered and at other times it was not. There are a number of interdictions that are associated with abortion. This has led to a large number of debates over the issue. In a culturally diverse society like India the decision related to an abortion is not limited to a woman alone. It is influenced by the societal viewpoints, influences of her own family and in-laws, laws laid down by the government, religion and more.

Abortion: A matter of Pro-life and Pro-choice

Reproductive rights are one of the most significant rights available to women. A woman deserves autonomy over her body and must have the right to choose if she wants to give birth to a child or not. If a woman is forced to abort her child or prevented from aborting a child, it is a grave violation of her bodily autonomy and reproductive rights in most cases, barring a few. It is influenced by moral, ethical, and religious considerations. The issue has been particularly controversial in recent times. There has been division into two groups which have been labelled as" pro-*life"* and *"pro-choice."* The former vehemently opposes abortion by any means be it medically or otherwise. They are of the view that once an egg is fertilized, the baby has the right to survive and live in the world. However, this view is often criticised since they are unable to consider the potential implications over the life of the women who are giving birth to such babies. There are several cases where women have unwanted pregnancies or do not have the means to raise a child when they got pregnant.[6] In addition to this, there is always

[5] Pregnancy and Abortion, *available at*: https://www.britannica.com/science/abortion-pregnancy/ (Visited on February 27, 2022).

[6] Miriam, "Can You Explain What Pro-Choice Means and Pro-Life Means?" (October 16, 2019).

the chance of medical complications arising out of childbirth. The latter are of the view that bodily autonomy is one of the most significant rights of a human being. They believe that the decision to give birth to a child should remain with the person who has to actually give birth to the child. They firmly oppose any kind of law which restricts abortion.[7]

III

Major International Events Related to Abortion

Article 12 of the ***Convention on the Elimination of All Forms of Discrimination Against Women*** provides that, *"States parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning."* This implies that it is the duty of the states across the globe to provide women access to abortion related services and prevent any discrimination against them.

Article 6 of the ***International Covenant on Civil and Political Rights*** provides that, *"Every human being has the inherent right to life. Law shall protect this right. No one shall be arbitrarily deprived of his life."* This means that the protection of human life is of utmost importance. There are several cases where the pregnancy can have a negative impact on the bearer and result in fatal complications. There are arguments regarding this provision which put forth the point that this right should also be extended to unborn foetuses. However, criminalization of abortion can lead to suicide by females as a consequence of the lack of availability of abortion due to the penal provisions of the state. Therefore, the abortion laws must maintain a balance between the Right to Life of a foetus and the Right to life of the mother.

The general trend relating to abortion law across the globe has been progressive with States providing for more lenient provisions related to abortions despite the societal and religious conflicts. However, the last year saw two major regressive decisions related to abortion that were taken in Poland and USA.

Poland witnessed widespread protests over a new abortion law which puts a near-complete ban on abortion. The new law provides for abortion only in an extremely limited number of cases which include the cases where the abortion is done as a consequence of a criminal act committed on the woman or her health is at risk.[8] The challenge to the law was unsuccessful

[7] Robert M Baird and Stuart E Rosenbaum., *The Ethics of Abortion: Pro-Life vs. Pro-Choice* (Prometheus Books 2001).

[8] Deutsch Welle, "Poland: Thousands Protest as Abortion Law Comes into Effect" (January 28, 2021).

and the law was enacted on 27th January, 2021. It was seen as a major setback for women's rights group in Poland and globally. A large number of Polish women travelled abroad to get abortions. This number, is only going to increase as a consequence of the law.[9] This is a significant blow to the Human Rights of women.

In the State of Texas in the USA, a near total ban on abortion was imposed which had a grave impact of the abortion care available in the State. The law prevents abortions merely six weeks after pregnancy. This was highly controversial since the people who go for abortions are usually at least six weeks into pregnancy. It even provided added incentive to anti-abortion groups by providing them with monetary rewards to report anyone who provides abortion care to women with foetuses over six weeks old.[10] The law witnessed widespread controversy with huge support coming in from the *"pro-life"* and *"anti-abortion"* groups. However, women's rights groups across the globe protested against the imposition of the law which effectively takes away the right of a woman to decide if she wants to give birth or not. The law was challenged before the Texas Court. The Texas Court has ruled the law as unconstitutional, which is being seen as a small victory for the women groups. However, the law has not been stopped from being enforced. An appeal against the ruling has already been filed and the US Supreme Court also has to put forward its opinion on the law before it is enforced.[11]

In a major development post the decision to impose a near total ban on abortion, the right to abortion suffered another major setback as the historical decision on abortion given by the US Supreme Court in the case of ***Roe* v. *Wade***.[12] It had been held by the court that the right to have an abortion is conferred upon by the Constitution of the United States of America. It was based on the rationale that the 14th Amendment of the Constitution of the United States provides a fundamental "right to privacy" under which the right of a pregnant woman to abortion has also been included. The right to abortion was not absolute and flexibility was allowed to the government to balance the interest in protecting the life on the unborn baby and the health of the woman.

However, this decision was overturned recently by the US Supreme Court in the case of ***Dobbs* v. *Jackson Women's Health Organization***.[13] The right to abortion was held to not be a right

[9] Emma Reynolds, "In Europe and the US, Abortion Rights Are under Renewed Threat" (November 1, 2020).
[10] Centre for Reproductive Rights, "Texas Abortion Ban Takes Effect, Ending Almost All Abortion Care in the State" (September 1, 2021).
[11] Reese Oxner, Eleanor Klibanoff, "State Judge Declares Texas Abortion Law Unconstitutional — but Does Not Stop It from Being Enforced" (December 9, 2021).
[12] *Roe* v. *Wade*, 410 U.S. 113 (1973).
[13] *Dobbs* v. *Jackson Women's Health Organization*, 2022 U.S. LEXIS 3057.

which is conferred upon by the Constitution of the United States. It stated that abortion is not "deeply rooted" in the history of the country and the right to regulate access to abortion vests with the states. This comes as a major shock to abortion rights activists all over the globe who had been vying for a greater access to abortion.

The events in Texas, USA and Poland show that even in the 21st century, the rights of women regarding abortion are still endangered. In an era of democracy and freedom, they are still denied the right towards bodily autonomy and the right to have a child or not. Texas and Poland are not the only places with restrictive abortion laws. There are several countries around the world with strict laws related to abortion. India, on the other hand has played

IV

Abortion and India

India, being the world's largest democracy has a major influence on Abortion Law around the globe. The reproductive rights of the women have often been violated in India throughout history. India, post-independence has made efforts to go on a progressive path and eradicate the practices which infringed the basic rights of people. However, being a culturally diverse society with varying beliefs and cultures, this task has proven to be intricate. **Section 312 to Section 316** of the **Indian Penal Code, 1860** prohibited all kinds of abortions except the ones that had to be undertaken to save the life of a pregnant women and provides for them as offences. The law regarding abortion under the Indian Penal Code, 1860 was regarded as unsuitable for the Indian society and a committee was set up to draft a proper law which governed the practice of abortion in India. This led to the Constitution of the ***Shantilal Committee*** in the year 1964. The committee worked over the next six years where it incorporated perspectives from all sections of the Indian society and various stakeholders in order to draft a futuristic law related to abortion and came up with the ***Medical Termination of Pregnancy Bill***. The efforts of the committee culminated with the enactment of the ***Medical Termination of Pregnancy Act, 1971*** after the Bill was scrutinized.

The Societal Setting Vis-a-Vis Abortion in India

India is largely a patriarchal society. Men are the dominating force in all spheres of life and are considered as an asset by the families. A large value is placed on a male child who is considered as a blessing compared to a female child who is considered as a burden by most families. This creates a dichotomy where the abortion of a girl child is often encouraged and forced while that of a male child is thought to bring bad omen to the family. The women who have aborted a girl

child are often expected to quickly conceive again irrespective of the impact on their reproductive health.[14] The killing of a female foetus inside the womb of a mother is known as *female foeticide*. It is widely prevalent in India. In order to tackle the menace, the ***Prenatal Diagnostic Techniques (Regulation and Prevention of Misuse) Act (PNDT Act), 1994*** and later amended by the ***Pre-Conception and Pre-Natal Sex Selection and Determination (Prohibition and Regulation) Act 2002*** in order to prohibit diagnostic testing of the gender of the foetus since it could result in the abortion of female foetuses. The advertisement of such tests has also been banned and if any diagnostic facility offers such testing, they are penalized criminally. Therefore, abortion in India is not only about women's rights but also gender discrimination against women at birth.

Abortion in India involves social, religious, economic and political aspects. It has both a negative and positive impact on the society. India has been consistently evolving as a society over the past few years. However, the impact of factors like illiteracy and poverty is still immense. It is essential that the legislation related to abortion – **Medical Termination of Pregnancy Act, 1971** be evaluated in the social context as well. The law related to abortion has been present for nearly five decades. However, most women still do not have access to safe abortion services. It has been estimated that nearly 90% of the abortions in India are performed under unsafe conditions with providers ranging from professional qualified doctors to quacks.[15] They have been preferred by the women since there is lack of professionals in the rural areas and women don't have the knowledge or the means to get it carried out in the city. The reasons for abortion in India are also diverse. In Maharashtra, it was found that abortions were mostly carried out since young women did not use contraceptives which resulted in unplanned and unwanted pregnancies. They felt the need to space their children out.[16] In Tamil Nadu, it was observed that the major causes for abortion were non-consensual intercourse, marital rape and more which led to unwanted pregnancy and abortion.[17] These are important factors when considering the social implications of abortion in India. These factors can be instrumental in driving policy changes and awareness campaigns across India to provide better education to women regarding their reproductive rights.

[14] Mohleen Kaur, "Changing Face of Abortion Laws in India: A Critical Investigation with Special Reference to the Medical Termination of Pregnancy (Amendment) Act, 2021" 3 *IJLSI* 941 (2021).
[15] Rami Chhabra and Sheel C Nuna, *Abortion in India: An Overview* (Ford Foundation 1995).
[16] Bela Ganatra and Siddhi Hirve, "Induced Abortions among Adolescent Women in Rural Maharashtra, India" 10 Reproductive Health Matters 76 (2002).
[17] TK Sundari Ravindran and P Balasubramanian, "'Yes' to Abortion but 'No' to Sexual Rights: The Paradoxical Reality of Married Women in Rural Tamil Nadu, India" 12 Reproductive Health Matters 88 (2004).

Moreover, the pregnancy rate of rape victims in India is nearly 5% for victims of reproductive age. The percentage of victims who receive immediate medical attention after the incident is only 11.7%. An alarming 47.1% of the victims do not receive any sort of medical attention post the rape. In addition to this, 32.4% of the victims are not able to discover their pregnancy until they have entered the second trimester and only 50% are able to undergo abortion.[18]

V

Legal Framework Regarding Abortion in India

Indian Penal Code, 1860

Section 312 of the Indian Penal Code, 1860 penalises the act of causing miscarriage by the women or any other person, if the act has not been carried out in good faith for the purpose of saving the life of the woman. The punishment in this case is imprisonment up to 7 years along with fine. **Section 313** provides for aggravated punishment if the miscarriage is caused without the consent of the women. It provides for imprisonment up to 10 years along with fine. **Section 314** provides the same punishment for *"Death caused by act done with intent to cause miscarriage."* **Section 315** provides for punishment for *"Act done with intent to prevent child being born alive or to cause it to die after birth."* **Section 316** penalises the *"causing death of quick unborn child by act amounting to culpable homicide."*

The provisions of IPC are now dependent upon the Medical Termination of Pregnancy Act, 1971 which is a Specific Act for dealing with the cases of abortion. The provisions of the latter prevail over the former in case of any conflict between the two laws.

Medical Termination of Pregnancy Act, 1971

It was the first law enacted in India which specifically dealt with abortion. It covers a number of aspects related to abortion which include the personnel who can terminate an abortion, the time, place and procedure for the termination and the requirements that need to be fulfilled in order to perform the abortion.

The qualifications of the registered *medical practitioner* have been elaborated under **Section 2(d)** of the Act. A medical practitioner is one *"whose name has been entered in a State Medical Register and who has such experience or training in gynaecology and obstetrics as may be*

[18] Sarabjit Kaur, "Analysis of the Medical Termination of Pregnancy (Amendment) Act, 2021" (*The Daily Guardian* October 17, 2021).

prescribed by rules made under this Act." The definition is the same as the definition under Section 2 of the Indian Medical Council Act, 1956.

The circumstances under which an abortion can be terminated are mentioned under **Section 3** of the Act. **Section 3(1)** provides immunity from the penal provisions related to abortion if the procedures mentioned under the Act are followed. **Section 3(2)** allows for an abortion to be terminated until a period of 12 weeks if one medical practitioner is of the opinion that the abortion needs to be terminated. In case the period is between 12 to 20 weeks, the opinion of two medical practitioners is needed. It is necessary that the opinion is formed in good faith that,

> *"(i) the continuance of the pregnancy would involve a risk to the life of the pregnant woman or of grave injury physical or mental health; or*
>
> *(ii) there is a substantial risk that if the child were born, it would suffer from such physical or mental abnormalities as to be seriously handicapped."*

The ***explanation*** provides that rape is to be considered as a grave injury to the mental health of the women. It also includes the scenarios in which one of the parties used a contraceptive device during the intercourse and the pregnancy was a result of the failure of the contraceptive device.

The opinion of the women has to be considered in determining if an abortion is to be carried out under **Section 3(3).** In case a woman is under the age of 18 years or a lunatic, the consent of the guardian is essential under **Section 3(4)(a)** of the Act. The pregnancy in no circumstances can be terminated if the consent of the women is not there except as provided in the Section 3(1)(a).

The place for the termination of pregnancy is provided under **Section 4** of the Act. It provides that the place can be:

"(a) a hospital established or maintained by Government, or

(b) a place for the time being approved for the purpose of this Act by Government."

Section 5 provides for dealing with emergency situations. **Section 5(1)** provides, *"The provisions of Section 4 and so much of the provisions of sub-section (2 of Section 3 as relate to the length of the pregnancy and the opinion of not less than two registered medical practitioner, shall not apply to the termination of a pregnancy by the registered medical practitioner in case where he is of opinion, formed in good faith, that the termination of such pregnancy is immediately necessary to save the life of the pregnant woman."* Section 5(2)

provides that in case the termination process is carried out by someone who is not a registered medical practitioner shall constitute an offence under the Indian Penal Code.

The Act was further strengthened by the ***Medical Termination of Pregnancy Amendment Act, 2002*** which dealt with women who had been working in private health sectors. A committee at the district level was to decide if private places could be allowed to provide MTP services. It furthered the requirements for compliance for carrying out the MTP services and introduced stricter penalties for the violation of the same. The amendments were not comprehensive and there was a need for the improvement of the conditions of private hospitals that provided abortion services. This led to the introduction of the ***Medical Termination of Pregnancy Rules, 2003.***

Medical Termination of Pregnancy Rules, 2003

The main motive behind these rules was to provide a set of guidelines so that the medical practitioner carrying out the abortion carries out the process with utmost care so that there is minimal threat to the life of the pregnant women. Some other important provisions were also added under the rules are as follows:

- They provide the constitution of the District Committee to be set up for the approval of private hospitals. The members must include a surgeon or gynaecologist or anaesthetist and at least one woman. The other members that can be present should be from NGOs, PRIs and local medical practitioners of that particular area.
- The infrastructure and requirements that need to be fulfilled in order for a place to be approved as a MTP facility have also been laid down.
- The Chief Medical Officer (CMO) has been tasked with the duty of inspection of the places where the abortions are being carried out. It is their duty to ensure that the places are medically safe and hygienic. If the place is determined not up to the mark for termination of pregnancy, i.e., it is not safe or hygienic, then the CMO can submit a report to the District Level Committee. The approval can be suspended or cancelled by the committee. The place which is under scrutiny has the opportunity of putting forth its defences and being heard before their certificate is cancelled.

Medical Termination of Pregnancy (Amendment) Act, 2021

The stringent provisions laid down were not sufficient to curb the menace of unplanned and illegal abortions. Thus, there was a need to update the prevailing laws on Abortion in order to keep pace with the changing time and address the shortcomings in the ***Medical Termination***

of Pregnancy Act, 1971 *and* ***Medical Termination of Pregnancy Rules, 2003***. This led to the introduction of the ***Medical Termination of Pregnancy (Amendment) Bill, 2020*** in the Lok Sabha in March, 2020. The Bill was passed by both houses of the Parliament and received Presidential assent of March 25, 2021. This led to the enactment of the ***Medical Termination of Pregnancy (Amendment) Act, 2021.*** It aims to provide easier access to abortion for rape victims and allows unwanted pregnancy to be terminated until the period of 24 weeks under **Section 3(2)(b)** of the Amended Act.

Section 3(2)(a) of the amended act provides for the termination of a pregnancy for less than 20 weeks with the advice of just one medical practitioner unlike the requirement of the advice of two medical practitioners under the earlier Acts. Moreover, special provisions have been made for allowing the termination of pregnancies where there are substantial abnormalities in the development of the foetus. **Section 3(2B)** provides that the, *"provisions of subsection (2) relating to the length of the pregnancy shall not apply to the termination of pregnancy by the medical practitioner."* Therefore, the upper limit is completely waived off in cases where the pregnancy of the women results in abnormalities in the foetus.

In the case of ***KS Puttaswamy v Union of India***,[19] it was held that, *"the right to privacy is protected as an intrinsic part of the right to life and personal liberty under Article 21 of the Constitution of India. The right was deemed to include at its core the preservation of personal intimacies including, but not limited to, 'procreation' and the 'right to be left alone.'* This meant that the women had the right to undergo abortion and their identity shall remain hidden. The judgment has been incorporated in the amended Act under **Section 5(A)** which provides that, *"No registered medical practitioner shall reveal the name and other particulars of a woman whose pregnancy has been terminated under this Act except to a person authorised by any law for the time being in force."* The law also provides for an imprisonment of one year or fine or both in case the provision is contravened.

Section 3(2C) of the act provides that, *"Every State Government or Union territory, as the case may be, shall, by notification in the Official Gazette, constitute a Board to be called a Medical Board for the purposes of this Act to exercise such powers and functions as may be prescribed by rules made under this Act."* **Section 3(2D)** provides that the board shall consist of: *"(a) a Gynaecologist; (b) a Paediatrician; (c) a Radiologist or Sonologist; and (d) such*

[19] *Justice K.S. Puttaswamy (Retd.)* v. *Union of India* (2017) 10 SCC 1.

other number of members as may be notified in the Official Gazette by the State Government or Union territory, as the case may be."

Analysis of the Amended Act

The amendment has sought to address the issues faced by the women seeking abortion in India. The provisions related to abortion of unwanted pregnancies are significant for the rape victims who now have the option to abort the foetuses up to 24 weeks after the pregnancy. However, one must understand that rape has a deep psychological impact upon the victim. It may take victims more than 24 weeks to come to terms with what actually happened, understand the consequences of an abortion or child birth and then make their decision. In such a case, the law is completely silent and the victim has to approach the court to seek justice. Abortion is a time bound process and delays can sometimes defeat the purpose behind the same. However, it is still found that the decisions by the Judiciary as well as the Medical Board are often delayed for various reasons. This can negatively impact their decision and have an adverse effect on the health of the female. No minimum period has been provided under the Amended Act within which a decision has to be provided by the Medical Board. In addition to this, the responsibility for the constitution of Medical Boards has been given to the States and the Union Territories. However, the timeline within which they need to be constituted have not been specified in the Act. This may lead to unnecessary delays since there is no strict plan of action. The act does not deal with issues related to transgenders.

VI

Judicial Activism and Right to Abortion In India

The Indian Courts have dealt with cases related to abortion time and again. The cases are often related to requests for termination made by rape victims and foetuses where there were anomalies or the life of the mother was in danger. They have also dealt with issues related to the right of privacy to the woman who is making the abortion.

In the case of ***Mr X* v. *Union of India***[20], the Apex Court held that, *"a woman has a right to make her choice of reproduction also comes under the dimension of her personal liberty which is guaranteed under Article 21 of the Indian constitution and also added that the right to bodily integrity allows her to terminate her pregnancy."* The sphere of the term *'personal liberty'* under Article 21 was expanded to include the right of a woman to make decisions regarding her reproductive choices in the case of ***Suchita Srivastava & Ors.* v. *Chandigarh***

[20] *Mr X* v. *Union of India*, W.P.(CRL) 1082/2020 & Crl. M.A. Nos.9485/2020.

Administration.[21] The Court stated that, *"There is no doubt that a women's right to make reproductive choice is also a dimension of personal liberty under Article 21. It is important to note that reproductive rights can be exercised to procreate as well as abstain from procreating."*

The decision of a woman to terminate the abortion without informing her husband and taking his consent was held to be mental cruelty by the Supreme Court in the case of ***Samar Ghosh* v. *Jaya Ghosh***.[22] It ruled that, *"if the wife undergoes vasectomy or abortion without medical reason or without the consent or knowledge of her husband, such as act may lead to mental cruelty."*

Murugan Nayakkar* v. *Union of India & Ors[23], the Supreme Court was dealing with the request for an abortion from a thirteen-year-old victim of rape. The law did not allow for such abortion explicitly since at that time the maximum time period for an abortion was 20 weeks. However, the Court considered the facts and circumstances of the given situation. It acknowledged that she suffered mental agony and trauma as a result of the incident which is still ongoing. The Medical Board's opinion was also considered and the court took the view that the termination of pregnancy through abortion was appropriate.

In the case of ***Savita Sachin Patil* v. *Union of India***[24], a women filed a petition before the Supreme Court for abortion. The ground for abortion was that the foetus had been found to be suffering from the Down Syndrome. The Medical Board did not advise in favour of the abortion. The Court denied permission based on the advice and stated that the baby could be born alive if the pregnancy had been allowed to continue. It further admitted that it was *"very sad for a mother to bring up a mentally retarded child."*

Therefore, it can be seen that the courts have generally adopted a progressive approach when it comes to cases related to abortion. They have paid special attention to the facts and circumstances of each case and have not been apprehensive of overstepping the limits of the governing law in order to provide justice to the petitioner. The jurisprudence developed by the Court was also influential in the Medical Termination of Pregnancy (Amendment) Act, 2021.

[21] *Suchita Srivastava & Anr*. v. *Chandigarh Administration* (2009) 9 SCC 1.
[22] *Samar Ghosh* v. *Jaya Ghosh* (2007) 4 SCC 511.
[23] *Kumari V* v. *State of Karnataka* (2017) SCC online SC 1902.
[24] *Savita Sachin Patil* v. *Union of India*, (2017) 13 SCC 436.

Moreover, in another landmark decision in the case of ***X* v. *The Principal Secretary Health and Family Welfare Department & Anr***.[25], the Court allowed a woman who was unmarried to abort a 24-weeks pregnancy which arose out of a live-in relationship. The court noted that post the 2021 amendment, the word "partner" has been used instead of "husband" in the explanation to Section 3. It stated that this showed the intent of the legislative to cover an "unmarried woman" under the Act. It observed that, *"Petitioner should not be denied the benefit on the ground that she is an unmarried woman"* and stated that, *''The distinction between a married and unmarried woman does not bear a nexus to the basic purpose and object which is sought to be achieved by Parliament."* Therefore, the Indian Court has been striving to provide liberal rights to Indian women in cases of abortion.

VII

Abortion Right in India: COVID-19 crisis and its impacts

In the light of the Covid-19 Pandemic, the *Disaster Management Act (DMA), 2005* was invoked by the Government in order to tackle the COVID-19 Pandemic. This led to the imposition of a 21-day lockdown across India. The Government at the States and Centre were given extensive powers to pass regulations in order to manage the dangerous epidemic disease of Covid-19 under the Epidemic Diseases Act, 1897. The response of the Government was perplexed and apprehensive as it did not have any clarity on the prevailing situation that arose as result of the Pandemic. They were consistently introducing new rules and changing the guidelines on a daily basis. This had a grave impact on abortion, ante-natal and neo-natal care, immunisation and other related services. These services were deemed to be essential. However, the Government were unable to take adequate steps to ensure timely access to hospitals and doctors to the needy persons.

There were multiple incidents where women had to face the brunt of unavailability of pregnancy related services or due to the stringent guidelines imposed for availing the services. A 22-year-old woman in Lucknow had to give birth in a queue while standing for the Covid-19 test, since the hospital denied admission without a negative report.[26]

The following policies had been brought by the Government in order to ensure that abortions and other SRH services were provided:

[25] *X* v. *The Principal Secretary Health and Family Welfare Department & Anr.,* 2022 LiveLaw (SC) 621.
[26] Sumanti Sen, "Denied Admission by Lucknow Hospital, 22-Yr-Old Woman Gives Birth Standing in Queue for COVID-19 Test" (July 7, 2020).

- Guidance Note on Enabling Delivery of Essential Health Services during the COVID-19 Outbreak
- Guidance Note on Provision of Reproductive, Maternal, New-born, Child, Adolescent Health Plus Nutrition (RMNCAH+N) services during & post COVID-19 pandemic
- Indian Council for Medical Research: Guidance for Management of Pregnant Women during the COVID-19 Pandemic

The implementation of these guidelines was a major issue since several health centres had been converted into Covid-19 facilities. Moreover, there were several restrictions on movement which prevented access to abortion related services to women. The Telemedicine Practice Guidelines were not clear if the Combipack of Mifepristone and Misoprostol, used for medical abortions, could be prescribed over the telephone, since the guidelines neither allowed it nor prohibited it.

The **NHRC** observed the grim situation and stated that:

> *"The lockdown has had an unprecedented impact on women's ability to access safe abortion services. Such a situation has left pregnant women with very few choices such as, continuation of pregnancy even though it may be unplanned or unintended; attempting an unsafe abortion; or waiting until the relaxation of the lockdown restrictions to probably undergo a second-trimester abortion in a health facility."*[27]

A study conducted by the Centre for Justice, Law and Society of Jindal Global Law School found that out of the *"3.9 million abortions that would have taken place in three months, access to around 1.85 million was compromised due to COVID-19 restrictions."*[28] It further found that between the period of 25th March, 2020 and 3rd May, 2020, abortion access was not provided to 59% of the pregnant persons.

Ipas Development Foundation completed data related to pregnancies and adoption during the early months of the Covid-19 pandemic. It found that, *"almost 80% of pregnant persons were unable to terminate pregnancies due to the inability in accessing MA Pills; 16% couldn't access private hospitals; major hospitals across the country reported 60% decline in abortion*

[27] National human rights commission. Advisory on rights of women. (October 7, 2020).
[28] Dipika Jain, Anmol Diwan, Kavya Kartik and Joshika Saraf, et.al., *Legal Barriers to Abortion Access During The Covid-19 Pandemic In India,* (March 2021).

rate, while the number was found to be 24% for community hospitals and 17% for PHCs."[29] The restrictions imposed on travel and transportation also affected the supply chain. The access to MA Pill was also made difficult since the people were unable to contact pharmacists. Moreover, there was an increased shortage in pills.

Impact on Marginalised Groups in India

The marginalised groups in the Indian society faced additional discrimination when it comes to getting an abortion. They often prefer going to a private hospital despite significantly higher costs to maintain secrecy and avoid any bureaucratic hurdles. The pandemic further worsened their situation. They already faced societal discrimination before the Pandemic, which later resulted in the creation of an additional barrier to their access to quality healthcare. In Rajasthan, the child of a women died soon after delivery since the hospital denied admission to her as she was a Muslim. The women reached the hospital in a critical state but was referred to Jaipur due to her religion. The time lost due to travelling proved to be crucial since her condition had vastly deteriorated at the time of reaching the hospital.[30] A similar incident took place in Buxar district, Bihar where a pregnant woman was not admitted to the hospital since she belonged to the Muslim religion.[31] A pregnant woman in Manipur was denied admission by five hospitals which eventually led to her death.[32] Such incidents were not uncommon during the Covid-19 pandemic and represent the sorry state of affairs in the country. The Pandemic had a disproportionate impact on the marginalised sections of the society.

This was a violation of the Constitutional principles and the Fundamental Rights guaranteed under Article 14 and Article 15 of the Constitution. They provide for the right to equality and non-discrimination. In such cases, the women or their kin who were affected by such actions are entitled to compensation. The right to health had been made "*independently justiciable*" in the case of ***Paschim Banga Khet Mazdoor Samity* v. *State of West Bengal***.[33] The State had been directed to pay compensation to the petitioner who was denied emergency care admission at seven different hospitals. The Court held that, *"Emergency care was included as a core*

[29] Neetu Singh, "From March to June 2020, 1.85 million women were denied safe abortion facilities" (GaonConnection June 12, 2021).
[30] Dev Ankur Wadhawan, "Rajasthan: Doctor Refuses to Admit Pregnant Woman Because She's Muslim, Her Child Dies after Delivery" (India Today April 4, 2020).
[31] Saurav Kumar, "This Pregnant Woman Was Denied Treatment at a Buxar Govt Hospital – and She's Not Alone" (The Wire May 24, 2020)
[32] PTI, "Denied Admission by 5 Hospitals, Pregnant Woman Dies in Manipur, Probe Ordered" (NDTV.com August 7, 2020)
[33] *Paschim Banga Khet Mazdoor Samity & Ors* v. *State of West Bengal* (1996) 4 SCC 37.

element of the fundamental right to health." It concluded that, *"primary duty of government in a welfare state is to secure the welfare of people, especially by providing medical facilities."*

The situation resulted in a double whammy for the marginalised sections since the sociocultural and economical barriers still existed during the Covid-19 Pandemic. The difficulty of obtaining healthcare services was only compounded in the wake of the Pandemic. They suffered a grave loss to health and life due to lack of availability of medical services. The impact on pregnant women had been disproportionate during the Pandemic in general due to gap in the availability of emergency and urgent care services. The unavailability of doctors, requirement for a negative Covid-19 report and other such compliances have resulted in unintended pregnancies and the people were forced to resort to unsafe methods of abortion.

Judicial Response During the Pandemic

An application was filed by a woman to undergo abortion during the 23rd week of pregnancy before the Bombay High Court since she was unable to approach the doctor within the 20-week time limit as a consequence of the lockdown. The court acknowledged that the petitioner was not in a wedlock and giving birth in such circumstances when she was unwilling to have a child would result in immense mental anguish. The bench allowed the petition under MTP and allowed it on the grounds that, *"continuing it will cause grave injury to her mental health''.*

In a different case, the plea for abortion was filed before the Bombay High Court by a 38-year-old married woman. She took the grounds that she was at an advanced age and unprepared for the pregnancy. Several recent decisions where the HC had allowed for abortion even after the period of 20 weeks had also been cited by her. However, the bench was of the view that the decisions had been given in very specific cases where the pregnancy could cause lifelong mental anguish to a petitioner, or it could harm the welfare of the child to be born. It stated that, *"We are of the considered view that the reasons given for medical termination of pregnancy beyond the statutory limit, that the petitioner and her family are in no condition financially and/or that the petitioner would be of an advanced age of 39 years and not be mentally prepared to be a mother are not valid grounds for termination of pregnancy under the said Act."*[34] Therefore, the permission for abortion was denied to the pregnant women.

The Rajasthan High Court in the case of ***Muskan* v. *State of Rajasthan,***[35] a petition had been filed by a sex worker for an abortion. She gave her account that she had been trafficked into

[34] PTI, "Bombay HC Denies Nod for Abortion to 38-Year-Old Woman" (/July 7, 2020).
[35] *Tagore Shikshan Sansthan* v. *State of Rajasthan*, Civil Writ Petition No. 4149/2020.

the trade and wanted to terminate her pregnancy since it was unintended. The court held that, *"abortion is imperative, so that petitioner can settled in life and the baby does not emerge as a snag in her possible peaceful life."* It stated that abortions are allowed when it is done to save the victim from the trauma of rape.

There was a case where the Bombay High Court allowed a 25-week pregnant minor rape victim to terminate pregnancy despite the medical report recommending against it. This was a major decision since the MTP needs the consent of the Medical Board and the consent was denied by the Board. The bench noted that in the present case, it needs to be acknowledged that pregnancy was the consequence of the rape. Therefore, in this case the continuance of this pregnancy *"is causing a grave injury to the mental health of the petitioner"*. Considering the facts and circumstances, the court permitted the termination of pregnancy. It further stated, *"In case the child is born alive during the termination procedure and if the petitioner and her parents are not willing or are not in a position to take responsibility of the baby, then the state government and the agencies concerned will have to assume full responsibility of the child."* This decision was significant since the Court understood that pregnancy can have a major impact on the rape victim. It also took psychological factors in consideration, in order to allow for termination of pregnancy.

Therefore, it can be seen that despite the grave issues that affected the services related o pregnancy during the Pandemic, the Courts put their best foot forward to provide justice to women who wanted to undergo abortions. They took into account the delays that can be caused due to the Pandemic and adopted a progressive view in order to ensure that justice is served.

VIII
Conclusion: A Way Forward

Abortion is still a major issue in the Indian society and there are a large number of women who do not get access to adequate medical facilities to carry out the process of abortion. The situation further worsened during the Covid-19 Pandemic where the women belonging to the marginalised groups were the worst impacted. There were several sorry incidents across the nation where the Fundamental Rights of the pregnant women were affected. The Governments at the Centre and the States did make efforts to improve their condition. However, the implementation at the ground level was not up to the mark. The Courts also did their best to provide justice to the petitioners who filed for abortion, carefully scrutinizing each case and factoring in the effect of the Pandemic. The jurisprudence developed by the court also influenced the Medical Termination of Pregnancy (Amendment) Act, 2021 which has

liberalised the process of abortion. It has afforded more rights to women when it comes to abortion. The rights of rape victims have been specifically recognized and the Courts as well as the legislature have shown sensitivity towards their rights.

India is a culturally diverse society with a number of factors like caste and religion influencing every aspect of life. The societal values, beliefs and morality varies across different regions. In such pressing circumstances, India has shown a remarkable performance in liberalising the law related to abortions. Societal and technological advancements of the nations have been positively utilized in order to take progressive decisions related to abortion law. The Legislature and the Judiciary have complemented the efforts of each other in providing safer access to abortions and providing women the right to their bodily freedom.

The Courts have recognized that the right of a woman to make reproductive choices is a part of her personal liberty under Article 21 of the Indian Constitution. **Margaret Sanger** has rightly stated that, *"No woman can call herself free until she can choose consciously whether she will or will not be a mother."* India, being one of the world's largest democracies has put a great step forward in providing reproductive rights to the women despite socio-cultural and religious dominance. It has been able to enforce it across the whole country, which even the developed nations like the USA and those in Europe could not achieve.

Suggestions

- Sex-Education is not a part of the curriculum of the Indian education system. It is imperative that it is introduced in times of growing influence of social media and increased interactions at a younger age. If the young generation is aware about the meaning of intercourse and its implications along with the contraceptives, there will be less unplanned pregnancies. This will directly reduce the burden on judiciary as well as medical facilities related to abortions.
- The abortion facilities must be examined adequately by the Chief Medical Officer and surprise visits should be made to ensure that it has sufficient facilities to carry out the abortion process and hygiene has been maintained. The penalties should be strictly imposed and the licenses should be cancelled in case they are found to be in violation of any safety standard.
- Abortion tribunals can be set up to deal with cases of abortion at a faster place. The adjudicators will also gain experience related to the cases, which will enable the faster disposal of cases.

- The awareness related to contraceptives should be widespread. The campaigns should be organised by the Governments at the state and central level in collaboration with educational institutions and NGOs.
- The consent of the female even in cases where she is a minor should be of utmost importance. If the female is unwilling to have a child, the guardian should not be in a position to force her to have the child. The related provision must be amended.
- There should be special care afforded to the marginalised communities who are unable to avail the medical services related to abortion. This will allow them better access to medical facilities.

SEX LAWS IN INDIA: A CRITICAL ASSESSMENT OF SEX LAWS FOR COMMON MAN by Sanjeev Jindal and Abhishek Jindal, Unistar Books Pvt. Ltd., Mohali, Chandigarh (2021), Pp.165.

Prof. (Dr.) Vageshwari Deswal*

The Indian Penal code contains ample provisions for regulating sexual behavior. We have elaborate definitions in the law as to what constitutes or amounts to obscene behavior, molestation, sexual harassment, disrobing, voyeurism, stalking, rape and unnatural offence. State paternalism has somewhat abated after judicial interventions such as striking down the archaic provision relating to Adultery in September 2018, watering down of Section 377 to decriminalize consensual sexual acts among adults[1], and currently a petition to criminalize marital rape is also pending before our apex Court.

Amongst people notorious for prudish behavior, it requires guts to pen something on a hitherto taboo subject. This book offers nuanced insights into the legislative provisions and their interpretations in simplistic manner devoid of legalese. The law needs to be explained in a manner that those who need protection should not hesitate in seeking help, and at the same time it should not be become a weapon in the hands of police and other law enforcing agencies for persecution of innocents. The book while minutely analyzing the relevant provisions, also presents a nuanced criticism of our existing laws and quotes compelling reasons for crucial changes in laws to prevent their abuse.

Authored by a retired judicial officer and his son who is a practicing lawyer, the book has been meticulously divided into eight chapters, covering offences such as rape, molestation, sexual assault, public obscenity while also touching upon related issues relating to indulgence in sexual pleasures, homosexuality, prostitution, live-in relationships and those involving run-away couples

The first chapter in the book is titled "Rangraliyan Manana" which when translated into English means 'wilful indulgence in sexual pleasures by consenting adults. The authors have quoted real life cases involving moral policing of unmarried couples indulging in sexual pleasures in private (not public spaces) Although this is not a crime *per se* under any of our laws but since such activities are considered immoral so the police invoke section 109 of the Cr.PC which

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

authorizes an executive magistrate to seek justification and execution of bond with or without sureties from such couple as guarantee for maintaining good behavior. In 2019, the Tamil Nadu High Court in a case titled, *My Preferred Tranformation and Hospitality Private Limited* v. *The District Collector Coimbatore*[2] laid down that, "Apparently, there are no laws or regulations forbearing unmarried persons of opposite sex to occupy hotel rooms as guests. While live-in-relationship of two adults is not deemed to be an offence, terming the occupation of hotel room by an unmarried couple, will not attract a criminal offence".

Drawing parallels between live-in relationships and the ancient concept of *Gandharva Vivaha* the authors have clarified that the laws have neither validated nor decried such relationships on the touchstone of legality. It is illegal to deny any couple legal protection if they seek protection of life and personal liberty without going into issues of the relationship being monogamous or bigamous. It is seen that courts sometimes deny legal protection to live-in partners by invoking the doctrine of Equity, justice and good conscience as they believe that one should come to the court with clean hands. But, these tenets and maxims are misplaced in criminal law and can be applied only in civil cases.

In the Chapter dealing with the crime of Rape, the authors have clarified that although rape is perceived as a physically barbaric act against the women, it is the emotional damage that persists for long, even after the physical scars heal. Also physical violence is very less in 90 percent of the rape cases as they are committed by victims close relatives, friends, neighbors or acquaintances and in these cases the victims are blackmailed, threatened, compelled or persuaded to relent. Minors, who are incapable of understanding the nature or consequences of act are incapable of resisting and are many times fooled into believing that it is causal fun and games. Reporting is also severely compromised in cases where rape is stigmatized and money, muscle power and social influence of offender dissuade the victim and her family from reporting. For cases involving consensual sex on promise of marriage or some other blandishment, the author suggests a new provision to be inserted after the existing provisions relating to rape and such a provision should be compoundable and carry lesser punishment that the prescribed minimum of seven years in other rape cases.

Also, allegations of India being unsafe for women or Delhi being the Rape capital have been vehemently refuted with the help of facts and statistics. As per NCRB data, India reported

[2] WP No. 31230 of 2019

28,046 cases of rape in a population of 135 crores in 2020, while UK and Wales reported 55,696 cases in a population of 6.7 crores during the same year and USA recorded 1,26,430 rape cases with a population of 33 crores. The figures though shameful, pale in comparison to the crime ratio of those who are touted as developed first world nations. While categorically rebuffing the patriarchal notions of provocative dressing being responsible for rise in sexual crimes the authors have declared that the sole reason behind such offences in the wicked/ evil sexual tendency of the criminal.

A strong case has also been made for legal regulation of the world's oldest profession- Prostitution by citing the Switzerland model where prostitution was made legal in the year 1942. Though Indian Penal Code deals with selling and buying of minors for purposes of prostitution, the term "prostitution" has been defined, not in the code but in the Immoral Traffic Prevention Act, 1956. The author notes that male depravity is boundless and prostitutes protect majority of women against sex crimes. Unfortunately, despite the fact that prostitutes constitute roughly two percent of the female population of India, nothing tangible has been done for their welfare or betterment by the Government. Prostitution has existed since times immemorial and is impossible to eradicate so, instead of ghettoizing prostitutes in downtown, dirty areas of cities, they should be provided with basic education, health care and other civil amenities to ensure a life with basic human rights.

The book also vividly highlights the cases of runaway couples, where instead of providing them protection, the police act as extra-constitutional authorities and ask them to produce marriage certificates. Cases of minors who elope wilfully without realizing the implications of their actions and then succumb under family pressure to give false testimony against their lovers have been lucidly explained highlighting the flawed interpretation of existing laws and their colossal failure in upholding the constitutional principles.

There are chapters dedicated to clarifying what constitutes obscenity and incidents related to dance bars in Mumbai or moral policing by anti-romeo squads. In 2017, the Supreme Court of India, relaxed the Maharashtra Governments archaic rules that banned dance bars and ruled that liquor and dance could co-exist but with riders. The SC bench observed that "a practice which may not be immoral by societal standards cannot be thrust upon the society as immoral

by the State with its own notion of immorality".[3] There is also a passing reference to Me-too movement and the reasons why it failed to make an impact.

Right to equality, life and personal liberty and fundamental freedoms are immutable. Whenever there is any anomaly or ambiguity in understanding of legal provisions that should be resolved in a manner that confirms with the constitutional morality. Sexual identity and activity are integral to personhood and sexual autonomy is integral to a dignified human life. Laws regulating sexual activity are pertinent for any society and we have a plethora of laws to protect our people against unwanted, underage, unhealthy or non-consensual intimacy. What we lack is correct interpretation and proper implementation of our laws. Every human- man, woman, trans person or child has an individual identity and freedom to make choices, albeit informed ones. The law needs to safeguard the same and intervene only when there is exploitation of dependencies or else when consent has been sidelined.

What is particularly striking about this book is that has been written like a novel albeit a non-fiction novel, drawing freely from real life cases and other incidents personally known to the authors during the course of their profession. The book has a very progressive message to convey without getting preachy about the same. The law has been laid threadbare and dissected minutely to expose its strengths as well as susceptibility to misuse. Overall an engaging read interspersed with real life experiences drawn by the authors from their professional interactions with litigants, judicial officers and the police, the book offers valuable insights into the misconceptions surrounding laws relating to sexual offences in India and offers clarity in a lucid and simplistic manner. This book is a value addition to any library and a must for every law library.

[3] *Indian Hotel & Restaurant Association and another* v. *The State of Maharashtra and others.*

LAWS AND POLICIES ON SURROGACY, COMPARATIVE INSIGHTS FROM INDIA by Dr. Harleen Kaur, Springer Nature, Singapore (2021), Pp. 233

Dr. Rohit Moonka*

Having a child is a joyous moments in the families as it brings a sense of fulfillment and completeness in their life. However, not every couple is fortunate enough to have a child due to some or other infirmity on their part and they go through the agony of living childless throughout their life. But due to the advent of various assisted reproductive technologies including in-vitro fertilization (IVF), cryopreservation, egg and sperm donation and surrogacy, it is becoming achievable for a childless couple also to procreate. At the same time, assisted reproductive technologies are stained with many socio-legal complexities and moral/ethical dilemmas since it makes the whole procedure of procreation as a transactional process instead of natural process of reproduction. Due to this, framing laws on surrogacy has put forth major challenges for the legislature, judiciary and policy makers.

The book under review has very comprehensively dealt with explaining the newest progress and improvement in different jurisdictions around the world dealing with surrogacy. The author of the book has done elaborate research and has discussed and analysed several latest judgments for the better understanding of the subject. The book consists of six chapters. Each chapter contains the headings and sub-headings to facilitate the reader in finding every minute detail easily and also a conclusion at the end.

The first chapter titled 'Introduction to Surrogacy' deals extensively with the wide ambit of assisted reproductive technologies (ART) including artificial insemination, in-vitro fertilization-embryo transfer, gamete intrafallopian transfer, zygote intrafallopian transfer, intracytoplasmic sperm injection. The author takes the reader through the evolution and scope of surrogacy and highlights various kinds of it. Then the author elaborates on how surrogacy became the most controversial amongst all other assisted reproductive technologies leading to various legal, moral and ethical issues to grapple with. The author in this chapter also highlighted several advantages of surrogacy over other assisted reproductive technologies.

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The second chapter ‘Surrogacy: Laws and Policies Across the Globe’ extensively deals with surrogacy laws from various prominent jurisdictions including Israel, Canada, Australia, United Kingdom, Singapore, Ukraine, Japan, U.S., New Zealand, Russia, Thailand, Nepal amongst other. The author has aptly pointed out the dearth of consistency in surrogacy laws across various countries citing the social and ethical foundation of the respective countries. It is also contended that the foremost reason for not having uniformity in surrogacy laws is due to lack of any international convention/treaties in this domain which the author has strongly vouched to bring parity amongst the member countries who will be signatory to such international convention/treaties.

The third chapter ‘Surrogacy in India’ discusses that how in the late twentieth century witnessed a rise in alternative reproductive technique using surrogacy as a means adopted by couples across the world. It also brought developing countries like India into the forefront of surrogacy and it was even termed as surrogacy capital of the world. However, the commercial nature of surrogacy raised huge public criticism and debate and highlighted the need for adequate policy and legal framework for commercial surrogacy in India. The author contends that the Indian government proposed various legislative and administrative measures particularly in last two decades to regulate the process of surrogacy especially for the protection of various rights of a wide range of persons involved in the whole process of surrogacy. In this chapter, the author also analyses the judicial pronouncement on surrogacy by various courts in India and also points out the gaps in the existing regulatory framework and suggest various measures for safeguarding the interest of the parties involved.

The fourth chapter ‘Surrogacy Arrangements: The Stakeholders Perspectives’ dwells into the vexed issue of the adequacy of legal and other measures adopted by the Government of India on surrogacy for the protection of various stakeholders particularly the rights and interest of the surrogate mother and surrogate child from any kind of abuse including any illegal or unethical practices. It is contended by the author that though few of the key questions have already been taken care of in the latest Surrogacy (Regulation) Bill, but it is far from adequate. It is suggested by the author to have adequate measures for safeguarding the rights of the surrogate mother and the surrogate child which will be achieved not just by laying down the same in the bill but also

clearly laying down the duties and other obligations of the anticipated parents in a surrogacy process.

The fifth chapter 'Homosexuals, Third Genders, Live in Couple, Singles and Their Right to Surrogacy' deliberates upon the position in various jurisdictions with regard to single parent, live-in couples and same-sex couples opting for surrogacy to have a child which the author found to be in consonance with the International Convention on Civil and Political Rights. In this regard, the author has critiqued India's latest Surrogacy (Regulation) Bill 2020 which did not allow the facility of surrogacy to be extended to single parent, live-in couples, same-sex couples and LGBTQ community despite Supreme Court of India's latest judgments asserting the constitutional liberties related to dignity, privacy and autonomy of the above mentioned class of persons also within the scope of right to privacy.[1]

The sixth chapter 'Conclusion and Suggestions' provides the fine insights on the task ahead for the legislature, judiciary and the policy makers in bringing robust measures to plug the loopholes in the existing mechanism of surrogacy. It is advocated by the author that since surrogacy is a highly useful process for the humanity, it should be well regulated to minimize any complications to various stakeholders. The author has put forth many such valuable suggestion based on international best practices for the Indian law and policy makers which hold great value due to the fact that Surrogacy (Regulation) Bill, 2020 is yet to be finally passed by the Parliament which will significantly help in removing the anomalies which if passed in its existing form will still be full of anomalies. The author also voiced for a comprehensive international instrument prescribing for international surrogacy arrangements.

This book makes for an exceptional reading as it dwells into an exceptional area of unexplored legal knowledge. It provides all-inclusive insights for the readers to know about the development of surrogacy and its regulations in India and around the world. The book is extraordinarily well written with lots of references and judgments. Author has initiated a profound debate on the issue of surrogacy and its regulations which will certainly encourage other researchers for further exploration in this area.

[1]K.S. Puttaswamy v. Union of India (2017) 10 SCC 1; National Legal Services Authority (NALSA) v. Union of India (2014) 5 SCC 438; Navtej Singh Johar v. Union of India, AIR 2018 SC 4321.