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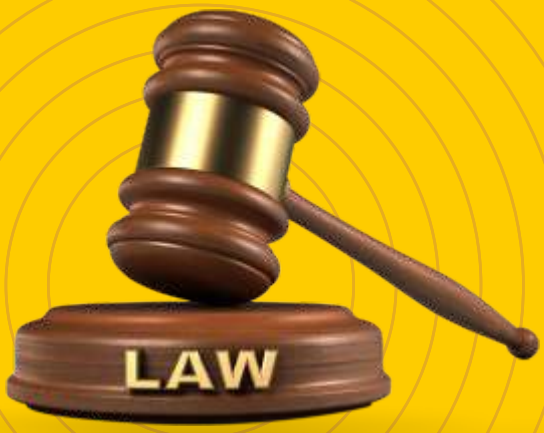

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EDITORIAL

Civilisation and technology have a symbiotic relationship together creating a symphony of growth in its entirety and also in allied ramifications. This characteristic reflects in the legal sphere as well because technology has decisively penetrated into legal matrix impacting the politicio-legal and judicial processes. Change is an essential attribute of society and theoreticians as well as scholars in different academic spheres must come up with novel but corresponding responses in their theoretical or scholastic constructions. Dehradun Law Review, A law journal of Law College Dehradun, Uttaranchal University intends to proceed in this well-cherished direction in its current issue.

Dehradun Law Review Vol-1, Issue-15 is at your disposal with a fresh paradigmatic analyses concerned with contemporary legal issues in the context of permeating technological and environmental after-effects in the legal judicial sphere. We aspire to present though provoking, substantive and insightful articles to benefit our readers and a voluminous numerical increase in articles in the current issue is the testimony of the fact.

In this Issue 1 of volume 15 of DLR 2023, issues concerning with emerging technological development especially AI and protection of environment have posed the challenge before the world community which are discussed in detail. In the current issue, topics like as:

Accomplishing Basic Needs with Sustainable Development Goals via Artificial Intelligence, Critical Analysis On Implementation And Impact Of Basel Convention On The Transboundary Movement Of End-of-life Ships For Recycling In South Asian Coasts –need For Sustainable Approach, Issues And Concerns Relating To Cyborgs And Technological Enhancements: Understanding Legal Implications Of Circuitry Neurons, Hart-fuller Debate And Its Significance In India – A Jurisprudential Analysis, Legal Framework Of Online Gaming In India: Examining The Core Legal Issues And Recent Legislative Developments, An Approach To Reconciliation Between Majoritarian Morality And Constitutional Morality: The Struggle For Establishing The Democratic Balance, Public Hearing In Parole: A Comparative Analysis, Reforms In Bail Provisions For The Undertrials In Bailable And Non-bailable Offences, Navigating The Jurisprudence On Arbitrability Of Disputes In India: An Analysis, A Contemporary Impact Assessment Of Pocso Act And Its Implementation, Experimenting With Cameras In The Courtroom: Live-streaming Court Proceedings And Concerns Of Contempt Of Court, Access To Justice And Government Attitude As A Litigant: Challenges And Plight, The Unsettling Landscape Of Wrongful Conviction: A Quest For Justice, Digital Personal Data Protection And The Right To Privacy, have been

extensively discussed and analyzed in depth and the pressing legal issues relating to them and their possible solutions within the Indian legal system are offered by the authors.

"Virtue is knowledge and ignorance is Vice" is a well known Socratic doctrine and our editorial team constantly adhere to this doctrine with all its tilt and potentials. However, it is the sole discretion of readers to judge the effectiveness and impact of our sincere scholastic efforts. Your constructive criticisms and suggestions are both-a boon and inducement which we sincerely look forward to during the course of our academic efforts. We also express our special gratitude to the contributors of articles and aspire for a prolonged association.

God Speed!

Prof. Rajesh Bahuguna
Editor-in-Chief

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ACCOMPLISHING BASIC NEEDS WITH SUSTAINABLE DEVELOPMENT GOALS VIA ARTIFICIAL INTELLIGENCE

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Abstract

Since human civilisation is a result of intellect, increasing human intelligence through artificial intelligence (hence referred to as AI) may benefit society. AI that excels in one or more disciplines, is manifestly beneficial to the people. AI is the most remarkable invention that benefits humanity. One aspect of AI is how pervasively it appears in our daily life in all of its products and forms. On the other hand, the idea of basic needs and the Sustainable Development Goals (hereafter referred to as SDGs) have emerged as the main priorities of contemporary democracy. In today's technologically advanced society, meeting basic needs and reaching the SDGs are only achievable through technical advancements; otherwise, these objectives would only be theoretical.This paper aims to build a relationship between basic needs and SDGs and how artificial intelligence can be helpful in the accomplishment of basic needs with SDGs. The objective of the paper is to use artificial intelligence to fulfil human needs and attempt to make the debate of AI a little more popular and a bit more mainstream by touching on human needs because AI has the potential to be harnessed to benefit humanity.

Key words

Scientific Technology, Artificial Intelligence, Basic needs, SDGs, technical advancements.

1. Introduction

Technologies are anticipated to become more powerful as a societal and economic lever for global transformation. Since the Industrial Revolution 4.0 has begun, new-age technology is taking the form of AI. AI has currently reached a sufficient level of maturity both as an umbrella scientific discipline and as a technology, having spread from laboratories to the entire society[1]. AIis rapidly expanding into new domains such as health, poverty, infrastructure, commerce, agriculture, education, disaster management, and others, as well as into the government policies that regulate each of these areas. Machine intelligence and robotics with deep learning capabilities have had significant disruptive and enabling effects on almost all the areas of the society. It is generally acknowledged that AI has shown a great deal of promise and appears to have demonstrated that it has the power to improve the world. Despite overwhelming enthusiasm, many individuals are still dubious about both the usefulness of the research appearing to support AI and the myriad potential applications that could have adverse

[1]Margaret A. Goralski and Tay Keong Tan, "Artificial Intelligence and Sustainable Developments"IJME, Vol. 18,p. 100330, 2020.

effects. As a result, AI ethics has grown into a thriving field of research, but it is still in its fancy, and there is not much agreement on what it involves or how it should be pursued, as with other new areas[2].

Scientific technologies and Basic Needs are two important components which have great impact and significance in human life. Basic Needs are generally described in terms of minimal conditions that a personmust meet in order to satisfy his or her basic needs, such as food, clothing, and shelter, and to lead a respectable life. The changing socio-economic condition of nations has extended the horizons of basic needs that encompassesa number of other psychological and social needs i.e. participation in governance, self-reliance, autonomy and self-expression. The relationship between technology and basic needs must be balanced and all the emerging challenges must be addressed with creative solutions, new laws and policies. The basic needs are also part of SDGs because SDGs includes all the essential requirements which can be cited with reference to basic needs. Among the 17 goals, few goals are true depiction of basic needs. It means that if a nation is achieving these goals with effective policies, it automatically fulfilling the basic needs of its people. SDGs provide a good framework for examining and categorizing the possible benefits and downsides of AI as technology becomes more common in modern cultures[3]. It is important to emphasise the list of basic needs included in the SDGs while talking about the proposed nexus between AI and SDGs with basic needs. The following SDGs have been selected by the authors from among the SDGs' 17 goals because they correspond to basicneeds -

Basic Needs under Sustainable Developments Goals-

- No Poverty (SDGs-1)
- Zero Hunger (SDGs-2)
- Good Health (SDGs-3)
- Quality Education (SDGs-4)
- Clean Water and Sanitation (SDGs-6)
- Decent Work and Economic Growth (SDGs-8)
- Industrial Innovation and Infrastructure (SDGs-9)

The list is not exhaustive one. Other goals may also qualify to be included as basic needs but in compliance of definition of ILO and other international organizations, the above mentioned goals can be considered as basic needs. In this context, authors will analyse whether the application of sophisticated technologies, such as artificial intelligence (AI), will help us to achieve the Sustainable Development Goals (SDGs) and basic needs, or will lead us further down the path of increased economic and social uncertainty and upheaval. This paper offers a thorough analysis of the function and impact of AI and associated technologies in accomplishing SDGs and basic needs.

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[2]Lideniro Alegre, "Potential Applications for Artificial Intelligence in the Petroleum Industry" JPT, Vol. 43, p. 1306, 1001, https://doi.org/10.2118/21138-PA.

[3]Nina Jatana and Alsitair Currie,"Population and the Sustainable Development Goals",Population Mattersavailable at: https://populationmatters.org/sdgs?gclid=Cj0KCQjwraqHBhDsARIsAKuGZeH57nTpQ2Eiglr1Koj9fol8HEfcYC1vcLZlKbtvkhBbODb8vFmiSrIaAnesEALw_wcB, (last visited on March 22, 2022).

2. Artificial Intelligence: A Concern

Artificial Intelligence is a field of computer science which emphasizes on the creation of machines that could work and react like humans. It aims at achieving efficiency and accuracy in human decision-making by replicating human intelligence. It could be said that it is intelligence demonstrated by machines, in contrast to the natural intelligence displayed by humans and other animals[4]. Artificial Intelligence could be classified into two different kinds, namely, analytical and human-inspired Artificial Intelligence. Analytical Al has characteristics similar to that of cognitive intelligence; which refers to the natural intelligence possessed by humans and animals involving the brain to perform an intelligent activity[5]. Analytical Al generates such logical reasoning of the functioning of the world using past experiences based on which future decisions are taken. Human Al comprises of those elements consisting of both cognitive capacities as well as emotional intelligence in addition to such other competencies needed in decision-making and interaction with others[6]. The scope and nature of Al is unlimited and it has marked an important place in the field of science, social science researches as well as other significant fields. Due to its goal of attaining automated expertise and simplifying human decision-making process, the field of Al has attracted major financial support and investments from both within and outside the field of computer science. It has also propounding impact on issues of basic needs and SDGs.

3. Understanding of Basic Needs

The notion of Basic Needs is not new in present scenario, but it goes back to 1940s. The reference of basic needs in writings was firstly found in the psychological literature of 1940s. The idea of basic needs got more specific shape and explanation in the article written by Albert Maslow in the journal of Psychological Review, 1943[7]. In this article, Maslow introduced the concept of hierarchy of needs. Maslow believes that under the domain of human psychology, everyone has inborn desire to be self-actualized and for achieving such goals basic needs must be fulfilled. His hierarchy of needs is shaped in pyramid style which goes downwards to upwards and includes psychological needs, security and safety needs, social needs, esteem needs and self-actualization needs[8]. In the hierarchy of needs, the psychological needs is considered as basic needs which includes food, water, clothing, shelter and breathing[9]. Further in 1950s, the concept of minimum needs were proposed by Pitamber Pant of Indian Planning Commission for the fulfillment of basic needs in Indian perspective.

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[4]Michael Negnevitsky, Artificial Intelligence, A Guide to Intelligent Systems, 20 (Pearson Education Limited, England, 2008).

[5]Saswat Sarangi and Pankaj Verma, Artificial Intelligence: Evolution Ethics and Public Policy 15 (Routledge India, New Delhi, 2019).

[6]Ibid.

[7]A. H. Maslow, A Theory of Motivation, available at: https://psychclassics.yorku.ca/Maslow/motivation.htm (last visited on March 24, 2022).

[8]Kendra Cherry, "Maslow's Hierarchy of Needs"Verywell Mind, available at: https://www.verywellmind.com/what-is-maslows-hierarchy-of-needs-4136760#:~:text=Needs%20at%20the%20bottom%20of,need%20for%20safety%20and%20security(last visited on March 24, 2022).

[9]Ibid.

However, Basic needs got the international institutional recognition by International Labor Office (ILO) in the year of 1976 which put forward the basic needs concept formally at the Tripartite World Conference on Employment, Income Distribution and Social Progress. The basic needs concept is also set out in the ILO document Employment, Growth and Basic Needs: A One World Problem published in 1977[10]. As per ILO, basic needs meansmeeting the minimum requirements of food, shelter, clothing[11], and also access to essential services such as safe drinking water, sanitation, public transport, health and education i.e. items of social consumption[12]. Several jurists have propounded its own idea of basic needs depending upon their understanding of socio-economic conditions of respective countries. For example, at primitive stage of human development, the food, clothing and shelter were on the focal point but as science and technology advanced, the right to the internet has emerged as a crucial right, indicating a shift in basic needs for human being in the present scenario. From human rights perspective, various International and regional human rights conventions have acknowledged, the right to rip off gains from scientific advancement and its utilization for the welfare of mankind[13]. A few basic needs are acknowledged in human rights instruments as being part of those rights that are essential for human survival. Therefore, in order to serve humanity and meet its basic needs, scientific innovations like AI must be utilised.

4. Sustainable Development Goals

United Nations established 17 Sustainable Development Goals (SDGs) in 2015, which must be met by 2030. These includes no poverty, zero hunger, good health, clean water and sanitation, industrial innovation and infrastructure, smart cities, decent work and economic growth and many more. It means that SDGs broadly involves the environmental, social, and economic &financial objectives. Sustainable development is described as a way of development that satisfies current wants and aspirations without jeopardizing future generations' ability to fulfil their own needs and desires[14]. The aim of the SDGs is basically guiding the world for looking forward to a more safe, sound and effectively peaceful environment with more sustainable consumption and production patterns, while also enshrining a global commitment "to leave no-one behind": not in the delivery of services nor when it comes to engaging people in decision making[15]. Unlike the MDGs, which were aimed at poor nations, the SDGs are universal and apply to all

[10]Kenneth A. Reinert, "The Basic Needs Approach", George Mason University, 2021,available at:https://reinert.gmu.edu/wp-content/uploads/2021/04/The-Basic-Needs-Approach.pdf (last visited on March 16, 2022).

[11]Louis Emmerij, "The Basic Needs Development Strategy", World Economic and Social Survey, available at:https://www.un.org/en/development/desa/policy/wess/wess_bg_papers/bp_wess2010_emmerij.pdf(last visited on March 26, 2022).

[12]Rimmer, Douglas. "'Basic Needs' and the Origins of the Development Ethos."15 JDA 215(1981)available at:http://www.jstor.org/stable/4190877(last visited on March 26, 2022).

[13]Szal, Richard J. "Operationalising the Concept of Basic Needs." 19 (3)The Pakistan Development Review 237-46 (1980)available at: http://www.jstor.org/stable/41258532(last visited March 28, 2022).

[14]Jaffery D Sachs, "From millennium development goals to sustainable development goals" 379The Lancet2206-221 (2012).

[15]United Nations,"Sustainable Development", Department of Economic and Social Affairs, available at:https://sdgs.un.org/goals (last visited on March 28, 2022).

Member States. They are also far more ambitious than the Millennium Development Goals, as they address not only the social, but also the economic, environmental, and political dimensions of sustainable development, with goals on inequalities reduction, no poverty, zero hunger, infrastructure, energy, peaceful societies, and other new areas[16]. Therefore, the SDGsare a bold promise that represent a valiant commitment to continue what we have started and deal with some of the most pressing problems in the world.

5. A Discussion on the linkage of AI with SDG sand Basic Needs

The relation of AI, SDGs and basic needs is very relevant topic of discussion and hotly debated subject in current world order. As per the relevant data in extant, AI has the potential to achieve its objectives across the SDGs and basic needs mostly through technical advancement. However, the development of AI may have a detrimental influence on SDGs and basic needs for that reason, it is necessary to analysis the impact of AI & associated technologies on SDGs and basic needs[17]. So far as SDGs are concerned, it is based on the three pillars namely social development, economical development, and environmental development. Sustainable-AI development is an inclusive framework. It is, nevertheless, distinct from previous frameworks in that it has the capacity to emphasize certain features of artificial intelligence and digitalization[18]. This shift in viewpoint provides particular insights that may be applied while debating the future of artificial intelligence. Another side, the dialogue on SDGs and basic needs have reached a very high degree of inclusiveness. It is applicable to all countries and areas of the world. It focuses on the fulfilment of basic desires of every individuals. It also adopts human rights approach towards basic needs and SDGs for effective implementation of policies and schemes at international as well as national level. By addressing basic needs within the framework of the SDGs, countries can work towards a more sustainable and equitable future, where no one is left behind and everyone has the opportunity to live a dignified life. The focus of the AI discourse tends to concentrate on the consequences of its applications for providing standard of life, good health and education facility and proper housing and sanitation facilities.

5.1. SDG 1- No Poverty

SDG 1 provides the goal to end the poverty in all its forms everywhere. Poverty amounts miseries to human life and everyone is abstained for getting the basic needs for the survival of their life. In the year of 2015 the most recent reports reveals that 10 percent of the world's population or 734 million people lived on less than $1.90 a day[19]. Before COVID-19, baseline projections suggested that 6 per cent of the global population would still be living in extreme poverty in 2030, missing the target of ending poverty[20]. The

[16]The World Bank, millennium Development Goals, available at:https://www5.worldbank.org/mdgs/ (last visited on March 28, 2022).

[17]Vinuesa, Ricardo et al., "The Role of Artificial Intelligence in Achieving the Sustainable Development Goals" 11NC1-3(2020).

[18]Henrik Skaug Sætra, "AI in Context and the Sustainable Development Goals: Factoring in the Unsustainability of the Sociotechnical System." 13Sustainability 4 (2021).

[19]United Nations, "Goal 1- End the poverty in all its forms everywhere",Sustainable Developments Goals, available at:https://www.un.org/sustainabledevelopment/poverty/ (last visited on April 05, 2022).

[20]Ibid.

pandemic's aftermath poses a threat to drive more than 70 million people into abject poverty.

This goal can be fulfilled by providing adequate standard of living, proper opportunity of employment and work, implementing schemes of social securityand equal right of men and women in economic rights. Adequate standard of living includes the adequate health facility and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services which is part of basic needs and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control. Meeting basic needs such as food, water, shelter, and access to essential services is crucial in eradicating poverty and ensuring a decent standard of living for all.

Since the development of new-age technology, AI will provide real-time resource allocation through satellite mapping and data analysis of poverty. The strength and opportunity such as Emergence of new technologies in primary and industrial sector across developing countries, Predictive power of machine learning upon satellite and aerial images, Deep Learning with mobile device data as a strong domestic income predictor, Combining digital transaction and property data in regression techniques, AI and digital technologies support government decision-making against economic breach[21]. Figuring out the global diffusion of AI advancements to guarantee equitable development. Blockchain technology for transparent and corrupt-free government operations, digital labour and outsourcing for employment, and passive data gathering combined with AI and data analysis for accurate estimates of poverty. Perhaps the most ambitious objective of all is to eradicate all types of poverty, everywhere[22]. AI can also assist in identifying people and communities who are poor by examining data and patterns. It can help with the targeting of social protection programmes, financial aid, and attempts to reduce poverty, ensuring that resources are directed towards those who most need them. AI can improve financial inclusion by giving access to underserved groups into banking and financial services.

5.2. SDG 2-Zero Hunger

SDG 2 explains to end the problem of hunger by achieving sustainable food security, nutrition and agriculture. SDG 2 focuses on three basic needs i.e. food security, nutrition and agriculture. The problems of hunger, food insecurity and malnutrition is prevailing across the globe and no country is free from these problems. Recent data shows that nearly 690 million people are hungry, or 8.9 percent of the world population - up by 10 million people in one year and by nearly 60 million in five years. The world is not on track to achieve Zero Hunger by 2030[23]. If recent trends continue, the number of people affected by hunger would surpass 840 million by 2030[24]. The COVID-19 pandemic could now double that number, putting an additional 130 million people at risk of suffering

[21]D. Le Blanc. "Towards integration at last? The sustainable development goals as a network of targets" 23SD176-187 (2015).

[22]M. Nilsson, D. Griggs,et al.,"Policy: Map the interactions between sustainable development goals" 534 Nature 320-322(2016).

[23]United Nations, "Peace, dignity and equality on a healthy planet", United Nations, available at: https://www.un.org/en/global-issues/food(last visited on April 10, 2022).

[24]Ibid.

acute hunger by the end of 2020. This problem of hunger can be eradicate only after providing adequate food. In the era of welfare state, the appropriate authorities have primary responsibility to provide food. Adequate food facility includes food, clothing, housing and medical care and necessary social services.Ensuring access to nutritious food and promoting sustainable agriculture is essential to meet the basic need of food security and nutrition.

In order to combat malnutrition, including within the framework of primary health care,through inter alia, the application of readily available technology and through the provision of adequate nutritious foods and clean drinking-water, taking into consideration the dangers and risks of environmental pollution[25]. This can only be secured by international cooperation including ensuring equitable distribution of world food supplies.To be sustainable, agriculture must meet the needs of present and future generations, while ensuring profitability, environmental health, and social and economic equity. Sustainable food and agriculture (here in after SFA) contributes to all four pillars of food security - availability, access, utilization and stability - and the dimensions of sustainability (environmental, social and economic)[26].

AI vows to assist with making food creation and utilization more proficient and sustainable. Agriculture technologies ranging from robots, sensors, drones, satellite imagery, big data and internet of things (here in after the IoTs) and other AI equipped entities are being used in various stages of agriculture[27]. Such sophisticated technologies are being employed for weather forecasting and monitoring, eco-friendly crop protection method, irrigated land scape mapping, and soil analysis to crop health analysis. With the developing measure of information being produced on farms, AI will be fundamental for farmers to use this information to make better decisions[28]. S. Aubry and Ch. Eigemann, prominent academician has suggested through his work that outdated technology and other agriculture related problem can be solved by the digital and new age-technology revolution in agri-sector[29]. The application of AI in the field of agriculturecan be precisely cited under the following heads:

- Use of Ag-tech at Pre-harvest level, for analyzing the pre-existing data relating to traits and genes of crops and also recommend that which crops will be best for particular fields[30].

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[25]Supra Note 22.

[26]United Nation, "Sustainable Food and Agriculture",Food and Agriculture Organization,available at: https://www.fao.org/sustainability/en/(last visited on March 18, 2022).

[27]D.G. Panpatte, "Artificial Intelligence in Agriculture: An Emerging Era of Research"Institutional Science, Canada, ScienceDirect, available at: https://www.sciencedirect.com/science/article/pii/S258972172030012X#bbb0340 (last visited on April 18, 2022).

[28]Ibid.

[29]S. Aubry and Ch. Eigemann, "New Challenges to digitalization of genetic resources for food and agriculture"10AFS 122-127 (2019).

[30]Netafim, "Precision Irrigation: Power a sustainable farming ecosystem to ensure a food secure future" NETAFIM, available at: https://www.netafimindia.com/digital-farming/(last visited on March 18, 2022).

- Seed sowing and planting, the primary step in agriculture is seed sowing and plantation. AI systems are now being applied in seed sowing and plantation process[31].
- Farm monitoring services by Drones, AI equipped drones are helping farmers scan fields, monitor crops, seeding and analyzes plant health[32].
- Agricultural Robots[33].
- Weather forecasting and Soil Moisture adequacy Indexthese technologies bring accurate and reliable data that help in timely crop damage assessment and crop planning[34] .
- Supply Chain Management[35] .

Therefore, Agriculture is not immune to the march of automation, and artificial intelligence (AI) is a vital tool in this evolution by informing on crop health, weather patterns, and soil quality. AI can improve agricultural practices by offering information for effective resource management, targeted irrigation, and pest control, leading to higher agricultural yields and greater food production. Artificial intelligence (AI) can accomplish the zero hunger goal by monitoring and analyzing data on food production, distribution, and consumption, assisting in the identification and correction of bottlenecks, the reduction of food waste, and the provision of wholesome food for all.

5.3. SDG 3- Good Health and Well-Being

SDG 3 deals with the good health and well-being of everyone. Ensuring healthy lives and promoting well-being at all ages is basic needs and essential to sustainable development. Poor health threatens the rights of children to education, limits economic opportunities for men and women and increases poverty within communities and countries around the world[36]. Health is also connected to other aspects of sustainable development, including water and sanitation, gender equality, climate change and peace and stability[37]. Currently, the world is facing a global health crisis of COVID-19 which is spreading human suffering, destabilizing the global economy and upending

[31]Rajesh Agarwal, "AI in Agriculture: Sowing the Seeds of Prediction-Fostered Planning",INC42, https://inc42.com/resources/ai-in-agriculture-sowing-the-seeds-of-prediction-fostered-planning(last visited on April 20, 2022).

[32]T. Bak and H. Jacobsen, "Agriculture robotic platform with four wheel steering for weed detection"87BE2125-2126 (2013).

[33]Fabienne Lang, "A 'Vegebot' has been built to harvest lettuce by using Machine learning",Interesting Engineering,available at:https://interestingengineering.com/a-vegebot-has-been-built-to-harvest-lettuce-by-using-machine-learning(last visited on April 20, 2022).

[34]T. Talaviya, D. Shah, et. al., "Implementation of artificial intelligence in agriculture for optimization of irrigation and application of pesticides and herbicides",4AIA58-73(2020)

[35]Baruah, Ayushman, "Artificial Inlligence in Indian Agriculture - An Indian Industry and Startup Review". EMERJ, November 22, 2019, available at: www.emerj.com https://emerj.com/ai-sector-overviews/artificial-intelligence-in-indian-agriculture-an-industry-and-startup-overview/(last visited on April 22, 2022).

[36]United Nations, "Goal 3-Good Health and Well-Being- Ensure Healthy Lives and Promote Well-Being for All at All Ages",Sustainable Developments Goals,available at: https://www.globalgoals.org/3-good-health-and-well-being(last visited on April 23, 2022).

[37]Supra Note 34.

the lives of billions of people around the globe[38]. The United Nations Development Programme highlighted huge disparities in countries' abilities to cope with and recover from the COVID-19 crisis[39]. The pandemic provides a watershed moment for health emergency preparedness and for investment in critical 21st century public services.

The utilization of the scientific progress in the health sector has been suggested in order to achieve this basic needs because basic needs such as access to healthcare services, clean water, sanitation, and adequate nutrition are fundamental for achieving good health and well-being for all. The market for AI in healthcare is quite promising. Its capacity to deduce conclusions and spot trends from vast amounts of patient records, medical pictures, epidemiological data, and other data[40] has a great deal of promise. AI has the potential to help doctors improve their diagnoses, forecast the spread of diseases, and customize treatments[41]. When AI and health care digitalization are coupled, healthcare practitioners may monitor or diagnose patients from a distance and change the way they manage chronic illnesses, which take up a significant portion of health care spending. Machine learning is suited to analyzing the data in millions of medical histories to forecast health risks at the population level[42]. This could be an early win for AI because it brings the potential for large savings and would not require the regulatory scrutiny to be expected when trying to anticipate individual health risks[43]. Hospitals also could improve their capacity utilization by employing AI solutions to optimize many ordinary business tasks[44]. During the pandemic time, AI is being used as a tool to support the fight against the viral pandemic that has affected the entire world since the beginning of 2020[45]. The first application of AI expected in the face of a health crisis is certainly the assistance to researchers to find a vaccine able to protect caregivers[46]. The predictions of the virus structure generated by AI have already saved scientists months of experimentation. The American start-up Moderna has distinguished itself by its mastery of a biotechnology based on messenger ribonucleic

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[38]United Nations, "Covid 19 and SDGs", UNDP, available at: https://feature.undp.org/covid-19-and-the-sdgs/(last visited on March 18, 2022).

[39]Ibid.

[40]Calcum Chase, "The impact of AI on Healthcare", Forbes, October 01, 2020, available at: https://www.forbes.com/sites/calumchace/2020/10/01/the-impact-of-ai-on-healthcare/?sh=9d9e55d6a071 (last visited on M April 27, 2022).

[41]Ibid.

[42]Jennifer Bresnick,"Top 12 ways Artificial Intelligence will impact Healthcare",Health It Analytics, April 30, 2018, available at: https://healthitanalytics.com/news/top-12-ways-artificial-intelligence-will-impact-healthcare(last visited on April 28, 2022).

[43]Ashokan Ashok, "Impact of Artificial Intelligence in Healthcare",Unfold Labs,available at: https://unfoldlabs.medium.com/the-impact-of-artificial-intelligence-in-healthcare-4bc657f129f5(last visited on April 28, 2022).

[44]LixaLix, "Building Equitable AI for Public Health", UM NEWS, January 20, 2020, available at: https://news.umanitoba.ca/building-equitable-ai-for-public-health/(last visited on April 29, 2022).

[45]Swami Sivasubhramaniam, "How AI and Machine learning are helping to fight covid-19",World Economic Forum,May 28, 2020, available at: https://www.weforum.org/agenda/2020/05/how-ai-and-machine-learning-are-helping-to-fight-covid-19/(last visited on April 30, 2022).

[46]Ibid.

acid (mRNA) for which the study of protein folding is essential[47]. It has managed to significantly reduce the time required to develop a prototype vaccine testable on humans thanks to the support of bioinformatics, of which AI is an integral part[48]. Similarly, Chinese technology giant Baidu[49], in partnership with Oregon State University and the University of Rochester, published its Linearfoldalgorithm[50] to study the same protein folding. This algorithm is much faster than traditional algorithms in predicting the structure of a virus, secondary ribonucleic acid (RNA) and provides scientists with additional information on how viruses spread[51]. Further, the Canadian company BlueDot is credited with the early detection of the virus using an AI and its ability to continuously review over 100 data sets, such as news, airline ticket sales, demographics, climate data and animal populations[52]. AI is also being utilized in therapy, and it has the potential to enhance the mental health of individuals who do not have access to human therapists.

Therefore,AI improves preventative healthcare programs and diagnostics, resulting in new scientific advances. The utilization of AI based technologies in Healthcare sector protects the right to health and also provide the supplemental help to achieve the SDGs 3. These technologies must be utilized by appropriate authority without any discrimination. At international level, a polite tendency must be adopted by developed countries towards developing countries regarding the supply and management of these sophisticated technologies.

5.4. SDG 4-Quality Education

Access to quality education is a basic need and a human right. By providing inclusive and equitable education, the SDGs aim to ensure that everyone has the opportunity to acquire knowledge and skills for a better future. SDG 4 focuses on the quality education and emphasizes on lifelong learning opportunities. The importance of education compelled to international as well as national communities to declare it basic needs. Everyone has the right to education[53]. Education shall be free and compulsory, at least in

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[47]Abbas M. AL-Bakry and Ammar AbdrabaSakran, "Importance of using Artificial Techniques in Medical Field",University of Information Technology and Communication, available at: http://uoitc.edu.iq/images/online_workshops/AI_Covid19.pdf (last visited on April 30, 2022).

[48]Supra Note 45.

[49]Baidu, "How Baidu is bringing AI to fight against coronavirus, MIT Technological Review,available at: https://www.technologyreview.com/2020/03/11/905366/how-baidu-is-bringing-ai-to-the-fight-against-coronavirus/(last visited on April 30, 2022).

[50]Linear Fold Algorithm is the combination of computational linguistics and incremental parsing algorithms that are used to scan the RNA sequence in a faster way.

[51]Keith Darlington, "How Artificial Intelligence is helping to prevent the spread of the covid-19 pandemic",Open Mind,available at: https://www.bbvaopenmind.com/en/technology/artificial-intelligence/how-ai-is-helping-prevent-the-spread-of-the-covid-19-pandemic(last visited on April 30, 2022).

[52]Cory Stieg, "How this Canadian Start-up spotted coronavirus before everyone else knew about it", CNBC,March 06, 2020, available at: https://www.cnbc.com/2020/03/03/bluedot-used-artificial-intelligence-to-predict-coronavirus-spread.html (last visited on April 30, 2022).

[53]Universal Declaration of Human Rights, 1948, art. 26.

International Covenant on Economic Social and Cultural Rights, 1966, art. 6 & 13.

Convention on the Elimination of All Forms of Discrimination against Women, 1979, art. 12

Convention on the Rights of Child, 1989, art. 28 & 29.

Conventions on the rights of persons with Disabilities, 2006, art. 24

the elementary and fundamental stages. Technical, professional and higher education shall be made generally available and equally accessible to all on the basis of merit. It is agreed that education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms[54].

For decades people have discussed how to revolutionize education with technology, whether "gamifying" instructional materials or expanding access to knowledge via massive open online courses. EdTechXGlobal and Ibis capital estimated that schools spent nearly $160 billion on education technology (Ed-Tech), in 2016, and forecast spending to grow 17 percent annually through 2020[55]. Although the exact percentage of artificial intelligence in education is unknown, it is expected to rise as more and more artificial intelligence technologies are used to accomplish important goals like improving teaching effectiveness and efficiency, ensuring universal access to education, and fostering the kind of skills that will be critical in the twenty-first century. So where will artificial intelligence be in education in 2030? It will most likely have a significant role. However, ethical considerations-beginning with who owns student data, who may view it, who can use it, and for what purposes-as well as technological issues are crucial to success.

ICT plays very important role in education sector. The objective of ICT in education is to provide accessibility through online medium of education and to improve the quality of teaching especially in remote areas[56]. Online learning has been around since the advent of ICT and its technologies. Teachers and students are both learning new approaches to teaching through this. In order to ensure that learning continues, online learning has become more and more popular during the COVID-19 epidemic. ICTs have ensured that education is accessible to everyone, even in rural places. It has made sure that every learner benefits, regardless of where they are. While attracting and keeping students is important, a fundamentally new approach to learning-inside or outside of the classroom-will probably bring about the real revolution in education. Over the past few decades, a lot of work has been done to move away from a standardised approach and to customise learning for each student. Adaptive learning solutions tailor lesson plans to each student's prior knowledge, unique learning style, and progress in order to overcome the shortcomings of traditional classroom instruction. Adaptive learning strives to provide each student with the appropriate information at the appropriate time in the most effective manner, as opposed to teaching the entire class a single lesson that may disengage quick learners or leave behind difficult students. Artificial intelligence could improve adaptive learning and personalized teaching by identifying factors or indicators of successful learning for each student that were previously not possible to capture.

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[54]Ibid.

[55]EdTechXGlobal and Ibis Capital, "Global EdTech industry report: A map for the future of education,"DELOITTE, available at: https://www.google.com/ search?q=%E2%80%9C2016+Global+EdTech+industry+report%3A+A+map+for+the+future+of+education%2C%E2%80%9D+EdTechXGlobal+and+Ibis+Capital&oq=%E2%80%9C2016+ Global+EdTech+ industry+report%3A+A+map+for+ the+future+of +education%2C%E2%80%9D+EdTechXGlobal+and+Ibis+Capital&aqs=chrome..69i57.340j0j4&sourceid=chrome&ie=UTF-8 (last visited on May 2, 2022).

[56]Manpreet Kaur, "What is ICT in education and its importance", TechPrevue, January 4, 2021, available at: https://www.techprevue.com/ict-in-education/ (last visited on May 6, 2022).

Teachers may no longer be required to do time-consuming administrative duties including managing and responding to standard inquiries. Natural language, computer vision, and deep learning could help replace teachers in answering students' routine questions or acting as tutorial supervisors[57]. In the future, voice and face recognition technology may be used by AI systems to monitor a whole classroom and identify individual pupils. Finally, by the application of machine learning algorithms to data from student education profiles, social media, and polls, AI might help teachers create the most productive groups or courses. UNESCO estimates that the world will need to recruit and train 24.4 million primary school teachers in order to achieve universal primary education by 2030 and another 44.4 million teachers to fill openings at secondary schools. Many of these new hires more than 85 percent of them, in the case of primary school will be required just to replace teachers who leave education[58]. The potential for AI is undeniably enormous, but it need a break from Big Tech and proprietary and Western focused systems. The necessity to ensure that high-quality educational systems are available to all is demonstrated not just by SDG4, but also by the significant effects that would result from achieving this objective. Better education in the poor countries would have enormous advantages for these nations.

5.5. SDG 6- Clean Water and Sanitation

SDG 6 deals with ensure availability and sustainable management of water and sanitation for all. Access to drinking water and sanitation facilities are recognized as basic needs, reflecting the fundamental element in every person's life for his/her health, dignity, and well-being. Lack of access to safe, sufficient and affordable water, sanitation and hygiene facilities has a devastating effect on the health, dignity and prosperity of billions of people[59]. People have rights, and states have a responsibility to provide services like water and sanitation. A person's right to water and sanitation must be guaranteed equally and without discrimination by duty bearers, while right holders are free to assert their rights. Everyone has the right to adequate, appropriate, safe, physically accessible, reasonably priced water for household and personal use. The right to sanitation entitles everyone to have physical and affordable access to sanitation, in all spheres of life, that is safe, hygienic, secure, and socially and culturally acceptable and that provides privacy and ensures dignity[60]. A recent UN report on global clean water and sanitation suggests that over 40% of the world population still doesn't have access to safely managed drinking water[61]. In short, the noble purpose of delivering clean water and sanitation needs serious attention and innovation by combining sustainable development with the intelligent management of infrastructure.

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[57]Jason Maderer, "Artificial intelligence course creates AI teaching assistant,"Georgia Tech Press, available at: https://news.gatech.edu/news/2016/05/09/artificial-intelligence-course-creates-ai-teaching-assistant, (last visited on March 28, 2022).

[58]Kate Hodal, "UN warns universal education goal will fall without 69 million new teachers",The Guardian, October 05, 2016, available at: https://www.theguardian.com/global-development/2016/oct/05/un-universal-education-goal-fail-69-million-new-teachers-unesco(last visited on May 10, 2022).

[59]United Nations, "Human rights to water and sanitation", UN Water, available at: https://www.unwater.org/water-facts/human-rights/ (last visited on May 10, 2022).

[60]Ibid.

[61]United Nations, "Goal6-Ensure access to water and sanitation for all", Sustainable Developments Goals, available at: https://www.un.org/sustainabledevelopment/water-and-sanitation/ (last visited on May 10, 2022).

AI has the potential to help resolve challenges related to clean water and sanitation. It has the power to revolutionize water-use efficiency and sanitation management in terms of engineering, mapping and forecasting while widely improving sustainability and scalability of water and sanitation services[62]. It is helping utilities and municipalities to better manage their water and wastewater systems to ensure a clean and sanitized water supply. Some utilities and water-intensive industries have already started using AI to innovate services related to water deliverability and sanitation[63]. Machine learning and artificial intelligence may be used to identify issues and ensure that resources are allocated early on in the process of treating water.

Another side, the existing manhole cleaning practice requires workers to manually position the sewer genic machine or sewer iron rod which is inserted in sewage line for cleaning but these machines are not that much effective to unblock the sewage line and no one wants to enter in it because the sewage are fulfilled with human excreta and toxic indissoluble filth. It is a great achievement by Indian engineers that the world's first Robotic scavenger is created by Kerala based Genrobotic Company and such robotic entity is named as Bandicoot 2.0[64]. During the launch of The Bandicoot 2.0, UN Secretary-General Mr. Antonio Guterres has accepted this fact that now AI has made it possible by replacing manual scavenging to robotic scavenging[65]. Another instrument is Manhole Monitoring System- G Beetle which monitors the manhole networks across the city. It works on the machine learning program and AI technology which gives information about the condition of manholes and also give an alarm when these manholes are getting overflow and clogged[66]. In the recent development, the development of Robotic Scavenging has been engaged by different country in order to protect the miserable condition and health of manual scavengers.

5.6. SDG 8- Decent Work and Economic Growth -

SDG 8 promote sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all. Roughly half of the world's population still lives on the equivalent of about 2 dollar per day and it has been seen in too many places, having a job doesn't guarantee the ability to escape from poverty. Poor working conditions are often related to poverty, inequality and discrimination and also vulnerable groups mostly faces such issues. The decent work promotes the earning of every individual which world be necessary for them to fulfill their basic needs.

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[62]DAIA, "Artificial intelligence and global challenges- clean water and sanitation",Medium, available at: https://medium.com/daia/artificial-intelligence-and-global-challenges-a-plan-for-progress-39b69df9cba3 (last visited on May 15, 2022).

[63]Ibid.

[64]Kathakali Chanda, "Bandicoot: Genrobotics' robot that can scoops out filth from sewers",Forbes India, June 07, 2018,available at: https://www.forbesindia.com/article/startups-special-2018/bandicoot-genrobotics-robot-that-scoops-out-filth-from-sewers/50401/1(last visited on May 16, 2022).

[65]Astha Ahuja, "Bandicoot, Sewer Cleaning Robot Wins Infosys Foundation's Aarohan Social Innovation Awards", NDTV NEWS, February 26, 2020, available at: https://swachhindia.ndtv.com/bandicoot-sewer-cleaning-robot-wins-infosys-foundations-aarohan-social-innovation-awards-41900/ (last visited on May16, 2022).

[66]Genrobotics, "G BEETLE- Manhole Monitoring System", available at: https://www.genrobotics.org/manholemonitoringsystem (last visited on May 16, 2022).

Improvement in economy and right to work would enhance the income of individual and this enhancement would provide better standard of living, quality of education and health and so forth. By focusing on decent work and economic growth, the SDGs aim to create an enabling environment where individuals can secure sustainable livelihoods, improve their living conditions, and meet their basic needs, thereby promoting inclusive and sustainable development.

In 2013, Oxford Martin School published a research paper entitled which suggested that 47 per cent of US jobs are at risk of automation over the coming two decades[67]. According to a Report by Mckinsey Global Institute[68], AI alone would contribute, on an average, 1.2 per cent per year in productivity growth. International Labor Organization (ILO)[69] demonstrates how "smart farming" increases productivity by using the Internet of Things (IoT), with sensors to collect real-time data which could be utilized for creating appropriate conditions that can sow, water, fertilize and harvest.

With the emerging New-Age Technology, the concerns regarding technology-led job displacement or joblessness have come to the center stage. The issue of machines displacing or replacing human labor has been discussed and debated for a very long time. John Maynard Keynes, who coined a new expression i.e. 'technological unemployment'[70]. He defined it as the "unemployment due to our discovery of means of economizing the use of labor outrunning the pace at which we can find new uses of labor[71]. Optimists agree that technology may be disruptive to jobs in the short run, but they insist that there is no permanent negative impact on jobs. At the other extreme, pessimists contend that under certain circumstances, new technologies can possibly lead to a lasting decline in the number of workers employed.

Further by fostering innovation, boosting productivity, and fostering inclusive and sustainable economic development, AI can significantly contribute to the achievement of SDG 8. Artificial intelligence (AI) technologies have the potential to automate repetitive work, generate new employment possibilities, improve decision-making, increase access to financial services, and optimise supply chain, resource allocation, and energy management processes. AI can promote sustainable economic growth by minimising environmental impact, decreasing waste, and enhancing resource efficiency. By eliminating human bias from the recruiting and recruitment procedures, it

[67]Carl Benedikt Frey and Michael Osborne, "The Future of Employment: How Susceptible Are Jobs to Computerisation", Oxford Martin School, available at: https://www.oxfordmartin.ox.ac.uk/downloads/academic/The_ Future_of_Employment.pdf(last visited on May 18, 2022).

[68]Mckinsey and Company,"Outperformers: High growth emerging economic and the companies that propel them", Mckinsey Global Institute, available at: https://www.mckinsey.com/mgi/overview/in-the-news/2018(last visited on May 20, 2022).

[69]Thomas Jayneet.al.,"Future of work in African Agriculture", ILO,available at: https://www.ilo.org/wcmsp5/groups/public/---dgreports/---inst/documents/publication/wcms_624872.pdf(last visited on May20, 2022).

[70]Reccardo Campa, "Technological Unemployment: a brief history of an idea"6OI60 (2018),available at: https://www.researchgate.net/publication/314187966_Technological_Unemployment_A_Brief_History_of_an_Idea(last visited on May 20, 2022).

[71]Ibid.

can also aid in addressing prejudice and discrimination in the labour market. To the benefit of society as a whole, it is crucial to make sure that AI technologies adhere to inclusion, ethics, and human rights values.

5.7. SDG 9- Industry, Innovation and Infrastructure

SDG 9 has primary focus to build resilient infrastructure, promote inclusive and sustainable industrialization and foster innovation. From the basic needs perspective, Infrastructure shapes the urban environment and is the engine of sustained and inclusive economic growth. It is our responsibility to develop quality, reliable, sustainable and resilient infrastructure, supporting economic development and social well-being. It is fundamental to promote inclusive, sustainable, affordable and equitable access for all, using to this end, new, innovative tools. SDG 9 encourages the promotion of technological advancements and innovations. This includes innovations in areas such as water purification, renewable energy, waste management, and transportation. Technological innovations can enhance the provision of basic services, making them more efficient, accessible, and sustainable. By investing in infrastructure development, including housing, water supply systems, sanitation facilities, and energy networks, countries can ensure that basic needs are met.

New hybrid manufacturing, which incorporates AI, IoTs sensors, and 4D printing, is changing sectors and resulting in exponential innovation. This emerging technology could also be deployed to address the infrastructure challenges, thereby promoting the public good in respect of energy, water, and waste management, transportation, real estate, and urban planning. For example, "traffic light networks can be optimized using real time traffic camera data and Internet of Things sensors to maximize vehicle throughput". While AI has the potential to be essential for both public and private sector innovation, a closer examination of the objective indicates that domestic development and improved access to ICT are far more important. Nonetheless, even if wealth is unevenly distributed, contemporary AI may contribute to broad creativity as well as scientific and technological development, which might possibly benefit everybody in the long term. Therefore, by leveraging AI technologies in industry, innovation, and infrastructure, countries can drive sustainable development, enhance efficiency, and promote inclusive growth, aligning with the objectives of SDG 9.

Conclusion

To conclude, it has been found that AI is quickly expanding its wing into various sectors. Machine intelligence and robots with deep learning capabilities have had significant disruptive and enabling effects on society. Therefore, preliminary findings from sustainable AI development indicate that there is a great deal of opportunity to think about AI in terms of sustainable development and basic needs. AI, being a collection of general-purpose technologies, does not have a single future. It has multiple futures, and these futures are dependent on social factors other than technical advancements. As the AI revolution alters our society, it may signal a utopian future in which human's basic needs can be fulfilled and this revolution also emphasizes that human and machines can coexist peacefully, or it may herald a dismal future filled with conflicts, poverty, and pain. Countries may take advantage of AI's potential to accomplish sustainable development, advance decent work, and promote economic progress by responsibly and broadly utilising it. By promoting AI in agriculture, such as efficient irrigation systems, post-

harvest technologies, and distribution networks, countries can enhance food production, reduce hunger, and ensure food security, addressing a fundamental basic need.

In this paper the authors have considerably tried to establish the relation between SDGs and basic needs by highlighting that basic needs can be addressed up to an extent with the SDGs. The authors also established that SDG and basic needs can be fulfilled substantially by prospective application of AI based technologies. AI can be utilized for satisfying the human needs and can establish a sophisticated digital society without any conflicts of coexistence between human and machines. The potential of AI can be harnessed to benefit humanity. Achieving SDG and providing basic needs is crucial for an egalitarian society. This can be accomplished by employing AI. Therefore, we need to create collaboration, responsible development, and suitable legislation, to prevent conflicts if any and achieve the goals. Collaboration among stakeholders, including governments, organizations, and communities, is crucial to leverage AI effectively in accomplishing basic needs while advancing sustainable development goals.

CRITICAL ANALYSIS ON IMPLEMENTATION AND IMPACT OF BASEL CONVENTION ON THE TRANSBOUNDARY MOVEMENT OF END-OF-LIFE SHIPS FOR RECYCLING IN SOUTH ASIAN COASTS –NEED FOR SUSTAINABLE APPROACH

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Abstract

On 5th December 2019, long waited Basel Ban Amendment- 1995 came into force, imposing absolute ban on the export of hazardous waste from the countries listed in the Annex VII (Liechtenstein, European Union & Organisation for Economic Co-operation and Development (OECD), to the countries not listed in Annex VII of the Basel Convention. The Basel regime considers obsolete ship as hazardous waste therefore the countries listed in the Annex VII are prohibited from exporting their obsolete ships for recycling to the non- annex VII countries, but in reality 40 percent of ships in the verge of End of Life Journey reaching South Asian Countries (Non -annex VII countries) are from the countries listed in Annex VII. Therefore this article critically analyses the implementation and impact of Basel Convention on the trans boundary movement of end of life ships for recycling in South Asian Coasts.

Key words

Basel Ban Amendment, Global Ship Recycling Industry, Ship Recycling in South Asian Countries, Basel Convention 1989, Marine Environment, Hong Kong Convention

Introduction

Ship Recycling is a preordained part of International shipping and it is inherently sustainable way of disposing obsolete ships[1], if recycled in a scientific & environmentally sound manner. Generally, operational life span of a ship is between 20 and 25 years, subjected to various periodical survey and certifications as stipulated by the International Maritime Organization in its Conventions. However, in addition to the age, many commercial and technical factors influence the End-of Life Journey of a ship[2], such as; unjustifiable repair costs, regulatory requirements, advent of new technologies and decrease of resale value in the secondhand market[3], technical obsolescence on

[1]Saurabh Bhattacharjee, "From Basel to Hong Kong: International Environmental Regulation of Ship-Recycling Takes One Step Forward & Two Steps Back" 1 (2) Trade, Law & Development, National Law University, Jodhpur Publication193 (2009). See also Kanu Priya Jain Improving the Competitiveness of Green Ship Recycling, Ph.D. Thesis submitted to Delft University of Technology, available at: https://doi.org/10.4233/uuid:3e74dea2-c01b-4b23-8194-2faec501a3c7 (last visited August 10, 2023).

[2]Ibid.

[3]Juan Ignacio Alcaidea, Francisco Piniella, et al. "The Mirror Flags" Ship Registration in Globalized Ship Breaking Industry" 48 Transportation Research Part D, Transport & Environment 378-392 (2016), available at: https://doi.org/10.1026/j.trd.2016.08.20.

account of wear & tear[4] etc., and increasing price for scrap metal may be one of the factor influencing the ship owners to opt for ship recycling.

Presently, shipbreaking industry is engrained in southern part of the Asia specifically in Bangladesh, India and Pakistan (Non-annex VII countries) though 90 percent of the global shipbuilding points, in terms of tonnage, are located in China, the Republic of Korea and Japan[5]. Reasons for the swift growth of shipbreaking industry, especially in southern part of the Asia are well known among the shipping community, such as availability of labour relatively at low cost, less procedural entangles and relatively lenient approach towards the environmentally sound management of hazardous waste and materials[6] etc.

Initially, shipbreaking activities were carried-out by industrialised port cities of the United States and the United Kingdom[7]. During 1960s, shipbreaking activities were taken over by the Taiwan and occupied the position of world's largest shipbreaking country until the end of 1980 till Japan, South Korea and China enter the global shipbreaking industry[8]. Therefore in the late 1980s East Asia was the world's point of convergence for shipbreaking[9]. However, the global shipbreaking industry straitened in the late 1980s and started to resurge in 1992, by that time the ship-recycling industry evidenced geographical shift from East Asia (except China)to South Asian countries namely, Bangladesh, India and Pakistan. One of the reasons for geographical shift may be adoption of the Basel convention, which considers obsolete ships as hazardous waste, accordingly obligated the member states to dispose obsolete ships in an environmentally sound manner. Managing the waste as per guidelines issued by the Basel Convention on Environmentally Sound Management of waste was a costly affair in the developed countries, consequently the ship recycling industry has evidenced an eventual shift from developed countries to developing countries and evolved as a major industry in southern part of the Asia.

At present, Chittagong in Bangladesh, Alang in India and Gadani in Pakistan are the prime ship recycling points accounting for 92 percent of the ship recycling, contributing significantly to the nation' need for secondary iron and steel, creating employment, adding to the Gross Domestic Product (GDP) of respective countries. However these ship recycling yards are exposed for many controversies due to the inadequate as well as unscientific infrastructure, lack of transparency and accountability in day-to-day affairs, serious violations[10] of environmental standards, compromised labour safety and welfare standards etc.

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[4]Tomi Solakivi, et al,"The European Ship Recycling Regulation & its market implications: Ship Recycling Capacity & Market Potentia" 294 Journal of Cleaner Production (2021), available at: http://doi.org/10.1016/j.Jclepro.2021.126236

[5]Gopal Krishna Choudhary, " An analysis of the creation of a global ship recycling fund in the framework of the Hong Kong International Convention for the safe and Environmentally Sound Recycling of Ships" World Maritime University Dissertations 102, available at: https://commons.wmu.se/all_dissertations/102(last visited on 13th March 2023)

[6]Ibid.

[7]Ibid.

[8]Ibid.

[9]Ibid.

[10]Supra note no 2. See also Ebe Daems and Gie Garis, Behind the Hypocrisy of Better Beaches, NGO Shipbreaking Platform, available at:www.shipbreakingplatform.org (last visited August 10, 2023)

Recently the Governments of South Asian Countries, those are engaged in the shipbreaking activities, have ratified (except Pakistan) the Hong Kong Convention 2009, consequently passed national legislations[11] in their respective countries to keep checks and balances on the violations, to ensure safe and environmentally sound recycling of ships at par with the international regulations as specified in the International Convention for the safe and environmentally sound recycling of ships, popularly known as the Hong Kong Convention 2009[12] in addition to Basel Convention. However the Hong Kong Convention, the most aspiring IMO convention on ship recycling will come into effect from 26th June 2025.

With these initiatives the South Asian Countries are striving to gain competitive advantage in the global ship recycling market and India has asserted that they are willing to grab 50% of global ship recycling market in the near-future[13], from the present share of 26 percent[14]. Similarly, other South Asian countries, namely, Bangladesh and Pakistan are also competing to base their economy on the ship recycling industry. Therefore the question is, whether these countries are efficient enough to address the environmental concerns, may arise as a consequence of wanton recycling activities in the South Asian Coasts.

In addition, the Basel Ban Amendment has introduced absolute ban on trans-boundary movement of EOL ships for recycling from Annex VII countries to Non-Annex VII countries. Wherefore, meticulous study and insight of the Basel Convention in light of the Basel Ban Amendment 2019 is vital to learn the market drift. Above and Beyond the ship recycling industry has evidenced geographical shift, many times due to many reasons including stringent international environmental legislation, therefore it is essential to investigate into the chances of geopolitical shift that may occur on the strict implementation of Basel Ban Amendment 2019.

The most adjourned amendment that inflict absolute ban on trans-boundary movement of obsolete ships, intending to improve the human health & environment came into force on December 5th 2019 and with this amendment the Basel regime has become a stringent piece of the International environmental jurisprudence, banning export of hazardous waste including EOL ships. Despite of Basel Regime, the trans-boundary movements of EOL ship from Annex VII countries to Non-Annex Countries are apparent during 2019-2021& also in 2022. Further, South Asian Countries engaged in ship recycling activities are Non- annex VII countries and non-parties to the Basel Ban Amendment but gained competitive advantage in the Global shipbreaking industry. Therefore in-depth study of the implementation and implications of the Basel Convention (after Ban amendment) is a core objective of the article.

In addition, various research studies have estimated that the gross tonnage of EOL ships will increase 3-5times by 2050, which calls for immediate action towards the creation of

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[11]Recycling of Ships Act, 2019.

[12]Hong Kong Convention, 2009.

[13]Union Budget 2021 | Ship Recycling capacity to double by 2024, generate 1.5 lakh jobs, available at: https://www.thehindu.com/business/budget/union-budget-2021-ship-recycling-capacity-to-double-by-2024-generate-15-lakh-jobs/article33716110.ece#:~: text=Finance%20Minister %20Nirmala%20Sitharaman %20on,will%20generate%201.5%20lakh%20jobs. (last visited August 10, 2023)

[14]Review of Maritime Transport, 2019.

required infrastructure, capacity building, stringent and inclusive ship recycling regulations, having pragmatic and scientific coverage of whole lot of activities related to recycling of EOL of ships.

Therefore the questions are;

- Whether Basel regime would be a panacea for increasing environmental degradation & related concerns in the South Asian Coasts, due to ship recycling activities?
- Whether the Basel Convention is efficient enough to regulate trans-boundary movement of EOL Ships from Annex VII countries to Non-Annex VII countries?
- Does ban imposed by the Basel ban amendment is going to impact the supply of ships for recycling industry in South Asian Coasts?
- Is Basel Ban Amendment 2019 together with European Union Ship Recycling Regulation, play an instrumental role in causing a phenomenal geo political shift of the ship recycling industry from Non-annex -VII Countries to the Annex-VII countries of Basel Convention?
- Whether the ship recycling yards in South Asian Countries are fully equipped to recycle the estimated gross tonnage of EOL ships without causing environmental degradation? What is the way-out?

I. International legal framework on transboundary movement of EOL ships for recycling in South Asian Coasts:

An average sized ship measuring 6,000 tonnages can release approximately 1,000 tons of asbestos and other toxic materials. These toxic materials and polychlorinated Biphenyls (PCB's)are, lead, barium, cadmium, chromium, zinc, pesticides, organo-mercury compounds, copper oxides, arsenic, solvents, paint, plastic, rubber, oil hydro carbon residues and asbestos, grease, ballast, bilge and non-indigenous organisms etc. However, the presence of these hazardous waste and materials in the sea water not only damaging the marine eco-system but also enters the human body via biological magnification.

A Greenpeace' study on major ship recycling yards in Asia revealed horrific data on the level of TBTs in sediments at the Alang Ship Yards, were 10 to 100 million times higher than internationally recognized limits[15]. In Bangladesh, thousands of protected mangrove trees have been cut to facilitate additional shipbreaking yards. NGOYPSA, estimates that at least 60,000/ mangrove trees has been cut along the coast near the city

[15]Saurabh Bhattacharjee, "From Basel to Hong Kong: International Environmental Regulation of Ship-Recycling Takes One Step Forward & Two Steps Back" 1 (2) Trade, Law & Development, National Law University, Jodhpur Publication193 (2009).

of Chattogram, in the past few years, having extremely deleterious effect on the coastal ecology[16].

The issues pertaining to trans-boundary movement of hazardous waste/EOL ships were first addressed in the United Nations Conference on the Human Environment 1972 (Stockholm Conference-1972) and later in Rio Declaration in 1992. The Stockholm Conference recommended for the establishment of UNEP, initially with the purpose to provide an international mechanism for the exchange of environmental information and to coordinate with the developing countries in outlining environmental policies. In 1982, an ad hoc working group of environmental experts met in Montevideo, Paraguay and formally decided to tackle the trans-boundary movement and disposal of toxic wastes. In 1985, UNEP issued the Cairo Guidelines and Principles for the Environmentally Sound Management of Hazardous Wastes. Further in June 1987 UNEP has established a draft convention on trans-boundary movement of hazardous waste and created an ad hoc working group composed of legal and technical experts to work towards the formulation and adoption of convention on the control of trans-boundary movement of hazardous wastes and their disposal. The efforts of working group came in to fruition in 1989 with the adoption of the convention on the control of trans-boundary movement of hazardous wastes and their disposal.

Further part XII of United Nations Convention on Law of Seas 1982 in its Articles[17] imposes general obligations on the state parties to protect and preserve the marine environment by taking individual and joint measures, are necessary to prevent, reduce & control pollution of the marine environment by using best practicable means at their disposal. Another important International Convention in this context is Convention for the Safe and Environmentally Sound Recycling of Ships, popularly known as Hong Kong Convention -2009. However Hong Kong Convention will enter into force on 26th June 2025.

II. Effectiveness of the Basel convention on the conservation of South Asian Coasts against pollution caused due to the ship recycling activities

The ship recycling industry is intensively regulated by the Basel Convention 1989 with its various annexes, protocols, amendments and guidelines, from time to time, with other regulatory frameworks. Basel Convention 1989 defined the waste and categorized the obsolete ships as hazardous waste because of the hazardous materials used in ship building.

In 2002, Basel Secretariat has released a comprehensive guide, recommending minimum standards for Environmentally Sound Management of Ship Recycling, called "Technical Guidelines for Environmentally Sound Management of the Full & Partial Dismantling of Ships"[18] (hereafter called as Technical Guidelines for Environmentally

[16]The Toxic Tide, 2022 Shipbreaking Records, available at: http://Offthebeach.org/2022, (last visited August 10, 2023)

[17]United Nations Convention on the Law of the Sea, 1982, arts. 192, 194(1), 195 & 210

[18]Technical Guidelines for the Environmentally Sound Management of the Full and Partial Dismantling of Ships, Secretariat of Basel Convention, Basel Convention Series/SBC No2003/2, Page 27-28, available at: https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---safework/documents/publication/wcms_117942.pdf (last visited August 11, 2023)

Sound Management of Ship Recycling adopted in COP-6 on December 2002) to ensure safe and sustainable ship recycling.

The Technical Guidelines has issued schemes on the structure, design and facilities of the ship recycling yards. Accordingly, hazardous waste reception and treatment facilities are mandatory part of the ship recycling yards. Beaching is not only considered as an unscientific method of recycling but also categorized as a most dangerous and heavily polluting shipbreaking method. Because, in "Beaching" sewage, oil, heavy metal, toxic material, plastic and other harmful waste and materials enter the coastal waters directly in an uncontrolled manner, therefore the Technical Guidelines has kept the "Beaching" out of its ambit. But in practice, ships are dismantled through the "Beaching" in the beaches of South Asian Coast, evidently opposite to the Technical Guidelines of Basel Secretariat[19].

However, Beaching is supported by the Hong Kong Convention -2009 and also recognized as environmentally sound method of ship recycling in the Supreme Court of the South Asian Countries. This may be because of lack of technical expertise or shortfall of required resources to implement the technical guidelines or to avoid the huge cost involved in environmentally sound management of ship recycling etc. are the matter of concern. Further text of the Basel Convention focuses on safe and methodical disposal of toxic wastes and influences the parties to treat the hazardous waste in the country of origin. But due to insufficiencies and contradictions exist in the Basel Convention 1989, influenced the vigilant Basel members to adopt Basel Ban Amendment in 1995 March 22nd in the third meeting of conference of parties and it came into force on 5thDecember 2019. Basel Ban Amendment recommends the efficient waste management at the source, per se.

The Basel Ban Amendment intends to ban the actual physical movements of hazardous wastes from the international borders of Annex VII countries to Non-Annex VII countries, including EOL Ships. The Basel Ban Amendment has introduced a new paragraph to the preamble of the Basel Convention, adding Article 4-A and Annex -VII to the Basel Convention 1989. With these additions the Basel Convention intends to prohibit trans-boundary movements of hazardous wastes, detailed in the Article 1(i) (a), destined for operations from the countries listed in Annex VII to the countries not listed in Annex VII, in other words EOL ships from the parties of Basel Ban Amendment and the states listed in Annex VII (OECD, EU& Liechtenstein) to the states not listed in Annex-VII.

In fact, Basel Ban Amendment is not applicable to non-parties and Ban amendment has neither prohibited the trans-boundary movement of EOL ships among and between the countries listed in Annex VII nor prohibited the trans-boundary movement of EOL Ships among and between the non-Annex countries.

Again there is no ban on the trans-boundary movements of EOL ships, if the countries have concluded bilateral, multilateral or regional agreements under Article 11 paragraph 1 and 2 of the Basel Convention, however such parties are still under the

[19]Lin Lin, Kuishuang Feng, et al. (2022) "Unexpected side effects of EU Ship Recycling Regulation: Call for Global Cooperation on Greening the Ship Breaking Industry" 17 (4) Environmental Research Letters (2022) available at: https://doi.org/10.1088/1748-9326/ac5a68 (last visited August 11, 2023)

obligation to dispose the waste in an Environmentally Sound Manner. It is important to note that European Union has excluded the EOL ships out of coverage of the definition of waste via Waste Shipment Regulation, hence EU flagged ships are not covered under the Basel Convention, thus trans-boundary movements of EU flagged ships are not regulated by the Basel convention.

Recycling of EU flagged ships are regulated by EUSRR which imposes mandatory obligations on the parties that EU flagged ships shall not be recycled in the recycling yards not listed in the EUSRR certified yard' list. No ship recycling yards in South Asian Countries are listed in the EUSRR approved list, encouraging the involvement of cash buyers via flag- hopping. The flag hopping has emerged as a prevalent pathway to facilitate the EOL journey of ships to the substandard recycling yards of the South Asian Coasts and has been further amplified radically after 2013 EUSRR. However, the EUSRR and cost and complexity involved in environmentally Sound Management of ship recycling guidelines of the Basel regime may be the reasons for increased involvement of cash buyers in the global shipbreaking industry.

Further Annex V-A & B of Basel Convention seeks information including details of the owner/s and purpose of the trans-boundary movement, scheme for the environmentally sound management of EOL ships etc. But, in practice implementing these regulations have become a big challenge because the ship owners are reluctant to disclose the purpose while departing from the EU ports. Therefore, though the Basel regime has established well-thought-out legal framework with positive sprit to control the trans-boundary movement of EOL ships but became ineffectual in implementing these regulations effectively, resulting into increased & unregulated ship recycling in South Asian sub-standard ship recycling yards, which is evident from the following table.

Table -1 Total Number of European Union Listed/Certified Recycling Facilities/Yards[20]

Countries	Total Numbers	Method of Recycling
Annex -VII Countries (EU,OECD & Liechtenstein)	91	Alongside slipway/ wet birth/Dry Dock/Along dismantling ramp/Floating and slipway landing
Non-Annex-VII Countries (South Asian Countries involved in Ship Recycling)	Nill	Beaching

III. European Union Regulatory Framework for the trans-boundary movement of EOL ships for Recycling:

European Union ship owners control around 40 percent of world's merchant fleet stands approximately one third of the total tonnage, recycled in the yards of the South Asia (UNCTAD 2019). European Union is the single largest market, exporting EOL ships for

[20]Commission implementing decision (eu) 2022/2462 of 14 December 2022, amending Commission Implementing Decision (EU) 2016/2323 establishing the European List of ship recycling facilities pursuant to Regulation (EU) No 1257/2013 of the European Parliament and of the Council, Text with (EEA relevance) available at: http://data.europa.eu/eli/dec_impl/2022/2462/oj (last visited August 10, 2023)

recycling especially to non-annex countries in South Asia (Bangladesh, India and Pakistan). Therefore it is vital to understand the regulatory frame work of European Union applicable to the trans-boundary movement of EOL ships ready for recycling.

Presently the trans-boundary movement of hazardous waste, excluding EOL ships[21], in European Union is regulated by Waste Shipment Regulation that reflects the letter and spirit of the Basel Convention as well as European Union Ship Recycling Regulation that resembles the Hong Kong Convention. Thus EU Flagged ships are not regulated by the EU Waste Shipment Regulation as well as Basel Convention, however the EUWSR remains applicable to all non-EU-Flagged ships that are distained for recycling and depart from any port within the EU. Waste Shipment Regulation recognizes the provisions of Basel Ban amendment but excluded the EU flagged EOL ships from its coverage, hence WSR is applicable to hazardous waste and not to EU Flagged EOL ships Accordingly hazardous wastes shall not be exported from the EU to non-OECD country but to this context Hazardous waste does not include EOL ships therefore apparently majority of EU flagged ships are recycled in the Non-EU certified and substandard yards at the South Asian Coasts against the regulations of European Union Ship Recycling Regulation, is no longer a secret.

Table-2 Annual Ship Recycling data of both Annex VII & Non-Annex VII Countries of Base Convention[22]

Year	2018	2019	2020	2021	2022
Country	In GT	In GT	In GT	In GT	In GT
Asia	1,85,13,603	1,17,72,224	1,69,65,252	1,44,83,521	72,22,736
Southern Asia	1,72,16,401	1,02,95,555	1,50,69,367	1,32,58,729	65,01,924
Europe	93,297	40,261	1,17,593	1,20,713	92,180
Middle Income Developing economies	1,33,12,666	1,00,22,201	1,20,06,522	1,06,10,453	52,39,647
OECD (Organisation for Economic Cooperation & Development)	9,64,884	12,16,599	17,96,224	13,16,177	6,65,550

The keen examination of five years UNCTAD data revels the Global fall of shipbreaking activities in 2019 and surge in 2020 but we cannot ignore the number of EOL ships recycled in South Asian Coasts and consequential coastal pollution. The Ban Amendment prohibits trans-boundary movements of hazardous wastes from annex-VII countries to non-annex VII countries but vessels are reaching ship recycling yards of South Asian Countries, is certainly not a coincidence rather lack of compliance by the parties to the Basel Convection or lack of effective implementation mechanism in place.

[21] EU Waste Shipment Regulation, art. 2(3)

[22] UNCTAD/ STAT, available at: https://unctadstat.unctad.org (last visited on September 10, 2023)

The national regulatory framework of South Asian Countries are still emerging, India being a member of Basel Convention ratified the Basel Convention in June 1992 and brought into force on 22nd September 1992. On ratification of the convention India has introduced Hazardous and Other Wastes (Management & Trans-boundary Movement) Rules of 2016; recently in 2019 these rules were amended. India has not ratified the Basel Ban Amendment[23]. November 28th 2019 India has ratified the Hong Kong Convention - 2009 consequently established Ship Recycling Act 2019 to bring Indian Shipbreaking Industry at par with the International Standards recommended by the Hong Kong Convention-2009. Bangladesh is a signatory and also has accessed to the Basel Convention in April 1st 1993. On 26th June 2023,Bangladesh has signed the International Convention for the Safe and Environmentally Sound Recycling of Ships 2009, popularly known as Hong Kong convention -2009

Pakistan is a member of Basel Convention but not ratified Basel provisions in their domestic legislations hence the export of EOL vessels does not require prior consent of the importer causing sever pollution Pakistan is not a member to the Hong Kong Convention -2009 and it lacks comprehensive effective sectorial regulations to regulate the ship recycling activities, though it is active in ship recycling and shares significant portion in ship recycling market, since 1947, after independence The ship recycling activities are regulated by the mandatory basic custom checks, general as well as environmental laws of the Baluchistan[24] Environment Impact Assessment Regulations 2000 has almost become futile due to lack of sources for regular monitoring of the ship recycling yards.

IV. Implications of Basel Ban Amendment on the Export of EOL ships for recycling in the South Asian Coasts(From Annex VII countries to Non-Annex VII Countries):

Waste Shipment Regulations excluded the EOL ships from the coverage of Basel Convention, unilaterally, of course, by using the wide discretion conferred on the Basel parties to define waste; therefore Basel Ban Amendment is not applicable to EU Flagged ships. State parties consider Article 11 of the Basel Convention as a pathway to export EOL ships for recycling by circumventing Basel Ban Agreement but the commission has clearly mentioned that the parties shall not use Article 11 to circumvent the Article 4-A of the Basel Convention and recycling EOL ships in an environmentally sound manner is still a mandatory obligation of the parties. In addition Basel Convention is the only international legal framework regulating trans-boundary movement of EOL ships presently and will continue to be in existence even after 26th June 2025.

Further IMO' European Union Ship Recycling Regulation is the only dedicated regional framework aimed to facilitate early ratification of the Hong Kong Convention and its focus is on the periodical survey, certification, preparation of inventory of hazardous materials of ships and ensuring ship recycling in environmentally safe and sound manner in the EU certified yards. Therefore in the presence of EUSRR, Basel Ban amendment is somewhat weak.

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[23]Mazyar Ahmad, "Ship Recycling in India-Environmental Stock Taking" 6:3 Indian Law Review 465-478(2022) available at, https://doi.org/10.1080/24730580.2022.2082100. (last visited August 10, 2023)

[24]The Baluchistan Ship Breaking Industry Rule 1979, see also Pakistan Environmental Protection Act, 1997

Hong Kong Convention -2009 will be effectual from 26th June 2025, which has been ratified by India and Bangladesh, with the aspiration of enhancing recycling activities in their respective coasts. In this scenario we cannot anticipate the geopolitical shift of recycling industry from the present Non-Annex VII countries to Annex-VII country, with immediate effect, at the same time we can't deny eventual shift of the recycling industry from Non-Annex Countries to the Annex VII countries, because EUSRR prohibits EU flagged ships being recycled in the yards not certified by the EUSRR and presently no ship recycling yards of Non-Annex countries are in the certified list of the EUSRR. However due to lack of compliance to the Basel Convention or challenges associated with the effective implementation of the Article 4-A of Basel Convention converting the South Asian Coasts as toxic colonies, externalizing the cost and causing degradation of coastal eco system.

V. Conclusion

Ship recycling is a sub-sector of global shipping, recovering million tons of ferrous & non-ferrous metal scrap for recycling and an enormous amount of machinery, equipment and other fittings for reuse, annually, ship recycling also acts as an equalizer of demand and supply, by removing obsolete ships from the shipping industry. But we cannot ignore the fact that ship recycling activities are releasing million tons of hazardous toxic waste and materials to the coastal eco-system, killing thousands of people directly and incidentally, externalizing the cost of the countries involved in the ship recycling. The problem is further worsening as the South Asian Countries are using unscientific and insufficient method of recycling called "beaching". Presently, the Basel Convention 1989 is the only international convention establishing well-thought-out legal framework with positive sprit to control the trans-boundary movement of EOL ships and also to ensure the environmental sound management of EOL ships. But becoming ineffectual in implementing these regulations effectively, because of the insufficiencies and contradictions exists in the convention. Further European Union has ratified the convention by maintaining reservations for the EOL ships, thus out of the ambit of Basel convention, resulting into increased & unregulated ship recycling in South Asian sub-standard ship recycling yards, in dark, resulting into irreversible environmental degradation and converting the South Asian Coasts as a new toxic colonies. Hong Kong Convention will come into force from 26 June 2025 that permits beaching may look encouraging too but the increased ship recycling activities can pose potential threat to the human elements and environment. Therefore, the world community by considering the importance of maintaining wholesomeness of environment for survival of human species, needs to extend their cooperation and technology support to the South Asian Countries engaged in ship recycling to establish scientific, comprehensive and cost effective replacement for the Beaching. However, it is important to note that, in 2013 Basel Secretariat has conducted feasibility study on cost-effective alternative to the beaching as it was funded by European Union.

ISSUES AND CONCERNS RELATING TO CYBORGS AND TECHNOLOGICAL ENHANCEMENTS: UNDERSTANDING LEGAL IMPLICATIONS OF CIRCUITRY NEURONS

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Abstract

'Cyborg' as the name suggest is a newer technological specie in which the technology combines with an organism hence making it more of a machine and less of a biological being. Certain neuroprosthetic devices when fitted into a human body enhance the motor and computational capabilities. What if someone hacks into the neuroprosthetic device and interferes with the mind functioning and consciousness of the cyborg, and what if someone's mind is influenced to buy a specific brand of product for commercial advantage? For enhancing our powers and abilities, we agree to integration of our bodies with technology, which may shout out for an international response, as it shakes the foundational values of humanity.

Key words-
Cyborgs, Technological Enhancement, Law, Neuroprosthetic Devices

Introduction

Though the term 'cyborg' may sound both novel and novice, but the fact is that cyborg technology has been in use for quite some time now. The term 'Cyborg' was coined by Manfred Clynes in 1960 for a paper meant to be presented at the NASA conference. Cyborg was conceived as an amalgam of 'cybernetics and 'organism' designed to armor problems of space travel. Cyborg as per the concept, enhanced the capacity of a human to survive in hostile and adverse environment[1]. Some of the relatable examples are prosthetic limbs, heart pacemakers and prosthetic devices implanted in brain area etc., most of which are controlled by thoughts[2]. The technology is also on the verge of brain implants which will enhance the cognitive abilities[3]. Cyborgs are now demanding cognitive liberties as they are under constant threat of being intruded by third party[4]. This not only raises concerns over cognitive liberty but also privacy and loss of identity as a human being[5]. It is pertinent to mention that every enhancement caused by

[1]Jackie Orr, Materializing a Cyborg's Manifesto, 40 WOMEN'S STUDIES QUARTERLY 273 (2012).

[2]John Law and Vicky Singleton, Performing Technology's Stories: On Social Constructivism, Performance and Performativity,"TECHNOLOGY AND CULTURE" 765 (2000).

[3]Jose Luis Cordeiro, From Biological to Technological Evolution, 15 "THE JOURNAL OF INTERNATIONAL ISSUES" 86 (2011).

[4]Stephen Castell, The Fundamental Articles of I.AM Cyborg Law, 11 "BEIJING LAW REV" 911 (2020).

[5]L. E. Cohen and M. Felson, Social Change and Crime Rate Trends: A Routine Activity Approach,44 "AMERICAN SOCIOLOGICAL REVIEW" 598 (1979).

artificial intelligence may not be a cyborg[6]. Also, it is necessary to understand that every prosthetic equipment implanted is again not cyborg[7]. Certain implants may be only externally attached, lacking computational abilities[8]. Cyborg's now mix their personality as a human and as a technological being, where they have accepted these technological auxiliaries as a part of their body, mind and being[9]. The legal issues pertaining to these can transgress upon privacy law, constitutional freedoms, property rights, medical negligence during implants, consumerism, disability law, copyright issues etc[10].

When we discuss the Cyborg concepts, a liberal interpretation may be given to it[11]. Cyborg must not be understood as a term related to human bodies with implanted chips but is a situation where the humans are engrossed with technology usage and are inseparably connected and dependent on it[12]. Wearing a digital device to measure health parameters or apps connected to these devices reflective of certain data concerning health is an example of how well the technology knows you and may be more than you[13]. The Supreme Court of United States in a case of *Riley v. California* (2014) included in the obiter that modern cell phones have now become a part of human anatomy and must not be searched by the police on arrest of a person without warrant for the purpose of gathering any data or information[14]. This is the first step towards acknowledging technology as a part of human being[15]. Before we discuss the concept and legal implications that it may give rise to, we need to acknowledge and accept the very presence of this technology that half of the world is unaware of and if by chance they know, relatability will be in reference to fictional movies and narrations. Thus, acceptance is the first step towards managing an apprehended technological catastrophe[16].

Understanding Cyberneuro ethics: Connecting Neurons and Circuits

The world is witnessing an era of neuronal interface systems where the mind and the

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[6]Peter K. Yu, Artificial Intelligence, the Law-Machine Interface, and Fair Use Automation, 72 "ALBAMA LAW REVIEW" 187 (2020).

[7]Dawn Goodwin, Refashioning Bodies, Reshaping Agency, 33 "SCIENCE, TECHNOLOGY & HUMAN VALUES" 345 (2008).

[8]Ryan Calo, Robotics and the Lessons of Cyberlaw, 103 "CALIFORNIA LAW REVIEW" 513 (2015).

[9]Katharina Block, Machina Sapiens: Digital Posthumanism from the Perspective of Plessner's Logic of Levels, 42 "HUMAN STUDIES" 83 (2019).

[10]Philip Auslander, Intellectual Property meets the Cyborg: Performance and the Cultural Polictics of Technology, 14 "PERFORMING ARTS JOURNAL" 32 (1992).

[11]Terrell Ward Bynum, Philosophy in the Information Age, 41 METAPHILOSOPHY 421 (2010).

[12]Martine Bellen, The Cyborg Suite,"ESSAYS ON THE WORLD AT LARGE" 253 (2006).

[13]D. Maimon, A. Kamerdze, M. Cukier And B. Sobesto, Daily Trends and Origins of Computer-Focused Crimes Against a Large University Network. An Application of the Routine-Activities and Lifestyle Perspective, 53 "BRITISH JOURNAL OF CRIMINOLOGY" 319 (2013).

[14]Kate Galloway, The COVID Cyborg: Protecting Data Status, 45 "ALTERNATIVE LAW JOURNAL" 164 (2020).

[15]S. Hinduja, The Heterogeneous Engineering of Music Piracy: Applying Actor- Network Theory to Internet-Based Wrongdoing, 4"POLICY AND INTERNET" 240 (2012).

[16]H. B. Milward and J. Raab, Dark Networks as Organisational Problems. Elements of a Theory, 9 "INTERNATIONAL PUBLIC MANAGEMENT JOURNAL" 355 (2006).

machines are interacting at full swing[17]. The concept may be raw at present because of an underdeveloped technology or science but the fact remains that such technology persists even in its reminiscent form thus making it mandatory for an inspection from both ethical and anthropological perspective[18]. This kind of joinder needs to be regulated and humans must be restrained from making choices that may harm them and also pose a threat to the society[19]. Such individuals will have to be saved from 'Hyper-connectivity' and rules will have to be laid down to enable them to cope up with abundant information[20]. Dealing with too much technology exposes them to distraction, where they are unable to focus on multiple tasks or understand the facts properly[21]. It is similar to a situation that they are now unable to filter the information and are engulfed by irrelevancy of not so required information[22]. This not just brings in the behavioral issues in an individual with symptoms of lost identity but also diminishes the line between what is personal and what is professional[23]. The neuronal interface systems have swamped the real world with virtualism[24]. The idea of collective consciousness is now replaced by the network consciousness[25]. Who would not want to be superior in race and be a part of the machine chauvinism[26]. The machines will soon be in conflict with religion and spirituality[27]. The moment they upload their minds in a computer, they will be senseless about anger, happiness and will live in immortality. The digitalized humans will be indifferent to concepts of forgiveness, compassion and sharing[28]. Every physical movement will have a virtual trail or timeline[29]. Any good experience could be revisited for emotional satisfaction. But what if these digital files of human were deleted or lost for some reason, will there be a retrieval mechanism too? Can sudden failure of the

[17]F. Gregory Lastowka and Dan Hunter, The Laws of the Virtual Worlds, 92 "CALIFORNIA LAW REVIEW" 25 (2004).

[18]Timothy W. Luke, Liberal Society and Cyborg Subjectivity: The Politics of Environments, Bodies and Nature, ALTERNATIVES 21 (1996)

[19]M. O' Neil, Revels for the system? Virus Writers, General Intellect, Cyberpunk and Criminal Capitalism, 20 "JOURNAL OF MEDIA AND CULTURAL STUDIES" 240 (2006).

[20]Michael Burger, Recovering from the Recovery Narrative: On Glocalism, Green Jobs and Cyber Civilization, 46 "AKRON LAW REVIEW" 925 (2013).

[21]Jack M. Balkin, Virtual Liberty: Freedom to Design and Freedom to Play in Virtual Worlds, 90 "VIRGINIA LAW REVIEW" 2043 (2004).

[22]David Lulka, The Residual Humanism of Hybridity: Retaining a Sense of the Earth, 34 "TRANSACTIONS OF THE INSTITUTE OF BRITISH GEOGRAPHERS" 378 (2009).

[23]Margaret Thornton, The Flexible Cyborg: Work-Life Balance in Legal Practice, 38 "SYDNEY LAW REVIEW" 14 (2016).

[24]Ronald R. Kline, Humans and Machines, 58 TECHNOLOGY AND CULTURE 835 (2017).

[25]Leilani Nishime, The Mulatto Cyborg: Imagining a Multiracial Future, 44 CINEMA JOURNAL 34 (2005).

[26]Emily Jones, Feminist Technologies and Post-Capitalism: Defining and Reflecting upon Xenofeminism, FEMINIST REVIEW 126 (2019).

[27]Kimberle Williams Crenshaw, Race, Reform, and Retrenchment: Transformation and Legitimation in Anti-discrimination Law, 101 HARVARD LAW REVIEW 1331 (1988).

[28]Ronald Kline, Where are the Cyborgs in Cybernetics, 39 SOCIAL STUDIES OF SCIENCE 331 (2009).

[29]Sumeyra Buran, Correspondence between Cyborg Body and Cyber Self, 5 JOURNAL OF RESEARCH IN GENDER STUDIES 310 (2015).

machinery cause death or trauma to a person?[30] For assessing how much of a machine has become human and how much of a human has become a machine, we rely upon the Turing test[31]. Humans would soon become 'monads', who lack interactions and are self-contained, with no other aspect of life. They are unaffected by physical or spatial interferences and are solely driven by internal dictates. They simply work on interpretations, representations and manipulations[32]. Will these monads suffer from virtual threats and nightmares in meta sphere in future is a thought to ponder upon[33]. The brain structures have already been sliced in 2013, hence making every inch of the brain structure decipherable. It won't be difficult to engage in the making of a replicated mind[34]. This leaves us with another interesting query? Will the nano-technology here play a role in identifying the functionality of each neuron, by attaching a neuro-machine to it. Therefore, such queries pertaining to person's identity triggers the need of carefully examining the ethical dilemmas related to neuronal interfaces[35]. Can a person in this way consider himself to be whole, where he is senseless about certain emotional simulations?[36]

I wish to quote certain examples to give a clearer picture of the concept of being a cyborg. John Rogers, a materials scientist in Illinois, at a conference pressed a point in the forearm with a pen and displayed certain patterns on a slide. These images were the pattern of his skin and also the pattern of the integrated circuits beneath his skin[37]. This circuitry monitored the heart rate, body temperature etc., which was stored as data in a nearby computer. This sounds relatable to many of us wearing digital watches and fit bits performing in similar manner though externally attached[38]. Another example was of a device that draped the animal's heart in circuitry and analyzed the functioning of all chambers of the heart. The device could emit pulse and generate heat and identify abnormal nerve patterns[39]. In another example, Michael McAlpine, a mechanical engineer created a bionic ear that could hear acoustic and ultrasounds. Another is the electronic skin with chemical sensors, which is soft and flexible used as prosthesis to

[30]Kieran Tranter, The Speculative Jurisdiction: The Science Fictionality of Law and Technology, 20 GRIFFITH LAW REVIEW 817 (2011).

[31]Tim Wu, Will Artificial Intelligence Eat the Law? The Rise of Hybrid Social-Ordering Systems, 119 COLUMBIA LAW REVIEW 2001 (2019).

[32]Thomas Cowper, Improving the View of the World: Law Enforcement and Augmented Reality Technology, 73 FBI LAW ENFORCEMENT BULLETIN 12 (2004).

[33]Mark A. Lemley, Law, Virtual Reality and Augmented Reality, 166 UNIVERSITY OF PENNSYLVANIA LAW REVIEW 1051 (2017).

[34]S.W. Brenner, Organised Cybercrime. How Cyberspace May Affect the Structure of Criminal Relationships, 4 NORTH CAROLINA JOURNAL OF LAW & TECHNOLOGY47 (2002).

[35]Patrick C. Lalonde, Cyborg Work: Borders as Simulation, 58 BRITISH JOURNAL OF CRIMINOLOGY 1361 (2018).

[36]Wendell Wallach, From Robots to Techno Sapiens: Ethics, Law and Public Policy in the Development of Robotics and Neurotechnologies, 3 "LAW, INNOVATION AND TECHNOLOGY" 185 (2011).

[37]Cyborg Wannabe, 32 THE HASTINGS CENTER REPORT 6 (2002).

[38]Peter Halewood, Law's Bodies: Disembodiment and the structure of Liberal Property Rights, 81 "IOWA LAW REVIEW" 1331 (1995).

[39]Stephanie Peebles Tavera, Utopia, Inc: A Manifesto for the Cyborg Corporation, "SCIENCE FICTION STUDIES" 21 (2017).

enable humans to feel their limbs again. Such examples are the window to the emerging domains of bio-electronics alarming for a regulatory checks and balances[40].

Emerging Era of Enhancement Technologies

The prosthetic add-ons are mostly restoring loss of ability used as a medical facility after taking due care and caution for public safety. Any issue related to it is generally covered by statutes and norms governing disability, medical negligence, citizen welfare etc[41]. In many jurisdictions (for example in United States) there are norms that regulates and check the product quality of these prosthetics and implants as they are merely devices and calls for 'best manufacturing practices'. But there are people who self-implant these devices under skin for notorious activities[42]. What law will regulate them and make them responsible for their misdeeds. In some parts of the world, implants and other devices are categorized on the basis of risk level thereby setting standards for public safety. It is so ironical to observe that we are debating about robots becoming human like because of artificial intelligence on one side and humans becoming robots like cyborgs on the other side[43]. The cyborg in nature and design is similar to a robot, giving it a direction to develop a legal framework keeping in mind the Robotics law[44].

Cyborgs open up discussion for governments on financial, ethical, legal and cultural issues. One may require an audit to understand the impact of technology, to understand how much of it is required to be restrained[45]. One cannot imagine the extent to which the technology is impacting and needs to be regulated[46]. Certain chip implants in the brain, are neuroprosthetic devices (like artificial hippocampus) meant to restore the damage caused to the brain through injury or loss, restore memories and also equip brain with superior capabilities like downloading information from internet, communicating through thoughts, edit memories and thoughts etc[47]. Similar example is of chip being inserted in the brain of soldiers fighting wars so as to suppress their emotions, helping them deal with trauma and fear. One can imagine how the binary language or algorithms inserted in the brain can give rise to copyright issues. It's only the nerves, synapses and neurons that hold true and natural to the soul of a human, rest everything

[40]Lisa Webley,The Profession(s) Engagements with LawTech: Narratives and Archetypes of Future Law, 1 "LAW, TECHNOLOGY AND HUMANS"6 (2019).

[41]Collin R. Bockman, Cybernetic-Enhancement Technology and the future of Disability Law, 95 "IOWA LAW REVIEW"1315 (2010).

[42]M. Yar, The Novelty of Cybercrime: An Assessment in Light of Routine Activity Theory, 2 "EUROPEAN JOURNAL OF CRIMINOLOGY" 423 (2005).

[43]Roger Brownsword, Law, Authority and Respect: Three Waves of Technological Disruption, 14 "LAW, INNOVATION AND TECHNOLOGY" 5 (2022).

[44]Kathleen Birrell, Indigeneity: Before and beyond the Law, 51 "STUDIES IN LAW, POLITICS AND SOCIETY 219" (2010).

[45]Joseph Pugliese, Prosthetics of Law and the Anomic Violence of Drones, 20 "GRIFFITH LAW REVIEW" 931 (2011).

[46]Rebecca Crootof, Cyborg Justice and the Risk of Technological- Legal Lock-In, 119 "COLUMBIA LAW REVIEW "233 (2019).

[47]Robert F. Service,The Cyborg Era Begins, 340 "AMERICAN ASSOCIATION FOR THE ADVANCEMENT OF SCIENCE"1165 (2013).

needs a passcode[48]. It's not only that legal issues concern binary of integrated circuitry in chips but will also question the prosthetic devices manufactured with novelty, which can raise claim for patent protection[49]. It will be interesting to note that whether with thoughts we will be able to click on the 'I Consent' tab to agree to licensing terms or will our body be halted till we upgrade to a better version of operating system. Will we be able to store our thoughts in the cloud server is another interesting query as our thoughts in the cyborg world are nothing but processed pieces data and information[50]. If this is the scenario, what privacy rights are we talking about. How are the courts going to investigate into the artificial structures of body and mind[51]. Are we in real stepping into age of cyborg where part of our brain runs on neurons and other half on integrated circuits disputed by numerous patent holders[52]. Certain jurisdictions even allow for reverse engineering of integrated circuits does that mean, we will be able to reverse engineer the mind of a cyborg. If yes, is there any obligation or responsibility under the law[53].

The information technology laws will require upgradation as privacy becomes a major issue. In cases of cyborg the most expected crime, is the crime of hacking[54]. Can the information stored in the form of memory be manipulated, can thoughts be tampered with, can data stored in the artificial structures of brain be stolen? These are the emerging legal implications of cyborg technology[55]. How hacking of implants take place can be understood from an example, where retinal prothesis was hacked to place the image on the back of retina that a person never saw, similar is the case of hacking into cochlear implants to transmit sounds that person never experienced or heard before[56]. At the moment we are suspecting individuals and corporations making hacking attempts into the implants but what would be the consequence if this intrusion came from the government side[57]. So, till now, spoken words and gestures could be considered as seditious but if the government hacks into the mind can a mere thought make the person liable for crimes like sedition[58].

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[48]Margaret Morse, What Do Cyborgs Eat? Oral Logic in an Information Society, 16 DISCOURSE 86 (1994).

[49]Tim W. Dornis, Artificial Intelligence and Innovation: The End of Patent Law as We Know It, 23 "YALE JOURNAL OF LAW AND TECHNOLOGY" 97 (2020).

[50]O. E. Radutniy, Adaptation of Criminal and Civil Law in View of Scientific-Technical Progress, 144 PROBLEMS OF LEGALITY 138 (2019).

[51]Daniel-CosminSporea, The Cyborg Judge: An Automation of Criminal (In)Justice?,REV UNIVERSUL JURIDIC 71 (2022).

[52]Mika Viljanen, A Cyborg Turn in Law, 18 GERMAN LJ 1277 (2017).

[53]Marta Albert Marquez, Posthumanism, Artificial Intelligence and Law, 84 PERSONA Y DERECHO207 (2021).

[54]P. H. Robinson & John M. Darley, Does Criminal Law Deter? A Behavioural Science Investigation, 24 "OXFORD JOURNAL OF LEGAL STUDIES" 173 (2004).

[55]David S. Wall, Revenge of the Cyborg Trolls Part Two: Putting IT into the Law Curriculum, 8 INTERNATIONAL YEARBOOK OF LAW COMPUTERS AND TECHNOLOGY 66 (1994).

[56]Kieran Tranter, Nomology, Ontology and Phenomenology of Law and Technology, 8 "MINNESOTA JOURNAL OF LAW, SCIENCE & TECHNOLOGY" 449 (2007).

[57]Andrea M. Matwyshyn, CSR and the Corporate Cyborg: Ethical Corporate Information Security Practices, 88 "JOURNAL OF BUSINESS ETHICS" 579 (2009).

[58]Dennis J. Tuchler, Man-Made Man and the Law, 22 SAINT LOUIS UNIVERSITY LAW JOURNAL 310 (1978).

Taking a step further, how would we determine the *mens rea*[59]. How will we analyze that whether the intention was of the cyborg or was impacted by the third party due to hacking. We have learnt about various criminological theories in case of humans but hardly have we come across any theory concerning botnets or cyborgs[60]. But a study into it can help us in many ways for example, it would give us better understanding about crimes committed using technology, enhancement of criminological knowledge when it comes to connection between real and cyber world as a space for commission of crime, and a criminological study may also facilitate in developing countermeasures for these crimes[61]. The crimes committed by cyborgs or robots are not easy to conceptualize as these crimes are committed in a hybrid criminal network, where a crime is committed by coordination and mutual cooperation between humans and machines[62]. In this scenario we depend upon the Actor-Network Theory (ANT) which emphasis upon the involvement of non-human entities in commission of crime[63].

Regulating Cyborgs in Physical World

Information-Mediated Mechanism

There is a reason why the legal norms exist for humans and not for non-humans, because the non-humans lack free will and moral reasoning. Though, in majority of cases legal personality has been bestowed upon various non-human entities for protecting certain rights and imposing certain obligations[64]. When it comes to newer forms of life like Cyborg, a perpendicular existence needs to be acknowledged and regulated for co-existence in the upcoming world of hybridization[65]. This relates closely to the term, trans-humanism, which explains enhancements and human augmentation in conflict with ethics. The reason of inseparability of human and technology is the distinctiveness[66]. One of the prime ways to regulate cyborg is through information-mediated strategy which is comprised of two components: first, cyborgs have an internal cognitive ability which depends on the mechanical structure which helps in coordinating and making a decision[67]. Second, is the input of the information, which is fed into the system to set the ball rolling for predictable outcomes. Thus, to regulate or to

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[59]S. Brown, The Criminology of Hybrids. Rethinking Crime and Law in Technosocial Networks, 10 "THEORETICAL CRIMINOLOGY" 234 (2006).

[60]Wytske Van Der Wagen and Wolter Pieters, From Cybercrime To Cyborg Crime: Botnets As Hybrid Criminal Actor-Networks, 55 "THE BRITISH JOURNAL OF CRIMINOLOGY" 589 (2015).

[61]Shella Brown, The Criminology of Hybrids: Rethinking Crime and Law in Technosocial Networks, 10 "THEORETICAL CRIMINOLOGY" 223 (2006).

[62]Doran Larson, Machine as Messiah: Cyborgs, Morphs, and the American Body Politic, 36 CINEMA JOURNAL 57 (1997).

[63]J. Law, Notes on the Theory of the Actor-Network: Ordering, Strategy and Heterogeneity, 5 SYSTEMS PRACTICE, 375 (1992).

[64]Bradley Bryan, The Constitution and the Program: Haraway and the Politics of Cyborg Emancipation, 19 "AUSTRALIAN FEMINIST LAW JOURNAL" 105 (2003).

[65]Steven Shavell, Law versus Morality as Regulators of Conduct, 4 AM. L. ECON. REV.227 (2002).

[66]Chad D. Cummings, Transhumanism: Morality and Law at the Frontier of the Human Condition, 20 AVE "MARIA LAW REVIEW" 216 (2022).

[67]Alexandra M. FrancO, Trans-human Babies and Human Pariahs: Genetic Engineering, Transhumanism, Society and the Law, 37 "CHILDREN'S LEGAL RIGHTS JOURNAL" 185 (2017).

give direction to cyborg's action one must focus on the mechanical structure and above all the informational inputs. By supervising the informational input, one cannot determine the behavioral consequences but can certainly assess the impact it may cause[68].

Agencement Mechanism

Another way to regulate a cyborg is to consider the concept of *Agencement*, which means assemblage. There can be human knitting into heterogenous assemblages by adding machines, tools, prosthesis, computers to their bodies[69]. Regulatory agencement mechanism, identifies the assemblages that actant consist of and can reconfigure the material, textual and economics to enhance predictability of actions and outcomes of the cyborg[70]. Building cybernetic sensory systems in a cyborg can achieve a configuration to deliver focused and ascertainable data sets[71].

Nudging

To endorse the regulatory agencement protocol, we resort to concept of Nudging, which means to manipulate the choices, causing a person to make predictable choice as compared to other options[72]. Nudging is a way of regulating cyborgs and can be done in various ways, viz., Informational nudges by manipulating information and suggesting possible ways of action to get conformity or desired outcomes, persuasive nudge use emotions to cause repulsions to certain acts, default choice nudges uses laxity of an individual to refrain him from making choices, commitment nudges suppress impatience and impulsivity, transactional nudges filter desirable actions from irrelevant ones and lastly exemption nudges blur otherwise imposed restrictions for desirable actions[73]. The humans are no more the supreme in the pyramid, who initially mediated for inventions, as law never intervened for non-human entities[74]. But now the times have changed, the non-humans now attain legal personhood and actively work within the regulatory framework[75]. The role of robots and artificial intelligence driven machines in decision making will invite the role of law in future[76]. Cyborg legislations will not

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[68]Steven S. Kapica, Living in Technical Legality: Science Fiction and Law as Technology, 28 "GRIFFITH LAW REVIEW" 272 (2019).

[69]Nelly Oudshoorn, The Vulnerability of Cyborgs: The Case of ICD Shocks, 41 "SCIENCE, TECHNOLOGY & HUMAN VALUES" 769 (2016).

[70]Greta Olson, Law is not Turgid and Literature is not Soft and Fleshy: Gendering and Heteronormativity in Law and Literature Scholarship, 36 "AUSTRALIAN FEMINIST LAW JOURNAL"65 (2012).

[71]Corinne May-Chahal, Claire Mason, Awais Rashid, James Walkerdine, Paul Rayson and Phil Greenwood, Safeguarding Cyborg Childhoods: Incorporating the On/Offline Behaviour of Children into Everday Social Work Practices, 44 "THE BRITISH JOURNAL OF SOCIAL WORK" 596 (2014).

[72]Amorim, Hellen Marinho, Cardoso and Renato Cesar, The Cyborg at the Threshold of Humanity: Redifining the Natural Person, 46 REVISTA DE BIOETICA Y DERECHO 76 (2019).

[73]Emilie Cloatre, Law and ANT (and its Kin): Possibilities, Challenges and Ways Forward, 45 "JOURNAL OF LAW AND SOCIETY" 646 (2018).

[74]Grant Wilson, Minimizing Global Catastrophic and Existential Risks from Emerging Technologies Through international Law, 31 "VIRGINIA ENVIRONMENTAL LAW JOURNAL" 307 (2013).

[75]Frank Pasquale and Arthur J. Cockfield, Beyond Instrumentalism: A Substantivist Perspective on Law, Technology and the Digital Persona,"MICHIGAN STATE LAW REVIEW" 821 (2018).

[76]Mark A. Lemley and Eugene Volokh, Law, Virtual Reality and Augmented Reality, 166 "UNIVERSITY OF PENNSYLVANIA LAW REVIEW" 1051 (2018).

determine the legality of actions but will function towards the desired or rather directed consequences[77]. It will balance the intensities, intricacies and probabilities of desired outcomes by redesigning, reconfiguring and proliferating its processes and patterns[78].

Conclusion and Suggestions

Donna Haraway's *A Cyborg Manifesto* (1992) has now become a reality[79]. Considering the pace of technological advancements, it's difficult to say that Information Technology laws across the world are well equipped to deal with cyborg technologies. While there is a requirement to make regulatory and strategic decisions for combatting future technologies posing threat, we are still debating on ethical issues. Maybe today we are unable to visualize and realize the problems pertaining to cyborg technology as our minds in the name of technology think about mobiles and laptops only. We are not seriously thinking because we don't see this technology embedded, we don't see our mobiles embedded in our skin, we don't feel the ear phones implanted in the ears hence we do not understand, the implications of cyborg technology. To make a policy or strategy to deal with technological advancements, we first need to accept and understand that such changes are in reality taking over the world[80]. We at the moment cannot apprehend the challenges that we might face engulfed in wires and circuits. The upgradation of the digital health is a development par excellence which must not at any cost compromise the human rights[81]. New standards must be built on old norms to adapt to the swiftly rising capabilities. The inherent racism, biases and malfunctioning would raise the chances of legal interventions, accountability and question the democracy[82]. This is the obligation on the legislators to keep the tech creators and human rights saviors at par. Every machinery developed or enhancement technique applied must not ignore the local knowledge or contextual constraints. Looking at the pace with which the technology is advancing, there is a need to maintain the register or indices of approved technology issued for usage only after getting a license. This further calls for global set up of international health data regulatory bodies with proper representations and health surveillance safeguarding the human rights[83]. The discussion about having a global regime is only because of the reason that violations by technology will not target the defined geographical limits but will cause a ripple effect transnationally.

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[77]Nicolas Suzor, The Role of the Rule of Law in Virtual Communities, 25 BERKELEY TECHNOLOGY LAW JOURNAL 1817 (2010).

[78]Mika Viljanen, Cyborg Turn in Law, 18(5)"GERMAN LAW JOURNAL"35 (2017).

[79]D. Haraway, A Cyborg Manifesto: Science, Technology, and Socialist-Feminism in the Late Twentieth Century, in D. HARAWAY, SIMIANS, CYBORGS AND WOMEN: THE RE-INVENTION OF NATURE, 149 New York: Routledge (1991).

[80]Barbara Pfeffer, The Bionic Plaintiff and the Cyborg Defendant: Liability in the Age of Brain-to-Computer Interface, 25 VIRGINIA JOURNAL OF LAW & TECHNOLOGY 56 (2021).

[81]Sara L. M. Davis And Carmel Williams, Enter the Cyborgs: Health and Human Rights in the Digital Age, 22 THE PRESIDENT AND FELLOWS OF HARVARD COLLEGE4 (2020).

[82]Linda Macdonald, Citizen Cyborg: Why Democratic Societies Must Respond to the Redesigned Human of the Future, 5 AMERICAN JOURNAL OF BIOETHICS 81 (2005).

[83]George Dery, Cyborg Moth's War on Terror: The Fourth Amendment Implications of One of the Federal Government's Emerging Surveillance Technologies, 11 "SMU SCIENCE AND TECHNOLOGY LAW REVIEW" 227 (2007).

HART-FULLER DEBATE AND ITS SIGNIFICANCE IN INDIA – A JURISPRUDENTIAL ANALYSIS

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Abstract

The twentieth century is an age of unrest, uncertainty, of changing values, contradictions and controversies. From 1914 to 1945, two world wars were seen. With the race of political upheaval and changes in values, it has observed a decline of faith in the positivist approach, revival of natural law, in reaction to which 'Pure Theory of Law' came into existence, which after the Nazi regime was again followed by a fresh reposition of faith in natural law theories. Within two decades (1950-70) it has noticed Radbruch-Hart debate, the Hart-Fuller debate and the Hart-Devlin debate. In all these three debates, Prof. Hart is the common figure. The object of this article is to examine the following – the views of Prof. Hart and Prof. Fuller in jurisprudence; the contents of their views; how they contradict each other; what is the bone of contention; is there any real controversy and relevance of such controversy in India. An attempt has also been made to offer some suggestions for a positivist-natural law approachment and lessons there from to India.

Key words-
positivism, natural law, morality, inner morality, legal realism

Introduction

Prof. H.L.A Hart is one of the significant spokesmen for a modernized form of analytical positivism[1]. One of the most indispensable and vital writings of analytical jurisprudence written in the English language since Austin's "The Province of Jurisprudence Determined" is "The Concept of Law.[2]" Prof. Hart's argument is not merely a restatement of Bentham, Austin, Gray and Holmes. He criticises old positivists for their too much adherence on sanction by calling that "*gun man situation writ large*", and American and Scandinavian realists for producing paradoxes about the nature of law[3].

Their perspectives gained new dimensions and understanding from his explanation, both of which are truly his own[4]. Prof. H.L.A. Hart's "The concept of law" (1961) is not merely a comprehensive reformulation of analytical positivism based on the theories of Austin and Kelsen, but in certain important respects, it also modifies the theories propounded by the said jurists. According to W. Friedmann, "two aspects of Hart's analysis of the concept of law are of special importance. In the first place, he bridges the age-old conflict between the theories of law emphasizing recognition and social

[1]Positive Analysis of Law means man made law
[2]H.L.A. Hart, "Positivism and the Separation of Law and Morals" 71 Harvard Law Review 593 (1958)
[3]H.L.A. Hart, The Concept of Law 6 (Clarendon Press, Oxford, 2nd Edn.)
[4]Lon. L. Fuller, "Positivism and Fidelity to Law - A reply to Prof. Hart" 71 Harvard Law Review 630 (1958)

obedience as essential characteristics of legal norm and those that see the distinctive characteristic of law in the co-related elements of authority, command and sanction"[5]. Prof. Hart's primary and secondary rules cover the both. He condemns naturalists for their claiming superiority of natural law over man-made law as higher law. He prefers positivist approach to law for the sake of clarity in law.

Professor Lon L. Fuller is a modern natural law jurist. He has turned a critical search light on both juridical positivism and legal realism. His main argument revolves around the '*sine quibus non*' circumstances that must exist for laws to be effective. According to him, law "is the enterprise of subjecting human conduct to the governance of rules"[6]. According to Fuller, "there are eight typical ideals or formal virtues to which a legal system should strive viz., generality, promulgation, absence of retroactive legislation and certainly no abuse of retrospective legislation, no contradictory rules, congruence between rules as announced and their actual administration, clarity, avoidance of frequent changes and the absence of laws requiring the impossible. These principles of legality are not basic conditions which every system necessarily fulfils, but constant pole stars guiding his progress. The greater its success, the more fully legal such a system is"[7]. He levelled the same criticism at Realist School supporters because they make the error of presuming that a strict division between is and ought, of positive law and morality, is both feasible and beneficial,[8] that is whether this distinction merely "is" in Hart's perspective or whether it "ought to be."[9] He is also thankful for Hart's efforts because they have rekindled the positivists vs. natural law thinkers' discussion, which had become merely an argument over perceptions with little else in common[10].

On the other hand, he criticizes naturalists for their attempt to formulate beforehand a timeless, immutable law of nature. He disagrees with the idea that natural law is an accumulation of trustworthy 'higher law' principles that human actions must be judged by. He contends that the pursuit of the fundamentals of a living law has to be free and unrestricted. Fuller suggests renaming an established phenomenon "*eunomics*" due to the widespread connection of the expression "natural law" with dogmatic and fundamentalist ideologies of ethics and law. He defines it as "the theory of the study of good order and workable arrangements"[11].

Views and propositions of Prof. H.L.A. Hart

Contrary, Hart preferred law as union of primary and secondary rules. According to Hart, "the primary rules are prescription of behaviour (duties) and secondary rules relate to the identification, creation, change and application of the former (powers)"[12]. He further stated that "the union of primary and secondary rules provides the key to the science of jurisprudence. Legal system is a complex union of primary and secondary rules"[13]. He also expressed that "two minimum conditions are necessary for the existence of any

[5]W. Friedmann, Legal Theory 287 (Universal Law Publishing Co. Pvt. Ltd., New Delhi, Fifth Edition, 2002)
[6]Gokulesh Sharma, An Introduction to Legal Theories 225 (Deep & Deep Publications Pvt. Ltd. New Delhi, 2008)
[7]V.D. Mahajan, Jurisprudence & Legal Theory 725 (Eastern Book Company, Lucknow, 5th Edn., 2001)
[8]Supra note 4, at 630-631
[9]Ibid.
[10]Ibid.
[11]Lon L Fuller, "American Legal Philosophy at Mid-Century" 6 Journal of Legal Education 457 at p. 473 (1954)
[12]Supra note 3, at Chapter V
[13]Id. at 111

legal system. On the one hand, those rules of behaviour which are valid according to the system's ultimate criteria of validity must be generally obeyed, and, on the other hand, its rules of recognition specifying the criteria of validity and its rules of change and adjudication must be effectively accepted as common public standards of official behaviour by its officials"[14]. Not only this, two other requirements are necessary for the existence of a legal system. First, the minimal content of natural law, shared by both law and moral must be present in every legal system. Secondly every legal system must have the four features of morality,[15] i.e. Importance of moral rules, resistance to intentional change, the voluntary nature of moral transgressions, and the nature of moral pressure because these attributes set it apart from the law, customs, etiquette and other kinds of systems of social rules.

What is essential for law? To Austin habitual obedience, to Kelsen effectiveness, to Holland enforceability, to Salmond justiceability, to Holmes predictibility but to Prof. Hart it is the rules of recognition which are essential for law. In his own words -

"*To say that a given rule is valid, is to recognise it as passing all the tests provided by the rule of recognition and so as a rule of system*[16] *Rule of recognition exists as matter of fact. The validity of other rules is determined by conformity with rule of recognition but there can be no question concerning the validity of the rule of recognition itself*."[17]

On the one hand, his theory advances the ideas of Austin and Kelson, but on the other, it makes significant changes. Hart bridges the long-standing divide between (1) legal theories emphasising recognition and social compliance as a necessary quality of a legal norm and (2) those who see the law as the related elements of authority, command, and sanction. The significance of these two parts of Hart's examination of the concept of law cannot be overstated. Savigny, Ehrlich, are the proponents of the first approach. The latter is by Kelson, Austin, and a number of their students and successors.

According to Hart, a system of law can only survive if at least two conditions are fulfilled. We must follow both the system's rules of recognition, which outline the criteria of validity, as well as its rules of change and adjudication, if they are valid in accordance with the system's ultimate standards of validity. Private Citizens are only need to meet the first requirement. The system's administrators must also meet the second requirement. They must view these as accepted norms of professional conduct and critically evaluate them.

Idea and contention of Prof. Fuller

Prof. Lon L. Fuller's "The Morality of law" is an enduring contribution to American Moral philosophy. It throws a new light on the relationship between morality and law and promotes a theory of law which has broad realistic connection in today's society. He has

[14] Id. at 113
[15] Id. at 169-176
[16] Id. at100
[17] Id. at107

written many articles[18] and book reviews,[19] but "The morality of law" is only his second book on legal philosophy, the first being "The law in Quest of itself"'.

Professor Fuller's theory of 'The Two Moralities' is the real contribution to juridical and moral philosophy. In his opening paragraphs of "'The Morality of Law" He expresses disappointment about the literature that already exists on the relationship between Law and Morality. He thinks that legal philosophies have failed to clarify the meaning of morality itself[20] and thus tries to clarify the meaning of morality himself. His approach is to "emphasize a distinction between..... the morality of aspiration and the Morality of duty". According to him "the morality of aspiration is the morality of good life, of excellence, of the fullest realization of human powers"[21]. He further expresses that "the morality of duty lays down the basic rules without which an ordered society is impossible or without which an ordered society directed towards certain specific goals must fail of its mark".

Unlike, Prof. Hart's Union of primary and secondary rules, Prof. Fuller defines law as "enterprise of subjecting human con- duct to governance of rules". "Unlike most of modern theories of law, this view treats law as an activity and regards a legal system as the product of a sustained purposive effort.[22]" For him legal system is not composed of "a net work of explicit bargains, but that it is held by a pervasive bond of reciprocity.[23]" In a legal system the internal and external moralities of law interact. According to Prof. Fuller a legal system must establish "some minimum efficacy in practical affairs.[24]" For proper legal system the inner morality of law must necessarily be observed. Unlike, Prof. Hart's rule of recognition, the validity of law according to Prof. Fuller depends, upon its conformity with "the inner morality of law." It is the morality of aspiration which Prof. Fuller has divided into internal and external moralities[25]. The first made up of ideals and exists what is called "substantive natural law". The latter is called 'the morality that makes the law possible'. It is a 'basic lower law' or 'procedural natural law'. It is this procedural natural law which gives validity to law.

Fuller pointedly observes that nature does not present us with 'is' and 'ought' in a neatly presented parcels as so many positivist assume. Fuller traces the minimum weakness of legal positivism and its inherent weakness of the law's quest for some exclusive command where it may start free from ethics and philosophy. Fuller says it is a futile exercise to separate is from ought and the law from morality solely to promote clear thinking in the law. He criticizes those who divorce ethics and morality from law. He

[18]Lon L Fuller, "Legal Fictions" 25 Illinois Law Review 363-99 (1930-31); Lon. L. Fuller, "Positivism and Fidelity to Law - A reply to Prof. Hart" 71 Harvard Law Review 630 (1958); Lon L Fuller, "American Legal Realism" 82 U. Pa. L. Rev. 429 (1934); Lon L Fuller, "Reason and Fiat in Case Law" 59 Harvard Law Review 376 (1946)

[19]C. K. Ogden, "Bentham's Theory of Fiction" 47 Harvard Law Review 367 (1933); Roscoe Pound, "Formative Era of American Law" Harvard Law Review 341 (1939); John Walter Jones, Historical Introduction to Theory of Law 55 Harvard Law Review 826 (1946); G.W. Paton, "A Text Book of Jurisprudence" 59 Harvard Law Review 383 (1948)

[20]Lon L Fuller (Lon Luvois), The Morality of Law 151 (Yale University Press, New Haven, 1964)

[21]Id. at.17

[22]Id. at.106

[23]Id. at.20

[24]Id. at 110

[25]R.W.M. Dias, Book Review "The Morality of Law" by Lon L Fuller, Cambridge Law Journal 157 (1965)

asserts that legal community should not waste time and effort in separating the 'is' and 'ought' and give full support to a system permitting reforms and progress and supplement legal positivism with natural law concepts.

Prof. Fuller does not argue that a legal system's rules must adhere to any moral or other external standard's substantive criteria. He continues to insist that laws must adhere to "internal morality". Beginning with morality of obligation and morality of aspiration, he makes a contrast between the two. The former is consistent with a legal external morality. It consists of the fundamental laws that society needs to function. Law, in his opinion, is a "purposive activity." The morality of aspiration makes a valiant effort to convince humanity to pursue ideals in a Platonic manner. He extrapolates eight criteria for the "inner morality" of the law from the structure of the legal order. These eight guidelines are not intended to serve as tenets of actual natural law. They are viewed as a sort of "procedural natural law" instead. The eight criteria are as follows - (1) generality; (2) promulgation; (3) lack of retroactive legislation and no abuse of retrospective legislation; (4) comprehensibility and clarity; (5) avoidance of inconsistencies. (6) Avoiding demands that are unreasonable (7) The law's consistency over time, or the avoidance of frequent changes, and (8) the consistency between how the law is announced and how it is actually applied. These law concepts serve as constant pole stars for his advancement rather than being fundamental requirements that every system must meet. A system like this is more totally legal the more successful it is.

Hart vs. Fuller

There is an age-old controversy as to the fact whether the legitimacy of legislation depends exclusively on formal standards or also on some moral standards. The positivists contend that a formal criterion that has been acknowledged as a law constituent in a particular order solely decides the legal status of a rule. In Britain, this comprises statute, precedent, and ancient custom, albeit it is not always agreed upon. A statement contained in one or both of these is considered to be "law," regardless of its righteousness or evilness. Contrary, the naturalists claim that a rule does not become law by fulfilling the formal requirements alone; in order to get the name and quality of law it has also to fulfil some moral criterion and an unjust or immoral precept cannot be called law merely because it has fulfilled the formal requirements[26].

Prof. Hart chooses the former way of thinking about law whereas Prof. Fuller adopts the latter. There is nothing new in the Hart-Fuller controversy. The old wine has been put into a new bottle. The whole controversy veers round their way off thinking about law. An idea of controversy can be found in these works "Positivism and the Separation of Law and Morals,[27]" "Positivism and Fidelity to Law - A Reply to Prof. Hart"[28]; "The Concept of Law"[29], "The Morality of Law"[30] and a book review of "The Morality of Law."[31]

In his celebrated essay,[32] Prof. Hart opposes positivist school of Jurisprudence from many

[26]R.W.M. Dias, "Temporal approach towards a new natural law" 28(1) Cambridge Law Journal 72 (1970)
[27]Supra note 2, at 593
[28]Supra note 4, at 630
[29]Supra note 3
[30]Supra note 20
[31]H.L.A Hart, Book Review of "The Morality of Law" by Lon L. Fuller, 78 Harvard Law Review 1281, 1296 (1965)
[32]Supra note 2, at 593

of the appraisals (that "there is a point of intersection between law and morals"[33] or that "what is and what ought to be are somehow indissolubly fused or inseparable"[34]) which have been focused against the emphasis on differentiating between the law as it is and the law that *ought* to be[35]. The charges levelled against positivism are the following -

(i) Separation between is and ought is erroneous and shallow because it prevents people from seeing the fundamental nature of law and how it is rooted in social life;

(ii) It is corrosive in practice in addition to being intellectually erroneous, because it has the effect of weakening resistance to the worst form of state tyranny or absolutism[36]

(iii) By ignoring penumbra, there is error of 'formalism' or 'liberalism'. German thinkers regard it as hell created on earth by men for other men.

After critically examining all the charges, Prof. Hart refutes them one by one. He insists that critics have confused the difference between law as it is and law as ought to be with a moral theory. According to moral theory statements of what is the case (statement of fact) belong to a category or type radically different from statements of what ought to be (value statements). Prof. Hart quotes an example from Wittgenstein which is cited in Fuller's "Human purpose and Natural Law"[37] and condemns it as a moral argument. Not only this, by giving historical account of is and *ought* separation tendency, he gives emphasis on merits and ingenuity of it.

Prof. Fuller, in his reply to Prof. Hart, contradicts it. Rephrasing the question of 'Law and Morals' in terms of 'order and good order', he criticises Hart for ignoring "The internal morality of order" necessary to creation of all law[38]. In view of Prof. Fuller, Prof. Hart's essay contains a significant internal inconsistency. At one place Prof. Hart says that "the distinction between law and morality is something that exists, and will continue to exist"; contrary, He appeared to be cautioning that "fidelity to law" is a "precious moral idea" that is in risk of being lost and that the actuality of differentiation is itself at risk[39]. Prof. Fuller throughout his reply-essay, emphasizes how positivism has discredited 'fidelity to law' which is equally important for positivists and naturalists. There are some criticisms against Prof. Hart.

First, as to definition of law Prof. Hart accepts diversity among Bentham, Austin, Gray and Holmes as to 'what law is'; but in his defence he ignores it. Prof. Fuller regards that law as command of highest legislative power and law as interpretation given by court and consequently crisis in constitutional position of Supreme Court lacks fidelity to law. On the other hand, lack of unanimity between Benthamite and Austinian views on constitutional limitation on the power of sovereign also causes lack of fidelity to law in cases of constitutional crisis[40].

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[33]A.P. D'Entreves, Natural Law, An Introduction To Legal Philosophy 116 (1952)

[34]Lon L Fuller, The Law in Quest of Itself 12 (Foundation Press, Chicago,1940)

[35]Arnold Brecht, "The Myth of Is and Ought", 54 Harvard Law Review 811 (1941); Lon L. Fuller, "Human Purpose and Natural Law" , 53 Journal of Philosophy 697 (1953)

[36]G. Radbruch, "Die Erneuerung des Rechts" 2 Die Wandlung 8, 10 (1947)

[37]Supra note 35 at 700

[38]Supra note 4

[39]Id., at 630-631

[40]U.S. Constitution, Article V, "Amending Power can never be used to deprive any state without its consent of its equal representation in the senate."

Second, Prof. Fuller criticizes positivists, claiming that their main goal is to uphold the rule of law and seek precise definition of law but what they plan to exclude from the definition of law is not clear[41].

Third, Positivist adherence to coercive power as the foundation of legal system also fails to realize the ideal of Fidelity to law[42].

Fourth, Prof. Fuller maintains distinction between order and good order i.e. One could argue that law indicates simplicity, and that law that upholds the needs of justice, morality, or human ideals of what law should be is what constitutes good order. In the life of nations the internal and external morality reciprocally influences each other. Fuller criticises Prof. Hart along with other positivists for their neglect of inner morality of law[43].

Fifth, Prof. Fuller criticizes Prof. Hart about his approach against purposive interpretation of law and legal institutions. He points out that "fidelity to law becomes impossible, if we don't accept the broader responsibilities that go with a purposive interpretation of law"[44].

Sixth, Prof. Fuller condemns rule of recognition as a criterion of validity. As Prof. Hart regards legal system as a continuing phenomenon, he also accepts that with reference to continuum morality is an indispensable factor, not only in genesis, but also in continuation of laws. But he excludes morality by shifting his ground and taking refuge in the present time frame[45].

Seventh, In particular, Fuller criticizes Hart's key distinction between rules conferring powers and rules imposing duties on the ground that it is to ensure foundation for a theory. He uses instances to illustrate how a rule can result in the formation of duties as well as the grant of power[46]. More intriguingly, a rule that grants a power may also allow for its extinction under specific circumstances. If this is the case, a regulation recognising the authority of some formal agency (such as the legislature) to establish "law" may very well include a moral restriction on that authority. Prof. Fuller also attacks Hart, (i) on his rescue of concept of law from gunman's situation writ large, as there is distinction, between face to face situation and indirect communication between law giver and the subject[47]. (ii) application of the rule of recognition to a complex

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[41]About Hart's warning against "infusion of more morality into law", Prof. Fuller points out six possible suggestions (1) It should not be assumed that evil aims might have as much coherence and inner logic as good ones (2) If weakening of partition between law and morality would permit in infusion of 'immoral morality', what is the most effective protection against this danger? No positivist has touched this issue (3) Judges have to balance between this objective and letter of statutes (4) The rules are justiciable (5) Through juridicial process danger of an infusion immoral morality does not present real issue and (6) Duty of judges does not raise grave issue.

[42]To this Prof. Hart also agree that foundation of legal system is not in coercive power but certain fundamental specifying the essential law making procedure, Supra note 2 at 603

[43]Supra note 4; Supra note 20

[44]Supra note 4

[45]Supra note 20 at 137-139

[46]Fuller gives examples of (i) Trustee paying of his pocket has right to reimburse himself out of property in his charge without enforcing beneficiary duty, for details see Lon L. Fuller, The Morality of Law 145 (Yale University Press, New Haven and London, 1964) (ii) he cites examples of rule concerning mitigation of damages, Lon L. Fuller, The Morality of Law 149 (Yale University Press, New Haven and London, 1964).

[47]Supra note 20 at 154

constitutional democracy[48]. (iii) The use of rule of recognition to explain how and when a primitive society makes its "step from the pre-legal into legal world"[49]. Pre-legal society representing rule of obligation or duty imposing rule and legal world power conferring rule are not convincing (iv) revival of old law in new set up after revolution.

On the other hand Prof. H.L.A. Hart reflects a critic search light on Fuller's. 'The Morality of Law' and tries to defend some of inefficiencies pointed out by Prof. Fuller. In his book review,[50] Hart criticizes Fuller for his definition of law as purposive enterprise which includes "rules of clubs, churches, schools and hundred and one forms of human associations". Thus the external borderline of law cannot be determined[51]. Secondly there are difficulties in making distinction between morality of duty and morality of aspiration[52].

Prot Hart defends (i) rule of recognition as complex and open textured[53]. (ii) A revival of old law after revolution, he makes it clear that "legislation of past legislator is accepted as law because, it is identified as such by presently accepted rule of recognition"[54]. Prof. Hart wittingly points out that principle of legality in terms of 'inner morality of law' is not new. It was urged by Bentham in name of utility; (iii) without dignifying the title of morality positivists also set values in the name of happiness and other substantive moral aims.

Divergent opinion on Law of Nazi Regime by Hart and Fuller

The controversy between Hart and Fuller veers most strikingly round the laws of Nazi Regime. There is unanimity of opinion between Professor Hart and Fuller as regards the desirability of punishment in such case is concerned. But they tackle the case differently. Prof. Hart condemns the view taken by German courts. Following Austinian way of thinking,[55] he argues that "the only proper procedure in this case would have been to make criminal legislation and punishment retrospective"[56]. It would have been clear that in choosing to punish the woman, one had to choose between two terrible outcomes: either leaving the lady unpunished or surrendering a priceless moral ideal upheld by many of the legal systems[57]. Prof. Hart argues that in acceptance of assertion of German court i.e. certain rules cannot be law because of their moral iniquity; there is confusion of the most powerful forms of moral criticism. Prof Hart clarifies two rival concepts of law;[58] *first*, the broader idea that encompasses all laws that pass the formal requirements of a system of primary and secondary rules, even if some of them violate morals; *second*, the narrower which excludes from "law" morally offensive rules. The

[48]Id., at 155
[49]Supra note 3 at 41
[50]Supra note 31
[51]Ibid.
[52]Id., at 1285
[53]Id., at 1293
[54]Id., at 1295
[55]H. L. A. Hart (ed.), The Province of Jurisprudence Determined and The Uses of the Study of Jurisprudence 185 (Weidenfeld and Nicolson, London, 1954)
[56]Hart argues choice between two evils that of leaving her unpunished and sacrificing a very precious principle of morality endorsed by most legal systems. He prefers punishment, Supra note 2 at 619
[57]Supra note 2 at 619
[58]Supra note 3 at 205-206

wider of these two rival concepts includes the narrower. He prefers the wider concept and instead of declaring morally iniquitous rules; "this is in no sense law" he prefers to say "this is law but too iniquitous to obey or apply"[59]. In a nut shell, the only solution of iniquitous law is retrospective enactment.

On the other hand, Prof. Fuller, preferring Radbruch's view argues that a law, in order to be valid must have an inner-morality. Prof. Fuller condemns Hart's assertion about persistence of law under Nazi system without making any inquiry[60]. Prof. Fuller also disagrees with Prof. Hart that courts ran away from the problem they should have faced by saying; "when a statute is sufficiently evil it ceases to be law." Prof. Fuller defends attitude adopted by German courts. He argues that matters, certainly would not have been helped if instead of saying, "This is not law", they had said "This is law but it is so evil we still refuse to apply it." Surely moral confusion reaches its height when a court refuses to apply something it admits to be law. According to Prof. Fuller, it would have not been wise for courts in those circumstances to allow to the people to take law in their hands, as might have been occurred while the courts were waiting for a statute.

Summing up, the whole controversy veers round the problem; that for Fuller morally iniquitous law is not law whereas Professor Hart concedes that morally iniquitous law is still law.

Where is the real controversy?

Hart-Fuller controversy regarding laws of Nazi regime is more verbal than real. This controversy may be resolved by adopting time frame approach. For Fuller, the essence of law lies in time frame of continuum and for Hart in the time frame of the present. Prof. Fuller argues that eight desiderates known as "the inner morality of law" is essential to the continued functioning of laws. Prof. Hart begins by equating "law" with the legal system, which is an ongoing incidence; nonetheless, he grounds his argument for positivism on the necessity for a simple means of determining law at any given time[61]. Elsewhere he had alluded to the acceptable proposition that some shared morality is important to the existence of any society[62]. Now the 'existence' can only mean 'continued existence' but he does not consider the morality as a pre-requisite of continuity which one would have thought, are implicit in his concept of legal system. It would seem, therefore, that Prof. Hart has revealed a greater separation between his concept of law and his positivism than between law and morality[63]. Prof. Hart has nowhere maintained difference between continued existence of society and continued existence of social system. Thus it becomes obvious that for continued existence of law, for both, morality is indispensable. It may be either in the name of "inner morality" of laws;[64] or "some shared morality"[65].

As regards validity of unjust law there seems to be only temporary controversy between Hart and Fuller. Any concept that considers the implications of continuity has a

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[59]Id., at 207
[60]Supra note 4
[61]Supra note 2; Supra note 3 at 203
[62]H. L. A. Hart, Law, liberty and morality 51 (Stanford University Press, Stanford, 1963)
[63]Supra note 26 at 74
[64]Supra note 20
[65]Supra note 62

connection between morality and law internally. For notwithstanding that an immoral precept is "Law" at a time, it will not continue to be "Law" indefinitely. Neither Austin, nor Kelsen nor Hart has concerned himself with the conditions of continuance. Morality is a factor that governs the health and continued life of law.

The debate between Hart and fuller regarding relationship between law and morality is also not serious. The dispute relates to the extent to which laws should be used to uphold morality, because neither Hart nor Fuller denies that some laws are shaped by moral considerations. The main fear of Hart in this regard is "infusion of more morality" or "immoral morality". To this, it requires clarification that "ought" is not synonym of morality. In other words "ought" is not exclusively moral "ought".

Fuller himself reduces the high voltage of natural law in acceptable minimum. It is evident that his conviction of "inner morality of law" is not the morality of religion. It is secularised form of morality that is essential for law. On the other hand Prof. Hart also accepts the essentiality of "minimal morality" for law As he points but that what has been achieved by Prof. Fuller in name of "inner morality of law" that has been valued by positivists in the name of happiness or other substantive moral aims of the law without dignifying with the title of morality[66]. Prof. Hart also equates the "inner morality of law" with Benthamite Principle of Utility[67]. Thus if one conceives ought in secularised form of morality, he cannot find any conflict between Prof. Hart's minimal morality or "some shared morality" on the one hand and Prof. Fuller's "the inner morality of law".

Significance of Hart-Fuller Debate in India

The famous Hart-Fuller debate and its subsequent development make it sufficiently clear that present is the age neither fully of positivist assertion nor of natural law precepts. It is an age of both i.e. positivist-natural law rapprochements. India has emerged as an independent nation in the mid-twentieth century. It may take very valuable lessons from jural developments in other parts of the world. Prof. Hart and Prof. Fuller represent the modified and socially acceptable versions of the positivist and natural schools. India may evolve its jural postulates in the light of positivist-natural law interdependence and co-operation.

The idea of natural law served as the foundation for the Indian Constitution. The Constitution of India, in Kelsonian terminology is the "Grundnorm" to which all state made law is to conform. It is the fundamental law of country. The Indian Constitution is regarded by Indian courts, especially the Supreme Court, as the "Grundnorm" to which all statutes must adhere and by which the legality of all legislative and executive actions must be determined. The first case was *State of Madras v. Smt. Champakam Dorairajan*,[68] wherein the Madras G.O. governing admission to an educational institution supported by the state was overturned by the Supreme Court. The Supreme Court guided by legal positivism and observed that "since there was a conflict between Fundamental Rights and Directive Principles of State Policy and since the latter were non-enforceable the order should be declared void". This led to the Constitution (First

[66]Supra note at 1291
[67]Id.
[68]AIR 1951 SC 226

Amendment) Act, 1951. We also can found the concept of "Grundnorm" in the case of *Srimati Indira Gandhi v. Raj Narain and Ors*[69].

The positivist tendencies are to be found in the modified form. The legislatures have plenary power to make laws vide Articles 245 and 246 read with the three lists given in the seventh schedule of the Constitution.

The natural law principles have been accepted and incorporated in the Constitution itself. They have formed the basis of positive laws. Activities opposed to decency or morality are prohibited[70]. The Supreme Court of India upheld a prosecution for keeping an obscene book as it was injurious to decency or morality[71]. Similarly the freedom of prostitute could be curtailed in order to check demoralising influence on public[72]. The legislature cannot enact criminal law retrospectively[73]. The procedural morality or inner morality of law, propounded by Prof. Fuller seems to find appropriate place in Indian Constitutional Jurisprudence. Retrospective criminal law has been declared bad as being highly inequitable and unjust[74]. As to prospectively, the Supreme Court pointed out that the Constitution has prospective effect only[75]. The principle of generality found full adherence in *Satish Chandra v. Union of India*,[76] where the Supreme Court observed that, "law should be general, persons and things similarly circumstanced are to be treated alike, both in privileges conferred and liabilities imposed." In *Shri Ram Krishna Dalmia v. Shri Justice S. R. Tendolkar*,[77] while interpreting Article 14 of the Constitution, the Supreme Court pointed out that, "classification under Article 14 must be based on intelligible differentia." The natural law principle has also been fused into the concepts of quasi-contract; reasonableness of restrictions, reasonableness of opportunity and courts power to strike down the order of administrative authorities on ground of violation of the principle of natural justice. These and similar instances are the example of specific formulation of natural law into the positive enactments. This tendency to incorporate natural law in positive enactments is supported by Prof. Hart also. He only differs as to application of these principles by courts. One of the important lessons for India in this respect is the need of positivist natural law rapprochement in India.

The task of making law alive can be entrusted either to the legislatures or to the judiciary. In Indian federation, the Parliament and the State Legislatures enjoy plenary power to make laws but those laws are subject to what ought to be or criterion formulated by the Constitution. The judiciary has to determine whether a law enacted by legislature is valid law?

In India, the positivist thinkers ask the court not to look behind what law 'ought to be'. The courts should interpret the law as enacted by the Legislature. They give much

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[69]AIR 1977 SC 69; See also A.K. Gopalan v. State of Madras , Maneka Gandhi v. Union of India , A.D.M. Jabalpur v. Shivakant Shukla

[70]Constitution of India, arts 19(2), 19 (4)

[71]Ranjit D. Udeshi v. State of Maharashtra, AIR 1963 SC 390 at p. 398

[72]State of U.P v. Kaushailiya, AIR 1964 SC 416

[73]Constitution of India, art. 20(1)

[74]Rao Shiv Bahadur Singh v. State of Vindhya Pradesh, AIR 1953 SC 394, at p. 398

[75]Sri Jagadguru Kari Basavarajendraswami of Gavimutt v. Commissioner of Hindu Religious Charitable Endowments, AIR 1965 SC 502

[76]AIR 1953 SC 250, at p. 252

[77]AIR 1958 SC 538

emphasis on the Parliamentary supremacy. It is advisable and desirable that task of making law alive can be best entrusted to judiciary, which sits continuously and Interprets law without fear and favour. The judiciary in India has to play an important role. According to Mr. Gajendragadkar, the former, Honourable Chief Justice of India, "the High Courts and the Supreme Court are required to function in a two-fold character. The Courts act as laboratories where the validity of the laws and executive action is tested in the light of the relevant Constitutional provisions. In another sense, courts act as perpetual watch-towers and keep an unceasing vigil to protect the fundamental rights of the citizens and to insist upon the observance of the constitutional provisions by the legislature and executive.[78]"

It is now sufficiently clear that the judiciary is not only mere interpreter of law as it is enacted by the Parliament. It is required and takes oath to adjudge what law "ought to be". For India law is neither fully what it "is" nor what it "ought" to be but the mixture of both. The lesson of positivist-natural law rapprochement is equally persuasive and valuable for the judiciary and the legislature. At this stage it is convenient to discuss how far the judiciary and the legislature have failed or succeeded in appreciating positivist natural law rapprochement in India.

Legislative and Judicial Appreciation of the Positivist Natural Law Approach in India

The Constitution of India is foremost a social document. It is a peculiar mixture of what law is and what law ought to be. The judiciary however started with most positivist or literal approach without appreciating the 'inner morality of law, The Supreme Court put literal construction on the Constitution and interpreting Constitution as it was at that time, held that the expression "Compensation" under Article 31(2) meant "Just and equivalent compensation." The judiciary, it is submitted with respect, failed to appreciate the real function of law in society. The Parliament appreciated what law ought to be or what significant role Constitution has to play in bringing socio- economic revolution in India. It nullified the effect of *Bela Banerjee Case*[79] by enacting the Constitution (Fourth) Amendment Act, 1955 which made the adequacy of compensation non-justiciable. However, the court did not change its outlook and gave most literal and non-progressive interpretation to expression "Compensation" in its judicial pronouncements. The climax of judicial positivist and conservative approach is to be seen in *R.C. Cooper v. Union of India*[80] and *H.H. Maharajadhiraja Madhav Rao Jivaji Rao Scindia Bahadur of Gwalior v. Union of India*,[81] by which the court frustrated the governmental efforts in furtherance of socio-economic development. It is pertinent to mention here that the former decision was pronounced by 10:1 and the latter by 9:2 majority votes of the court. The effects of these two decisions were annihilated by the Constitution 25th and 26th Amendment Acts. Thus the legislature from time to time corrected the judicial approach by reminding that Constitution is not to be deemed as it is but what function it has to play in society or what 'ought to be'.

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[78] P.B. Gajendragadkar, The Indian Parliament and the Fundamental Rights (Tagore Law lectures) 194 (Eastern Law House, Calcutta, 1972)

[79] State of West Bengal v. Bela Banerjee, AIR 1954 SC 170

[80] AIR 1969 SC 634

[81] AIR 1971 SC 530

The Second round of controversy between "is" and "ought" started from the historic decision of *Golaknath v. State of Punjab*[82]. The highest court of land in this case declared that Indian Parliament was incapable of making a constitutional amendment so as to curtail or remove fundamental rights enshrined in the Constitution. The majority headed by Chief Justice, Subba Rao, gave more emphasis on Article 13 (2) as it was. From this angle the court gave main emphasis on positivist and literal approach. From another point of view, the learned judges paid more consideration to natural law theory, which prevailed before or during the 17th and 18th centuries by recognizing inalienability[83] and immutability[84] of fundamental rights. In this respect, it is humbly submitted that the learned Chief Justice speaking for him- self and four other judges and Mr. Justice Hidayatullah could not pay attention towards modernized natural law theory[85]. Had they realized so, the *Golaknath* controversy could have been avoided. An extremely modified form of natural law is reflected best in the exposition of Prof. Lon L. Fuller. Fuller opposes the idea that natural law is a set of supreme, "higher law" principles that must be used as a standard for evaluating human actions.

The rigour of Golaknath thunder-bolt was reduced by the Constitution 24th Amendment Act by which Parliament reasserted its power to amend any part of the Constitution including Part III as was conceded previously by the Supreme Court itself in *Shankari Prasad Singh Deo v. Union of India*[86] and *Sajjan Singh v. State of Rajasthan*[87]. In the former case, the Parliamentary power to amend any part of the Constitution was conceded by unanimous court where as in latter by a majority of 3: 2. The validity of the Constitution 24th Amendment Act along with others was challenged before the largest bench of the Supreme Court in *Keshavananda Bharti v. State of Kerala*[88]. Now the table was turned and extreme positivist approach was pleaded by Government giving emphasis on Article 368 as it was. The Government pleaded for unfettered and unbridgeable power of Parliament subject to only limitation put by Article 368 itself. Out of 13 judges bench six learned judges conceded the unlimited power of Parliament to amend any part of the Constitution. On the other hand, the majority was not persuaded by this positivist approach. The majority of seven judges adopted the positivist natural law rapprochement. It took a reconciling attitude between what Article 368 provides (is) and what would be the output of exercise of that power. It conceded the power of Parliament to amend any part of the Constitution putting a limitation on constituent power that Parliament in exercise of constituent power cannot destroy the "basic-structure" of the Constitution. In this way the majority of the court took a reconciliatory approach between what article 368 was and what its output ought to be. Mr. Gajendragadkar, the former, Chief Justice of India disagrees[89] with victim of "basic

[82]AIR 1967 SC 1643
[83]Id., at 1698
[84]Id., at 1656
[85]P.K..Tripathi, Some Insights into Fundamental Rights 32 (University of Bombay, Bombay, 1972)
[86]AIR 1951 SC 458
[87]AIR 1965 SC 845
[88]AIR 1973 SC 1461
[89]P.B. Gajendragadkar, Indian Democracy: Its Major Imperatives (B.I. Publications, Bombay, 1975)

structure" adumbrated in *Kesavananda Bharati case*. Dr. Harichand regards it a 'chronic-disease'[90]. Dr. P K. Tripathi finds judiciary more effective than any opposition[91].

It can be said that these and similar opinions mark the one sided approach i.e. positivist approach as to the Parliamentary supremacy. The Constitution 39th Amendment Act requires rethinking by those who assert the positivist approach to amending power. The constitutional validity of 39th Amendment Act was challenged before 5 judges constitutional bench of the Supreme Court. It is interesting to note that barring justice Khanna, all the remaining four judges had upheld the unlimited amending power of Parliament in *Keshavananda Bharati case. In Smt. Indira Nehru Gandhi v. Raj Narain*[92] most of them found 39th Amendment Act as declaratory judgment not a law,[93] militating against checks and balances,[94] against rule of law and separation of powers[95]. In this way the observation of the Supreme Court in this case marks an excellent example that formal criterion is not enough for a valid constitutional amendment, but it is also essential that what is content and output of the exercise of power. The dissolution of the full bench (13 judges bench) of the Supreme Court, constituted with a view to review *Keshavananda* case further strengthens the judicial appreciation, of positivist-natural law rapprochement adopted by the highest court of land in the above mentioned case.

The Supreme Court adopted the positivist-natural law rapprochement while construing the amending power of the Parliament, however it failed to appreciate the same positivist-natural law rapprochement in *A.D.M. Jabalpur v. Shivkant Shukla*[96] dealing with the executive power during the proclamation of Emergency. By 4:1 majority the court gave the executive blanket power to play with the life and liberty of the people. The positivist approach of the court was that if there is power that can be exercised irrespective of consequences. In this way, it failed to appreciate even the modified version of positivist approach as pleaded by Professor H.L.A. Hart i.e. some shared morality is important for existence of law. The positivist-natural law rapprochement required that while endorsing the absolute nature of the powers vested in executive. It is matter of satisfaction, however, that in his strong, forceful and persuasive dissent, Mr. Justice Khanna appreciated the positivist-natural rapprochement. The learned judge warned against startling consequences "if the contention that consequent upon the issue of the Presidential order no one can seek relief from courts during the period of emergency against deprivation of life and personal liberty, is accepted". According to him "the state has got no power to deprive a person of his life or personal liberty without the authority of law. It is the essential postulate and basic assumption of the rule of law in every civilized society"[97]. The dissent of Justice Khanna is much persuasive. The court

[90]Dr. Harichand, "A critique of the 'Basic-Features' Theory" 3(4) Journal of the Bar Council of India 426 at 441 (1974)
[91]P.K. Tripathi, "Rule of Law, Democracy and the Frontiers of Judicial Activism" 9 Journal of Indian Law Institute 36 (1972)
[92]AIR 1975 SC 2299
[93]Ibid.
[94]Ibid.
[95]Ibid.
[96]AIR 1976 SC 1207
[97]Id., at 1276

should appreciate the view that Constitution (Article 359) is for the people and not people for the Constitution and consequently it should change its extreme positivist approach.

Conclusion

After the *Keshavananda* case, Parliament enacted the Constitution, 42nd Amendment Act, 1976 which makes the Parliament's amending power unfettered, unbridgeable and omnipotent. After that the Constitution Amendment Act cannot be challenged even on the ground of procedural defects. So, it is extreme positivist approach to parliamentary, omnipotence. In the earnest submission of the writer the Parliament ought to consider the desirability of such an amendment to Article 368 keeping in view the written federal Constitution of India. The three organs of the government should not be over enthusiastic. The legislature, the executive and the judiciary should take positivist-natural law rapprochement and without asserting superiority over each other, they should act with due deference, mutual confidence and self-restraint.

LEGAL FRAMEWORK OF ONLINE GAMING IN INDIA: EXAMINING THE CORE LEGAL ISSUES AND RECENT LEGISLATIVE DEVELOPMENTS

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Abstract

Since the last decade, India has witnessed exponential growth in Digital Media and Entertainment sector. 'Online Gaming' is one of the major segments of this Industry growing at a rate of 38% Compound Annual Growth Rate[1] (CAGR). Reach of high speed internet to the corners of rural India, low cost data plans, availability of affordable mobile handsets, emergence of around 275 plus online gaming companies, 15,000 plus game developers and Increase in number of 'Online Gamers' expected to reach 442 millions by 2023[2] are the key factors responsible for growth of 'Online Gaming' environment in India. The ancient texts suggest that gambling though considered immoral was prevalent in form of 'Dyut'[3] since time immemorial in India. Under the present legal framework Games of Skill are permissible but Games of Chance are prohibited. Despite certain positive aspects like economic growth and employment avenues for youth, there are also several ill-effects of online gaming such as addiction, monetary losses, mental health issues, money laundering and increase in Cyber Crimes and Cyber Fraud cases. Still, the future of this industry seems promising, so it is necessary to explore the possibilities of regulation rather than banning or prohibiting it.

Key words -
Online Gaming, Games of Skill, Game of Chance, Online Gaming Industry, Cyber Crimes.

I. Introduction

The Law Commission of India in it's 276th Report entitled "Legal Framework: Gambling and Sports Betting Including In Cricket" came to some remarkable and important conclusions with regard to online gambling and betting which could be cited at the outset of this discussion. One of these reads as under:

"*With the advent of online gambling and the anonymity that it ensures, the gambling and betting activities have acquired a global presence. It has, therefore, become more*

[1] Sansad TV Perspective: Regulating Online Gaming Industry(https://testbook.com/ias-preparation/regulating-online-gaming-industry-sansad-tv prespective#:~: text=These%20laws %20have %20been% 20challenged,laws%20to%20ban%20onlin% 20gaming.) (last visited Jul. 5,2023).

[2] GullyChat Today: Ground Rules for Gaming Expansion in India (https://www.adgully.com/gullychat-today-ground-rules-for-gaming-expansion-in-india-136331.html#:~:text=As %20per%20Invest%20India%2C%20revenue,user%20base%20of%20180%20million.), (last visited Jul. 5,2023).

[3] Dyut or Dyut Krida was a famous dice game played for stakes during the Mahabharata period.

challenging for countries to monitor or curb these activities. Many countries that prohibit gambling have not been successful, particularly with regard to online gambling. The transnational character of online gambling platforms calls for much needed change in approach. With the changing times, there could always be an option to have a relook at the earlier approach of a complete ban. The relook if any, may take into account the possible loss of revenue and employment generation that a regulation could bring about[4]. " In line with the above context, one another conclusion drawn in the same report seems worth citing, which reads as under:

"*However, incapacity to enforce complete ban has resulted in rampant increase in illegal gambling, resulting in a boom in black-money generation and circulation. Since, it is not possible to prevent these activities completely, effectively regulating them remains the only viable option. Thus, if Parliament or the State Legislatures wish to proceed in this direction, The Commission feels that regulated gambling would ensure detection of fraud and money laundering etc. Such regulation of gambling would require a three-pronged strategy, reforming the existing gambling (lottery, horse racing) market, regulating illegal gambling and introducing stringent and over-arching regulations*.[5] "
These two conclusions drawn by Law Commission clearly highlight the two most important concerns with regard to online gaming in India:

1. That with the recent technological advancements, online gaming is taking shape of a huge industry having a promising future, with immense potential for creating job opportunities for youth and wealth creation for nation in form of taxes, surcharges and increase in foreign exchange reserves through investments; and
2. That regulation can be a better alternative instead of complete ban, as complete ban can increase malpractices such as online frauds, money laundering, racketeering, tax evasion etc. which may cause huge revenue losses to the nation.

Therefore, the object of this article is to inquire into the historical and social perspectives of gambling and to examine the effects of unregulated gambling and betting. Further, the purpose of this article is also to critically appreciate the present legal framework and efficacy of the evolving regulatory framework with regard to online gaming in the Indian Context.

Gaming v. Gambling:

Though Gaming and Gambling are two different activities and in the 'generic sense' the difference between these two terms can be understood in a very simple manner. While Gaming is a wider connotation, wherein the result of the activity is dependent upon skill of the player and money is not involved in it, whereas, result of gambling is totally dependent upon chance or luck and money is directly involved in it as stake. The greed of winning large sum of money in return of small contributions as stakes is the main reason for popularity of gambling. In *RMD Chamarbaugawala v. Union of India*[6] the Hon'ble Supreme Court relied on the skill test to decide the fact that any particular act is gambling or not. The Court observed that "*if any competition substantially involves skills*

[4]Para No. 9.1 of Chapter IX of 276th Report of Law Commission of India.

[5]Supra note 2.

[6]AIR 1957 SC 628.

are not gambling activities but are commercial activities protected under Article 19 (1)(g)" (of the Indian Constitution). As per the definition of "Gaming" provided under the Goa, Daman and Diu Public Gambling Act, 1976, is "Gaming includes wagering and betting, or wagering or betting on digits of numerical figures arrived through manipulation in any manner whatsoever; or on order of digits, or on digits themselves or on their pictorial representation. Any transaction whereby any person employs or engages any other person to wager or bet with any other person. The collection or soliciting of bets, receipts or distribution of winnings or prizes in money or otherwise in respect of wagering and betting; or any act which is intended to aid, facilitate, wagering or betting or such collection, soliciting, receipt or distribution shall amount to Gaming with an exception of lottery which shall not be included in the definition". With the dominance of internet and online gaming websites and platforms the line of distinction between these two activities has blurred[7] and reached a point of convergence[8]. We are now living in the era of 'gamblification' of non gambling activities[9] which are primarily 'shown' or 'pretended to be' games of skill or social gaming.

A. Historical background of Gambling and Betting in India

The history of gambling and betting dates back to the history of human civilization. It existed in different forms such as *Dyut* (game of dices), horse-racing, wrestling, cock-fights, boat-racing and bull-fight etc. Though the social sentiments towards betting and gambling have been different across different times and different cultures, but gambling have been prevalent across the globe in almost every civilization. Though gambling and betting have always been considered immoral in the Indian culture, yet there is sufficient proof in the ancient Indian texts to show that gambling and betting were prevalent in India since time immemorial and the same was not considered illegal. The biggest example of ill effects of gambling available for reference in the ancient Indian texts is that of Mahabharata, wherein *Dharmraj Yudhisthir*, not only lost his kingdom but also his wife and brothers. As per the ancient Indian texts the habit of gambling not only destroys wealth of the gamblers but also yields misfortune and disrepute to him. *Narada Smriti*, *Yagnavalakya* and *Kautilya* were in support of regulating gambling activities by the state. There have been hymns in the *Atharva Veda*[10] for success in gambling activities. *Yagnavalakya Smriti* states that son should not repay the debt of father borrowed for the purpose of fulfilling lust and gambling. The Katyayana Smriti[11] states that if gambling cannot be prevented at all in the state, it should be regulated. It further mentions that gambling can be legalized by the state after payment of taxes to the king or the ruler. As per *Manusmriti*[12] gambling and betting activities destroys kingdoms and these activities are similar to open theft which the king must make all efforts to suppress. It further states that the king should inflict punishment on persons indulged in gambling activities. Virtues like truth honesty and wealth are lost due to addiction of gambling

[7]Aroon Deep, The blurred lines between gaming and gambling, https://www.thehindu.com/ (last visited Jul.6,2023).

[8]Joshua Brustein, Fantasy Sports and Gambling: Line is Blurred, https://www.cnbc.com/ (last visited Jul.6,2023).

[9]Tom Brocks and Mark Johnson, The Gamblification of Digital Games, Volume 21, Issue1, Sage Journals, 2023.

[10]Hymn No. XXXVIII.

[11]Verses Nos. 935 to 939.

[12]Hymns Nos. 9.221, 9.222 and 9.227.

which is a self-destructive act. Despite the prevalence of gambling in the ancient Indian texts the Indian culture has always condemned gambling and it has never been considered as socially accepted activity. A constitutional bench comprising of five judges in *Kishan Chander & Others v. State*[13] of Madhya Pradesh has rightly observed that: "*Considering the fact that gambling is an evil and it is rampant, that gaming houses flourish as profitable business and that detection of gambling is extremely difficult, the law to root out gambling cannot be in the public interest. Such a law must of necessity provide for special procedure but so long as it is not arbitrary and contains adequate safeguards it cannot be successfully assailed*."

B. Need of regulating Gambling and Betting

There are several problems which are associated with, or may be the consequences of unregulated gambling and betting. Unregulated gambling and betting can result into growth of illegal trade and commerce. Corruption in sports such as match fixing, spot fixing or speculations (*Satta*) can increase in sports, specially in cricket which is the most popular game in India. Illegal and unregulated gambling activities may lead to increased crime rates as the poor persons loosing their money in gambling and betting may resort to commission of theft, extortion, chain snatching and robberies to compensate the losses. Mental health issues among the youth and wastage of national wealth and resources may also occur due to lack of regulation. Moreover, huge sums of money earned from the highly profitable unregulated gambling and betting business may be used by the terrorist organizations and anti-national elements for conducting insurgent activities or waging war against the elected government similar to situation prevailing in some of the parts of the world, where terrorist organizations are indulged in illegal drug trade where they use the money earned in terrorists activities. Whereas, there are several advantages of regulated gambling and betting activities as regulated gambling and betting generate considerable amount of revenue in form of taxes, surcharges and duties[15] . These activities not only increase employment opportunities for youth but also boosts tourism. Regulated gambling and betting protects the vulnerable classes of the society from being looted and facilitate the agencies in law enforcement.

C. Existing Laws and Regulations on Gambling and Betting in India

Betting and Gambling and imposition of taxes on these activities are state subjects listed under entries 34 and 64 of the State List (List II) of the Seventh Schedule of the Indian Constitution[16]. Despite the fact that betting and gambling are subjects falling within the exclusive legislative competence of state still there are central laws that incidentally affect the subject viz. The Indian Penal Code, 1860, The Indian Contract Act, 1872, Foreign Exchange Management Act, 1999, The Lotteries (Regulation) Act, 1998,

[13] 1964 SCR (1) 765.

[14] Bharat Vasani and Samiksha Pednekar, To Bet or Not to Bet, https://corporate.cyrilamarchandblogs.com/ (last visited Jul.9,2023, 10:30 PM) https://corporate.cyrilamarchandblogs.com/2019/08/to-bet-or-not-to-bet-betting-laws-india/

[15] Gambling Laws and Regulations India,https://iclg.com/practice-areas/gambling-laws-and-regulations/india (last visited Jul. 12,2023).

[16] INDIA CONST.art. 246, Seventh Schedule.

Prize Competitions Act, 1955, The Young Person's (Harmful Publications), Act, 1956, The Prevention of Money Laundering Act, 2002, The Information Technology Act, 2000, Central Goods and Services Act, 2017, The Income Tax Act, 1961, Consumer Protection Act, 2019 and some other central rules such as Information Technology (Intermediaries Guidelines) Rules, 2011, Telecom Commercial Communications Customer Preference Regulations, 2010 also touch upon the issues related to Gambling and Betting in India.

Special State Acts & Laws related to Gambling and Betting

The Bombay Prevention of Gambling Act,1887, The Rajasthan Public Gambling Ordinance, 1949, The Meghalaya Prevention of Gambling Act, 1970, The Goa, Daman and Diu Public Gambling Act, 1976, The Tamil Nadu Gaming Act,1930, The Sikkim Casinos (Control & Tax) Act, 2002, The Tamil Nadu Betting Tax Act,1935, The Tamil Nadu Prize Schemes (Prohibition) Act,1979, The Telangana Gaming Act,1974 and The West Bengal Gambling and Prize Competitions Act, 1957 are some of the significant state enacted laws on the subject of Gambling and Betting.

D. Public Gambling Act 1867

The Public Gambling Act, 1867 was enacted on 25th January 1867[17], with the dual object of punishing public gambling and keeping of common gaming houses. It *inter alia* provides for penalties for owning or keeping or having charge of a gaming house and penalty for being found in gaming house. Under the act staking on public streets on animals or birds fight has also been made punishable offences. The police has wide powers of arrest, search, seizure and destruction of gaming materials and it is not necessary to prove that any game whatsoever was being conducted in the gaming house was for stakes. Provisions for enhanced penalties have been prescribed for repeated offences. The Public Gambling Act, 1867 carved out an exception with regard to 'games of skills' and did not apply to such games irrespective of the place they were played. At the time of its enactment the act acquired the character of a national enactment, due to its wide territorial applicability, but under The Government of India Act, 1935[18] provincial legislatures were empowered to legislate exclusively on the subject of Betting and Gambling. Post independence and after enforcement of Constitution of India the position remained the same and these subjects fall in List II that is the state list under the 7th schedule. Therefore, The Public Gambling Act, 1867 lost its character of a central legislation and under the present regulatory framework it can only be applicable to any particular state subject to its adoption by the legislature of such state. At Present 14 states and union territories[19] have adopted this act by passing adopting enactments.

II. Regulatory Framework of Online Gaming and the Current Legal Regime

As stated earlier, the line of distinction between gaming and gambling has blurred due to dominance of Online Gaming Platforms and Apps. The settled principle under Indian law is that games of skills are permitted and legal in India whereas games of chance are

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[17]Act No. 3 of 1867.

[18]CH.2 Act 1935.

[19]States and Union Territories of Andman and Nicobar Islands, Arunachal Pradesh, Chandigarh, Dadra and Nagar Haveli, Haryana, Himachal, Lakshadweep, Punjab, Madhya Pradesh, Chattisgarh, Manipur, Mizoram, Tripura and Uttarakhand have adopted The Public Gambling Act, 1867.

prohibited. This clarity is diminishing day by day due to the rise of online culture in our country, as access to high speed internet, cheap data plans and mobile gadgets are revolutionizing the ways in which the common consumer used to behave a decade ago. Moreover, the rise of startup culture[20] has also impacted each and every sector, including Media and Entertainment Sector. The sudden boom of gaming platforms and Apps after COVID-19 Pandemic has also increased the competition among the players of this sector. The lack of a fully fledged regulatory regime for online gaming industry is one of the major reasons for increasing violations and there is a state of legal conundrum at present. The humble submission of the authors with regard to lack of regulatory framework is that, the scenario with regard to online gaming has changed drastically and beyond the imagination of law makers in last few years and the main problem with online gaming industry in the current time is that the platforms which claim that they are serving 'games of skill' or 'social games' through their platforms or Apps to the consumers, are actually serving 'games of chance' or games having predominant features of 'gambling' played for monetary stakes. Fantasy gaming[21] is the one of the most popular and growing segments in the online gaming industry which combine the elements of interest with elements of earning or winnings in form of money. The other major problem is that 'Gambling and Betting' are subjects falling within exclusive legislative competence of states and there are huge anomalies and inconsistencies in the nature and context of state laws. While some state laws provide for a blanket ban on gambling and betting (both offline and online) some states permit regulated approach in their laws on this subject. The most recent legislative step taken by the Government of India is the Amendment brought to the Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021 on 6th April, 2023. (Popularly known as Gaming Amendments). Yet, it cannot be said that there was a complete absence of regulation on the specific subject of 'online gaming'. There have been some state acts, rules and ordinances already in place, before these amendments were introduced. Prior to the analysis on the efficacy of the above amending act (which is the current law) the legislative development on this topic can be understood by going through chronological development of law on this subject. The first ever state law permitting and regulating the online gaming was The Sikkim Online Gaming (Regulation) Act, 2008[22], it was enforced on 29th July, 2008. As per the preamble of this act, the object of this act is to "*provide for control and regulation of online gaming through electronic or non-electronic formats, and to impose a tax on such games, in the state of Sikkim*." This act defines "Online Games[23] " as "Online Games" means all or any games of chance or a combination of skill and chance, including but not limited to Poker, Roulette, blackjack or any game, played with cards, dice, or by means of any machine or instrument or money's worth, as may be prescribed from time to time." The term Online Gaming has been defined as "Online Gaming[24] " means any gaming, where any player

[20]Startup Ecosystem in India- Growing or Matured, (last visited Jul.12,2023). https://assets. kpmg.com/content /dam/kpmg/in/pdf/2019/01/startup-landscape-ecosystem-growing-mature.pdf

[21]The Evolving Landscape of Online Gaming in India (last visited Jul.13,2023). https://assets. kpmg. com/content/dam/kpmg/in/pdf/2019/03/online-gaming-india-fantasy-sports.pdf

[22]Act No. 23, Acts of Sikkim State Legislature.

[23]Section 2(d), Sikkim Online Gaming (Regulation) Act, 2008.

[24]Section 2(k), Sikkim Online Gaming (Regulation) Act, 2008.

enters or may enter the game or takes or may take any step in the game or acquires or may acquire or may acquire a chance in a lottery, by means of a telecommunication device including the negotiating or receiving of any bet by means of telecommunication device." The Sikkim Act also defines some other important terms such as "License", "Online Gaming Servers", "Online Gaming Websites", "Penalty", "Sports Gaming" and "State". This act establishes a licensing regime for permitted online games throughout the state via intranet. This act is a living piece of legislation amended four times since its enactment in the years 2009, 2012, 2015 and 2017. The Nagaland Prohibition of Gambling and Promotion and Regulation of Online Games of Skill Act, 2015[25] is another state legislation which has been enacted on this subject. The Preamble of this act states the purpose of this act, it says that the aim of this act is "*to prohibit gambling and regulate and promote online games of skill*". The Act defines "Gambling[26] " as "Gambling means and includes wagering and betting on games of chance but does not include betting or wagering on games of skill". The act in clear terms draws distinction between 'Games of Skill' and 'Games of Chance'. It states that, where there is preponderance of skill over chance is a 'Game of Skill' and where there is preponderance of chance over skill is a 'Game of Chance'. It also sets a licensing regime and measures for promotion of online games of skill. The Act states that "*Once a license has been obtained under this Act, wagering or betting on online 'games of skill' or making profit by providing a medium for playing 'games of skill' shall not amount to gambling so long as they are being provided to players and are being accessed by players operating from territories where 'Games of Skill' are exempted from the ambit of Gambling*." Schedule A annexed to the Act enumerates a list of games of skill which include- Chess, Sudoku, Quizs, Binary Options, Bridge, Poker, Rummy, Nap, Spades, Auction, Solitaire, Virtual Golf, Virtual racing games including virtual horse racing, virtual car racing etc., Virtual Sports including virtual soccer, virtual cricket, virtual archery, virtual snooker/ bridge, pool, Virtual Fighting, Virtual wrestling, Virtual boxing, virtual combat games, Virtual adventure games, Virtual stock/ monopoly games and Virtual sport fantasy league games. Besides these specific laws enacted on the subject under discussion, there have also been some legislative steps which could not see the light of the day and become law but had these bills became law, would have been very significant legal reforms and would have contributed in bringing more transparency in the online gaming sector and creating a strong legal regime. The Sports (Online Gaming and Prevention of Fraud) Bill, 2018[27] was introduced as private member bill in Lok Sabha by Dr. Shashi Tharoor, A Congress Member of Parliament. The Object enumerated in the preamble of the bill was "*to establish an effective regime to maintain the integrity of Sports in India by preventing and penalizing, Sports Fraud, regulation of Online Sports Gaming; and for the matters connected therewith or incidental thereto*." The last paragraph of the 'Statement of Objects and Reasons' of this bill is most relevant, so far as the need of regulation of online gaming is concerned, it stresses upon the need of an uniform central law to address the present concerns on the subject and states that "*Betting and Gambling are state subjects however, the Parliament of India has the legislative competence to enact a law*

[25]Act No. 3, Acts of Nagaland State Legislature.

[26]Section 2(1), The Nagaland Prohibition of Gambling and and Promotion and Regulation of Online Games of Skill Act, 2015.

[27]Bill No. 259 of 2018 as presented in Lok Sabha.

to govern online betting and gambling in light of its powers under Entry 31 of List 1 of Seventh Schedule to the Constitution, as explained in the 276th Report of the Law Commission[28] *of India. The need of the hour is a comprehensive regulatory framework, overseen by a competent regulatory body, to check the flow of black money in online sports gaming, and to curb any illegal activities in connection with it. Apart from the check on criminal activities, the regulation of online sports gaming may encourage investment in the sector, which in turn can lead to technological advancements as well as revenue and employment generation*." Another Private Member Bill Introduced on the issue which could not become law is Online Gaming Regulation Bill 2022[29] . This bill was introduced in Lok Sabha Adv. Dean Kuriakose, Member of Parliament. The Preamble of this Act enumerated the object as "*to establish an effective regime to regulate online gaming industry to prevent fraud and misuse and for matters connected therewith and incidental thereto*." The aims and objects of the bill mainly focuses on the ill-effects of long hours of online gaming specially on the adolescents, which can impair normal socialization, and can cause physical and mental harm, wastage of natural resources and loss of precious time and addictive features of online gaming. The Objects and reasons part also states that there should be limitations of time and money an individual can invest while playing these games and it also stressed the need for establishment of an online gaming commission[30] which can regulate the online gaming industry in India and also set standards for industry in the country.

Some Recent Legislative Developments

The State of Meghalaya on 26th March, 2021 notified The Meghalaya Regulation of Gaming Act, 2021[31] with an object to regulate gaming within the state, both games of skill as well as the games of chance. The definition of Gaming under the act includes both games, the games of skill and games of chance. The focus of the act is to create a licensing regime for all types of gaming either played online or offline. It also provides that Meghalaya Prevention of Gambling Act, 1970[32] shall have no application on any games of skill or chance licensed under this act. Schedule-A of the Act provides a list of Games of Chance permitted under this law. They are- Baccarat (Punto Banco), Big Six Wheel (Wheel of Fortune), Chemin-de-for, Craps, Flush, Brag, Three Card Game, Kino, Pontoon/21, Roulette, Slots, Super Pan9 and any other game of chance permitted by the State Government from time to time. Schedule-B of the Act enlists Games of Skill which are- Backgammon, Bingo, Blackjack, Napoleon, Poker, Poker Dice, Rummy, Solitaire, Spades, Prediction of results of gaming events and placing a bet on the outcome in part or in whole, of sports or sporting events such as football, cricket, lawn-tennis, chess, golf, horse-race and such other games, Virtual adventure games, Virtual Combat games, Virtual mystery and and detective games, Virtual racing games including virtual horse-racing, virtual car racing et al., Virtual Sports fantasy league games, Virtual sports

[28]Under the chairmanship of Justice B.S. Chauhan this report was submitted with regard the question of legalization of Gambling in india. The Report inter alia suggested that it is desirable to ban gambling but keeping the practical difficulties in mind the Commission suggested regulation of these activities.

[29]Bill No. 78 of 2022 as presented in Lok Sabha.

[30]Section 3 and 4 of Online Gaming Regulation Bill, 2022.

[31]Act No. 9 of Meghalaya State Legislature.

[32]Act No. 8 of Meghalaya State Legislature.

gaming including soccer, golf, cricket, archery, snooker, bridge, pool et al., Virtual stock/Monopoly Games, Virtual team selection games and any other game of skill permitted time to time by the State Government. At present all games either games of skill or chance played for stakes are banned in the state of Telangana. As per media reports[33] the state of Telangana is thinking to introduce a law for regulating games of skill, as the enforcement of a complete ban is difficult and may have adverse consequences. The newly introduced law may have an oversight board to determine that whether any game is a game of skill or chance. The state of Rajasthan has introduced the draft of Rajasthan Virtual Online Sports (Regulation) Bill, 2022[34] with the purpose of bringing a licensing regime for regulating fantasy sports, esports and other games of skill viz. Poker, quizs, virtual stock games etc. In the month of March 2022 it came through media reports that state of Maharastra is planning to amend Maharastra Prevention of Gambling Act, 1887[35] to address the issues relating to online gaming. In the month of October, 2022 the State of Tamil Nadu has introduced Tamil Nadu Prohibition of Online Gambling and Regulation of Online Games Bill, 2022[36] which seeks to regulate online gaming and prohibit gambling on games of chance. The state of Kerala is planning to again put a ban on online Rummy played for stakes on the grounds of rise in number of suicide cases in the state. As the notification of the state Government banning online Rummy played for stakes was struck down by the Hon'ble Court in the month of September, 2021. The state of Karnataka in 2021 had amended The Karnataka Police Amendment Act[37], which sought to prohibit all online games for stakes, including the games of skill, In the month of February 2022, the Hon'ble High Court of Karnataka had struck down certain provisions of this amending act. The State Government has filed an appeal against the Hon'ble High Court's Order and the Appeal is pending before the Apex Court.

Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Amendment Rule, 2023

The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Amendment Rule, 2023[38] may be considered to be the latest legislative step towards enacting a central law on the subject of 'online gambling' and creating a full proof legal framework to address all contemporaneous issues that need to be addressed due dominance of digital environment and boom in Digital Media and Entertainment Sector. In exercise of powers conferred by sub-section (1) and clauses (z) and clauses (za) pf sub-section (2) of section 87 of The Information Technology Act, 2000, the Central Government introduced these amendments (Popularly known as "Gaming Amendments") to The Information Technology (Intermediary Guidelines and Digital

[33]Gowree Gokahle, Tanisha Khanna and Raashi Vaishya, Gaming Law 2022, https://www.nishithdesai.com/

[34]https://finance.rajasthan.gov.in/PDFDOCS/REVENUE/10746.pdf (visited on Jul.26, 2023).

[35]Supra Note. 33.

[36]https://prsindia.org/files/bills_acts/acts_states/tamil-nadu/2023/Act9of2023TamilNadu.pdf (visited on Aug.5,2023).

[37]https://prsindia.org/files/bills_acts/bills_states/karnataka/2021/Bill%20No.%2037%20of%202021%20Karnataka.pdf (visited on Aug.9,2023).

[38]G.S.R. 275(E) Dated 6th April 2023.

Media Ethics Code) Rules, 2021[39] on 6th of April, 2023. As discussed earlier, that betting and gambling are subjects falling within the exclusive legislative competence of states. Though some of the states have enacted state laws which permit certain games of skills, while there are also some state laws which completely ban both games of skill as well as games of chance played for stakes, either played online or offline. Looking into the immense growth of online gaming sector and various social and economic issues that have emerged in the recent times The Ministry of Electronics and Information Technology (MeitY) has introduced amendments to The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021. The object of the amendment is to protect the children and other vulnerable sections from harms of illegal gambling and betting websites and Apps. The amendment aims to protect them from addiction related harms and financial losses caused due to addiction of online gaming in children and adults. It also aims to protect children and create measures for content related harms. Especially with regard to depiction of violent and inappropriate content accessed by them, or playing real money games. The other objects that the amendment aims to achieve are controlling advertisements of offshore betting and gambling websites and platforms targeting Indian players and to prevent money and money laundering related issues by creating strict KYC[40] compliance mechanism. This amendment has added several definitions and coined out a mechanism for verification of online games to be "permissible online game" by the Online Gaming Self Regulatory Bodies (SRBs) designated by the Central Government of India. Section (qa) of the amending act defines "Online Game" as "Online Game" means a game that is offered on the Internet and is accessible by the user through a Computer Resource or an Intermediary." Section (qb) defines "Online Gaming Intermediary" as "Online Gaming Intermediary means any Intermediary that enables the users of its computer resource to access one or more online games." Section (qc) defines "Online Gaming Self-Regulatory Body" as "Online Self-Regulatory Body means an entity designated as such under rule 4A." "Online Real Money Game" has been defined under section (qd) of the amendment as "Online Real Money Game" means an online game where a user makes or deposit in cash or kind with the expectation of earning winnings on the deposit". An explanation has been added to this definition to further elaborate and clarify the meaning of 'winnings' as per the explanation 'winnings' means any prize, in cash or kind, which is distributed to a user or intended to be distributed to a user of an online game based on the performance of the user and in accordance with rules of such online game.' Section (qe) defines "Permissible Online Game" as "Permissible Online Game means an online real money game or any other game or any other game that is not an online real money game." Permissible Online Real Money Game" has been defined in Section (qf) as "Permissible Online Real Money Game means an online game real money game verified by an online gaming self-regulatory body under rule 4 A."

The new rules provide for adequate control to safeguard Indian players from illegal gambling and betting websites and Apps in the following ways:

[39]G.S.R. 139(E) dated 25th February, 2021.

[40]KYC Means "Know Your Customer" it is an initiative for verification of Customers mainly used in Banking Sector.

(i) The intermediaries[41], social media platforms, and App Stores are bound not to publish, share or host any online game that may have tendency to cause user harm and has not been verified as "permissible online game" by "Online Gaming Self-Regulatory Body" (SRBs)[42] by the Central Government.

(ii) These rules also restrict any advertisement or surrogate advertisement or promotion of any online game not verified to be a "permissible online game".

(iii) Even any other game non-real money game that may cause user harm or affect security of the nation will have to be compliant to the obligations as applicable to "Online Real Money Games" and the Central Government has the power to require such compliance.

The Online Gaming Self-Regulatory Bodies shall ensure that any online game is tested and verified against the framework published on its website before the "Online Real Money Game" is verified as "Permissible Online Game". The framework should mandatorily include:

1. The safeguard that measures that Online Real Money Games should not be against the Integrity of nation, Sovereignty and national interest. It should not be against public order and morality and security and friendly relations with other nations;
2. It must ensure safeguards from user harm psychological harm to vulnerable sections specially children and young adults;
3. Safeguards regarding Age rating and parental controls;
4. Measures ensuring safeguard from addiction, financial losses, frauds, defined 'limits of time' and 'money spent' and frequent warning messages during long gaming sessions.

Duty has been casted upon the SRBs to ensure the above safeguards which will protect the children and other vulnerable sections of the society from ill-effects of Online Gaming in India.

Conclusion

From the above discussions it is clear that gambling and betting cannot be banned completely, instead of imposing a blanket ban on these activities, regulatory approach seems to be a better option as of today. It is also clear that Government is taking effective steps, so far as regulation of Online Gambling is concerned. Gambling and Betting are serious issues which both, the legislature as well as society has to handle very delicately. But, today we are living in digital environment, where the world is changing with fast speed and laws and regulations need to be pro-actively enacted to meet the expectations of the changing society. As the ill-effects of these activities are known to all of us, therefore a holistic legislative approach by the legislature and a self-regulatory behavior from the society is the need of the hour to sensibly deal with issue.

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[41]Section 2(I)(w) of the Information Technology Act,2000 defines the term Intermediary.

[42]Deeksha Bhradwaj, Three Gaming Self-Regulatory Bodies to seek Govt. Nod, https://www.livemint.com/ (visited on August 18,2023).

AN APPROACH TO RECONCILIATION BETWEEN MAJORITARIAN MORALITY AND CONSTITUTIONAL MORALITY: THE STRUGGLE FOR ESTABLISHING THE DEMOCRATIC BALANCE

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Abstract

This research paper mainly investigates the tension between the two major concepts in democratic societies that is majoritarian morality and constitutional morality. Majoritarian morality refers to the belief that decisions, particularly political decisions in the society should be made based on the will of the majority, whereas constitutionality morality refers to the idea that decisions should be made in accordance with the constitutional principles. This research will delve into the historical context and developments of the two concepts and also highlights how these principles have been implemented in the political systems of various countries. This research paper also focuses on case studies and examples of moral and constitutional disagreements, such as controversial judicial decisions, legislative initiatives, or social movements. A study will also look at the ramifications of this tension for democratic administration and the safeguarding of individual rights and liberties. Finally, the study suggests viable answers as well as recommendations for conciliatory or conflict resolution in democratic countries between a majoritarian morality and a constitutional Morality.

Key words
Constitutional Morality, Majoritarian Morality, Interests, Minority, Freedom.

1. Introduction: Understanding the tension between Constitutional Morality and majoritarian morality in democratic societies.

Constitutional morality[1] and majoritarian morality[2] or majoritarianism[3] from long ago has been considered two distinct concepts and ideologies. Constitutional morality[4] highlights those values and principles which are incorporated into the constitution of any country. It includes the basic and fundamental rights of the citizens, the rule of law, and separation of power principles. Constitutional morality is considered to be based on

[1]G.V. Mahesh, Constitutional Morality- A Need for Consensus on the Concept, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3353874 (last visited on August 28, 2023).

[2]State of Maharashtra v. Indian Hotel and Restaurants Association, Civil Appeal No.2704 of 2000.

[3]Robert Longley, What is Majoritarianism? Definition and Examples, available at: https://www.thoughtco.com/majoritarianism-definition-and-examples-5272219 (last visited on August 25, 2023).

[4]Manoj Narula v. Union of India, (2014) 9 SCC 1.

the idea that constitution is the highest law of the nation and every individual and institution in the country should act according to the provisions of the constitution[5].

On the other hand, majoritarian morality believes that the rights of the majority are superior to the rights of the minority. This concept believes that the majority has all the right to make decisions in the political system even if it is not according to constitutional principles[6].

There is always a conflict between these two concepts because one always suppresses the fundamental freedom of the individual and the other tries to protect the fundamental rights of the minority. As we know in political democracy, it is an ardent belief that the majority has the power to take decisions but these decisions should according to the constitutional principles and they should protect the rights of the minority peoples[7].

When majoritarian morality is given priority over constitutional morality then the fundamental rights of the individual and the authority of constitutional institution starts getting less priority. Therefore, citizens and institutions should have strived to protect constitutional morality and ensure that constitutional principles should be followed and respected at every point in time[8].

2. Understanding Morality

Morality refers to the set of rules and principles that ensure individuals and society distinguish between what is right and wrong and also justice and injustice[9]. It is a system of beliefs and conducts which enables individuals and society to take decisions based on the predetermined rule which is accepted by society and also helps in acting in a way that is considered ethical and virtuous[10]. Morality always sprouts from cultural, societal, and religious influences, and at the same time morality has not been the same and static, it could be different for the society and based on the societal background[11]. However, many of the moral and ethical principles are universal like the value of Human life, the importance of Honesty, and the need to treat others with respect and compassion. The study of Philosophy includes various principles of morals and ethics like utilitarianism, deontological ethics, and virtue ethics. The aim of these principles is to provide the basis for decision-making and also provide rules for excelling good life in society. After all, Morality is a very complex and multidimensional aspect that have

[5]Michel Rosenfield; "The rule of law and the legitimacy of constitutional democracy" 74S. Cal. L. Rev. 1307 (2000).

[6]Brest Paul, "The fundamental rights controversy: the essential contradictions of normative constitutional scholarship" 90.5 The Yale Law Journal 1063-1109 (1981).

[7]Samuel Freeman, "Constitutional democracy and the legitimacy of judicial review" 9.4 Law and Philosophy 327-370 (1990).

[8]B.P. Frohen and GW Carey, Constitutionality Morality and the Rise of Quasi-Law (Harvard University Press, London, 2016).

[9]T. Campbell, Justice 2 (Palgrave Mcmillan London, 1988).

[10]Id. at 3.

[11]P. Sororkin, "Social and Cultural Dynamics: A Study of Change in Major Systems of Art, Truth" Ethics Law and Social Relationships, 259 (2017).

significant part to play in society in order to shape the attitude of individual and the society as a whole[12].

Utilitarianism has been considered as an ethical principle which holds the best action is the one that maximizes overall happiness or pleasure for the greatest number of people. Utilitarianism believes in consequentialism, meaning that the morality of an action is defined by its outcome or consequences[13]. Utilitarianism principles could be summarized as follows:

The greatest happiness principle: Actions of individual or the state could only be said morally right if they promote the greatest happiness or pleasure of the maximum number of the people.

Consequentialist thinking: consequences of an action is determining factor of morality, not the intention of the doer.

Hedonistic calculus: The value of an action is judged by the capability of generating amount of pleasure or happiness it generates, minus whatever discomfort or suffering it results in.

Impartiality: The happiness or pleasure of all individuals should be given equal consideration.

Utility: An action's overall usefulness or benefit should be considered when determining its moral value. Utilitarianism has been controversial, as it can sometimes conflict with other moral principles, such as individual rights and justice. Critics argue that it can justify actions that are morally problematic, such as denying the well- being of sacrificing the well-being of a few for the benefit of many. Nonetheless, supporters of utilitarianism said it offers a practical and effective means promote the well-being of society as a whole.

Emmanuel Kant has immensely contributed in the study of the morality. He is of opinion that the supreme principle of morality is based on the principle of rationality which he called categorical imperative. Kant has placed the principle of the categorical imperative on the premise of the objectivity and rationality. So according to him all the value judgment must be based on the rationality and it should be universal in nature. Kant has given the instrument of practical reason through which the rationality has been discovered. The fundamental principle of morality according to the Kant is Categorical Imperative which is none other than autonomous will of the individual. He proceeds by saying that morality includes the idea of a "good will" and "duty". These moral concepts of duty and will led Kant to believe that the individual is free and autonomous as long as it appears not as illusion. The moral philosophy of Kant is addressed to the first person a deliberate question "what a person can do in certain circumstances" and answer to this question is based on the universal Categorical Imperative which is applicable to every person. In contrast to the Kant's moral philosophy David Hume's moral philosophy rejects the rational basis. David Hume said

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[12]A. Bandura, "Social Cognitive Theory of Moral Thought and Action" 3 Handbook of Moral Behavior and Development 45-103 (1991).

[13]William H. Shaw, Contemporary Ethics: Taking Account of Utilitarianism 7 (Wiley-Blackwell, New Jersey, 1998).

reason cannot be the basis of morals. He said moral distinctions are derived from moral sentiments like esteem, praise, or blame etc[14].

3.Constitutional Morality: The importance of Constitutional Morality in protecting individual rights and ensuring the smooth functioning of democracy.

Constitutional morality ensures that the values of the Constitution should be protected and the administration of law should be based more on the ethos of the Constitution[15]. The law should not be enforced very strictly rather it should be in accordance with the liberal principles of the constitution. As we know there is no concrete definition of constitutional morality instead it is having a flowing meaning which is changing according to the change in society and always tries to further the betterment of society[16].

To understand the meaning and importance of Constitutional morality, we must go through the ideals of constitutional makers and adhere to the ethos of the various factions of society. Apart from this it also includes the democratic principles and ideals enshrined in our Constitution by the founding fathers. It is very difficult to define Constitutional morality and on the basis of the context it has a different meanings depending upon the circumstances where it has been used. But in a broader context, Constitutional morality tries to maintain an effective judicial system with constitutional values[17].

It is true that the Constitution and law guide society but in return, it is an obligation of society to act according to the Constitution and law. When a society behaves in tune with the Constitution then it can be said that the society is preserving and protecting the Constitutional morality[18].

This term Constitutional morality had been used for the first time by great legal luminary Dr. Bhim Rao Ambedkar while defending the decision to include the structure of the administration in the Constitution by quoting George Grote, "*The diffusion of 'constitutional morality', not merely among the majority of any community, but throughout the whole is the indispensable condition of a government at once free and peaceable; since even any powerful and obstinate minority may render the working of a free institution impracticable, without being strong enough to conquer ascendance for themselves*".

Explaining the Concept of Constitutional Morality again Dr. Ambedkar quotes Grote:

"*By constitutional morality, Grote meant… a paramount reverence for the forms of the constitution, enforcing obedience to authority and acting under and within these forms, yet combined with the habit of open speech, of action subject only to definite legal*

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[14]David Hume, A Treatise of Human Nature, Book 3 (Dover Publications Inc., New York, 1888).

[15]Nandita Narayan, "Constitutional Morality as Tool in Interpretation of the Constitution- A Critical Analysis" Indian Journals 1-23 (2021).

[16]Frank I Michelman "Socioeconomic rights in constitutional law: explaining America away" 6.3 International Journal of Constitutional Law 663-686 (2008).

[17]A Kumar "Two Different but same perspectives on Constitutional Morality" ILI Law Review 258-275 (2022).

[18]I Oernice, "Multilevel constitutionalism and the Treaty of Amsterdam: European constitution-making revisited" Common Market Law Review (1999).

control, and unrestrained censure of those very authorities as to all their public acts combined, too with a perfect confidence in the bosom of every citizen amidst the bitterness of party contest that the forms of the Constitution will not be less sacred in the eyes of his opponents than his own[19]."

Dr. Ambedkar spoke in the constituent assembly with great insight and eloquence regarding Constitutional Morality. He has become an icon for the backward class and with great pressure spoke about our social and political life, not only of the backward class but for all Indians. The Constituent Assembly discussed the role of the judiciary to protect constitutional morality. It has been entrusted with the duty to protect and preserve Constitutional morality[20]. For this, the Apex Court of India has been made as a guardian, protector and interpreter of the Constitution. Very devotedly constituent assembly has made that the Constitution and Constitutional Morality reject personal laws, traditions and Customs[21].

Constitutionality Morality is not only a recommendation rather it is obligatory, and considered as a tool for transformation and reforms depending upon the changing scenario in the nation. The definition of constitutional morality encompasses more than simply adhering to the letter of the law; it also ensures that the Constitution's ultimate goal a socio-juridical situation that allows each citizen to express their full human potential and for whom and by whom the Constitution was created which has been realized[22].

A democratic society based regime, the idea of constitutional morality and judicial principles assumes great importance and also attaches meaning to an individual's independence and dignity. Following the fundamental tenets of constitutional democracy is what is meant by constitutional morality[23]. Dr. Ambedkar has viewed constitutional morality as it maintaining the effective balance between the various group's competing interests and the administrative collaboration to resolve them amicably and without any confrontation to reach their goals at any cost.

The independent and fearless judiciary is accountable for safeguarding and upholding the constitutional principles, values, and protection of individual rights in a parliamentarian system of democracy[24]. Both removing judicial values from the constitution and the constitution not having judicial values are absurd. The idea of constitutional morality should be entrenched in each person's thinking, and it should also be acknowledged by the independent judiciary that upholds it[25]. Where judicial integrity is questioned and there is a lack of judicial vigilance, constitutional morality

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[19]Goswami, "On the Emergence of Constitutional Morality' as a Double Edged Sword in India" Jus Corpus LJ (2022).

[20]Nakul Nayak, "Constitutional Morality: An Indian Framework" American Journal of Comparative Law 13 (2021).

[21]Id. at 15.

[22]R Hirschl, Towards Juristocracy: The Origins and Consequences of the New Constitutionalism (Harvard University Press, London, 2009).

[23]Neomi Rao, "On the Use and Abuse of Dignity in Constitutional Law" 14 Colum. J. Eur.L.201-205 (2008).

[24]Owen M. Fiss "The Forms of Justice" 93 Harvard Law Review 1-58 (1979).

[25]Yaniv Roznai "Unconstitutional Constitutional Amendments: The Limits Of Amendment Powers" 124 (2017).

cannot be safeguarded[26]. People can approach the judiciary to obtain justice, which demonstrates the morality of the Constitution. It is stressed that people understand that justice has been done and that they actually receive it. There would be a relationship between judicial principles and constitutional morality in order to establish the sovereign mandate. The Constitution's emphasis on morals must be prudently preserved for the good of the people if it is to have any worth[27].

4. Majoritarian Morality: Discussing the dangers of Majoritarian Morality

Majoritarian morality[28] is a social and political phenomenon; it is different from the majority rule in the democratic system prevailing in the country. This socio-political incident occurs in society when the majority section of society tries to impose its values and ideals on the minority section of society. In other words, people are forced to live according to the values and ideals set by the majority, leaving the individual thoughts and values[29] .

Majoritarian Morality has started a discussion in the history of democracy that it would result in prejudice towards the minority and would also marginalize the minority section of society. For example, people belonging to the religious minority who do not share religious and cultural beliefs and values shall harm themselves by not getting a fair chance at political, educational, and employment opportunities in the democratic system[30].

Majoritarian morality can be defined as the belief that the majority of people should have the right to decide what is right and wrong. This means that moral decisions are made by the majority of the population and not by a few individuals[31]. This type of morality is often used in democracies, as it allows the majority of the population to determine the collective moral standards in society. In contrast to other forms of morality, majoritarian morality does not take into account the individual rights of individuals or minorities, but instead focuses solely on the wishes of the majority

Political systems where the dominant party is able to control the decision making which is based on the aspirations of the majority section of the society, may lead to the detrimental to the minority section of the society. This may result in less participation of minority groups in the political system of the country and also lead to a reduction of diversity in the democracy, which may leave some groups unrepresented in the politics of the country.

When the minority disagrees with the ideals and values of the majority then it would result in the violation of the individual freedom and rights of the minority people

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[26]Id. at 124.

[27]Inter Parliamentary Union, Democracy: Its Principles and Achievement, 4 (The Inter-Parliamentary Union, Geneva 1998).

[28]Supra note 24 at 2

[29]A.P. Chatterji, Tb Hansen, et.al. (eds.) Majoritarian State: How Hindu Nationalism Is Changing India 12 (Oxford University Press, 2019).

[30]Id. at 12.

[31]Bruno Amble, "Morals and Politics in the Ideology of Neo Liberalism" 9(1) Socio-Economic Review 3-30 (2011).

particularly freedom of speech, freedom of association including all other fundamental freedoms.

When majoritarian morality has been practiced in the democracy then minority groups have suffered a great amount of loss, particularly in their constitutional rights. Firstly in a democracy, the government is decided by the majority votes; moreover, the policy is framed in tune with the majority values and ideals which always affects the interests of the minority groups. These are the important key points that affect the interests of the minority in the majoritarian democracy.

Marginalization and Discrimination:-In a democracy based on majoritarian morality, minority groups are pushed toward the threshold of society and also subject to prejudice as a result of majoritarian morality. Minority groups are also not given equal opportunities and rights when the majority tries to impose their ideals and values on them. There are several examples such as political participation; employment, health, and education were made limited access to the minority in majority-based democracy.

Restricted Political Participation: In a democracy, the majority always has a huge influence on political decisions due to their numerical advantages. As a result, the majority may be able to enact laws and policies that support their own interests and beliefs while ignoring the apprehensions and necessities of the minority groups. Due to less political representation and their unheard opinion in the legislative bodies may not be taken while making the decisions.

Cultural Disintegration: In majoritarian democracy, minority groups always feel pressure to accept the cultural norms and practices of the majority. As a result of accepting cultural norms and practices lead to the destruction of their cultural identities and cultural norms. Additionally this lead to the repression of the minority culture, languages, and usages of the minority, and by this, they could be marginalized by the majority.

Inequality and Injustice: it is very easy to maintain sustained inequality and injustice by the majoritarian morality. It could happen that laws and policies based on morality may unintentionally result in inequality and unequal behavior against minority groups. By placing minority groups at a disadvantage and impeding their socioeconomic advancement, can exacerbate social and economic inequality.

Risk to Individual Rights: Individual rights and freedoms are very vulnerable to majoritarian morality. The individual rights, freedoms, and autonomy of members of the minority groups would be violated by applying the moral standards of the majority groups. This may involve the restriction to exercise the people's right to speech, expression, beliefs, and freedom of religion.

However, majoritarian morality is not bad all the time but it is dependent upon the circumstances in which it is used. Majoritarian morality is used in the development of society for example regulations could be put in order to protect the environment when it is supported by the majority of the people. Majoritarian morality is not always against the minority, it could be used to exploit the advancement of the society.

5. The Conflict between Constitutional Morality and Majoritarian Morality: Limiting the Power of the Majority.

Conflicts between constitutional morality and majoritarian morality arise when constitutional ideals and principles conflict with the preeminent beliefs and preferences of the majority. Constitutional morality refers to the values and precepts that promote individual liberties, advance equality, and ensure justice for all. Alternatively, majoritarian morality, which may or may not be consistent with constitutionalist values, is the collective moral perspective of the majority[32].

The judiciary has to strike a balance between constitutional morality and majoritarian morality and uphold and protect individual freedoms and also the rights of minority groups. The judiciary could do this while upholding the fundamental rights and values enshrined in the Constitution. It is the duty of the judiciary to protect the minority from the atrocities of the majority[33].

The Court can play an active role in protecting the rights of minority groups and promoting constitutional morality. It can also inform the citizens about their rights through their judgments and constitutional interpretations. The judiciary shapes public opinion and promotes constitutionalism by setting precedents and establishing legal principles[34].

The judiciary plays a vital role in resolving the conflict between constitutional morality and majoritarian morality. Some of the key features are how the judiciary can uphold constitutional morality.

Interpretation of the Constitution: Constitutional interpretation is the primary duty of the judiciary. If majoritarian morality and constitutional standards conflict, the judiciary must interpret the Constitution in a way that preserves its fundamental principles and protects individual liberties. While interpreting the constitutional provision judge's responsibility is to make sure that the constitutional provisions are not broken by majoritarian preferences.

Protecting Fundamental Rights: It is the duty of the judiciary to safeguard the constitutionally recognized fundamental rights particularly defend minority rights when there is strong apprehension that majority morality poses a threat to those rights for an individual or a group of people.

Judicial Review: The judiciary's ability to conduct judicial reviews is crucial in many democratic regimes. As a result, the judiciary can determine whether laws and policies passed by the legislature or government are constitutional. A judicial review can overturn a majority morality law even when it reflects majoritarian principles in order to uphold constitutional principles and protect minority rights. It is essential for many democratic regimes that their judiciaries can conduct judicial reviews. As a result, the

[32]Andras Sajo, Limiting Government: An Introduction To Constitutionalism (Central European University Press, Budapest, 1999).

[33]Wojciech Sadurski, "Judicial Review and the protection of constitutional rights" 22(2) Oxford Journal of Legal Studies 276 (2002).

[34]M.W. McConnell, "Active Liberty: A Progressive Alternative to Textualism and Originalism" 119 Harvard Law Review (2006).

judiciary is able to assess the constitutionality of laws and policies passed by the legislature and government. Even laws reflecting majoritarian morality can be overturned through judicial review to maintain constitutionality[35].

Maintaining a balance between Majority rule and Individual Rights: The judiciary always tries to maintain the balance between the individual rights of the citizen and the majoritarian rule. In a democracy, the majority is a necessary evil, but the judiciary has been an important organ of the government that checks the tyranny of the majority and protects the rights of minority groups. It checks the majoritarian influence and ensures that the rights of the very individual are protected and preserved.

Legal Principles and Precedents: The judiciary established precedents through its judgments given, that is converted into legal precedents and supported by every authority established in the country as a law. The judiciary established legal precedents that enrich constitutional values when there is a conflict between majoritarian and constitutional morality. The set of principles could be used as a precedent and torchbearer for future disputes.

6. Challenges Faced by Democratic Societies: Judicial View

Before the start of the twenty-first century, Constitutional morality has not been gained a place in the judicial discussion. Till recently, only a handful of judgments of the Supreme Court highlighted the principle of Constitutional morality. For the purpose of highlighting the role of the Apex Judiciary in establishing Constitutional Morality, we have to rely on some recent judgments delivered by the Court. Some of the judgments are which signify Constitutional Morality is Triple Talaq, Sexual Orientation, Abortion, Adultery, and the entry of women into a temple. These judgments of the Supreme Court help in understanding the tension between the two principles of democracy.

In Navtej Singh Johar v. Union of India[36] in this particular case, the Supreme Court accepted the arguments of the petitioners that Homosexuality, Bisexuality, and other sexual orientations are not forms of any disease. Criminalizing it, certainly, is a violation of the person's dignity and invades the right to privacy protected under Art. 21 of the Constitution. It also restricts the growth of the personality and hindered the exercise of freedom provided under the Constitution. The Supreme Court opined that the rights of the LGBT cannot be dependent upon the majority's beliefs. As history shows persons belonging to LGBT communities are discriminated against and vehemently abused on the basis of their identities and therefore they need protection and assurance that their rights always be protected, as the Constitution of India has provided equal protection of rights enshrined under the Constitution. Everyone irrespective of sex has been given full protection under the Constitution. Therefore, Section 377 IPC violates several fundamental rights, particularly the right to dignity, right to equality and liberty, freedom of choice, freedom of expression, and freedom of privacy. While upholding the sexual activities of the two consenting adults observed that "the overreaching ideals of individual autonomy and liberty, equality for all sans discrimination of any kind,

[35]L.B. Tremblay, "The legitimacy of judicial review: The limits of dialogue between courts and legislatures" 3(4) International Journal of Constitutional Law 618 (2005).

[36]Navtej Singh Johar v. Union of India, Writ Petition (Criminal) No.76 of 2016.

recognition of identity with dignity and privacy of human beings constitute the cardinal four corners of our monumental Constitution forming the concrete substratum of our fundamental rights that have eluded certain sections of our society". The Judgment of Navtej reinforced the jurisprudence of constitutional morality and forbade the majoritarian morality that supports the belief and aspirations of the majority section of the society.

Similarly, the Supreme Court has reaffirmed Constitutional morality over majoritarian morality while delivering the judgment in the case of Joseph Shine v. Union of India[37]. The Supreme Court made Section 497 unconstitutional on the grounds of the dignity of women and equality enshrined under the Constitution. This judgment made it clear that the idea of "a woman as a possession of her spouse" is completely contrary to constitutional principles.

The Supreme Court again gave effect to the personal choice of adult women to marry a person of the same or different religion[38]. The Apex Court overruled the judgment of the Kerala High Court which ordered the young girl to be sent to the custody of her parents until she married properly under the Indian tradition. Another vital example of personal autonomy was the case of Common Cause v. Union of India, wherein the Supreme Court of India has given permission for the execution of a living will of persons suffering from chronic terminal diseases and likely to go into a permanent vegetative state. In this case, the court has recognized the right to have a dignified death which is protected under Art.21 of the Constitution of India.

The biggest blow to majoritarian morality has been given by the Court in the case of Young Lawyers Association v. State of Kerala[39], which recognized the right of Hindu women to freely observe their religion irrespective of their age. The Apex court disallowed the societal practice of not allowing women of a certain age who are subject to mensuration to enter the temple considered to be an exclusionary and discriminatory practice and therefore, held to be a violation of Art.14, 15, 21, and 25 of the Indian Constitution.

Recently, a case has been filed before the Supreme Court of India to lift the ban on the screening of the movie Padmavat in the four states, the Supreme Court lift the ban stating that banning a film, or expression of creative content, from being exhibited is a great shock to the constitutional conscience[40].

The Supreme Court of India in of its various judgments highlighted the Constitutional morality in following "Constitutional morality in its strictest sense implies a strict and complete adherence to the Constitutional principles as enshrined in the various segments of the document. It is required that all constitutional functionaries to "cultivate and develop a spirit of constitutionalism" where every action taken by them is governed by and is in strict conformity with the basic tenets of the Constitution[41]."

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[37]Joseph Shine v. Union of India, Writ Petition (Criminal) No. 194 of 2017.

[38]Shaffin Jahan v. K.M. Ashokan, Criminal Appeal No. 366 of 2018.

[39]Young Lawyers Association v. State of Kerala, Writ Petititon (Civil) No. 373 of 2006.

[40]Viacom 18 India Pvt. Ltd v. Union of India, WPC (No.) 3402/2013

[41]Suribhi Jindal, "Social Morality vs Constitutional Morality with special reference to Navtej Singh Johar v Union of India" available at:https://articles.manupatra.com/article-details/Social-Morality-vs-Constitutional-Morality-with-special-reference-to-Navtej-Singh-Johar-V-Union-of-India (last visited on June 9, 2023).

7. Conclusion: Emphasizing the importance of Constitutional Morality in democratic societies.

Justice Dipak Misra has said "Constitutional Morality means to bow down to the norms of the Constitution and not act in a manner which would become violative of the rule of law of action in an arbitrary manner. It along with the commitment to the Constitution is a facet of Constitutional Morality"[42].

Constitutional Morality cannot be dependent upon societal morality, as Societal Morality is very subjective connotation. There can be no compromise between constitutional morality and social morality when it comes to establishing the rule of law. Under the guise of societal morality, individuals' fundamental rights cannot be violated, since

Constitutional morality is based on an appreciation of the diversity within society. Our Constitution is a living, organic document that may change as the needs and desires of society change. In order to confront injustice and evils that have been prevalent in society could only be addressed the court when they have been equipped with the progressive and practical interpretation.

There are many instances where the section of society does not want to accept the constitutional change but the Courts in India very enthusiastically propounded the constitutional principles which have been considered as the expression of the Constitutional Morality. With reference to Part III, IV, and V constitutional morality and judicial values have been examined very minutely to further individual, social, political, and judicial justice. Part III of the Constitution of India has been considered transcendental and plays a vital role in securing justice in civilized societies which are based on constitutional morality.

The preamble of the Constitution of India embodies the pledge to provide justice which should be in the nature of social, economic, and political. That pledge could only be used as means to achieve constitutional morality and judicial values. It has been accepted that constitutional morality and judicial values are inalienable in achieving the goals of the democratic setup.

In the end, we can say that in a democratic society, there has been no place for majoritarian morality. It leads to injustice to the minority people living in the society and hinders the growth of the society as well as the individual of the society. Constitutional Morality backs and supports the transparency and credibility of the judiciary. It also respects individual autonomy rather than societal commonness. So for the strengthening of the democratic setup, Judiciary should respect the Constitutional principles and values which form the core values of constitutional morality.

[42]Manoj Narula v. Union of India, Writ Petition (civil) No. 289 of 2005.

PUBLIC HEARING IN PAROLE: A COMAPARATIVE ANALYSIS

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Abstract

This paper examines public hearing of parole from a comparative perspective. It begins with a brief overview of the history and purpose of parole hearings. It then discusses the different types of public hearing models used in various nations. Comparative analysis of the public hearing process in each jurisdiction is provided, including how the public's role and input may differ. The study also explores how public hearing of parole has evolved over time and how it may be affected by current trends and changes to the criminal justice system. The paper attempts to highlights the benefits and limitations of public hearing of parole.

Keywords: *Parole, Law, Citizens , Transparency*

INTRODUCTION

The Supreme Court in the extra ordinary appellate jurisdiction while deciding a special leave petition has reiterated period of Parole is to be excluded from the period of sentence and observed that Parole is granted by the State Government. For parole, specific reason is required. Parole can be granted for number of times[1]. As the authority to grant parole rests with the state government prisoners who are influential may be granted parole for many numbers of times. This quasi-judicial function of the executive had always been into question in many cases which came in lime light of the common man through media.

Once an accused is convicted, he is exposed to altogether a different life of the prisons. In India prison is a state subject[2] so the state government legislates on functioning of prisons and role of different functionaries for prison administration.

Unlike probation, Parole is not very widely known as a correctional means for offenders as the proceedings are not in public and decided by the administrative authorities. Parole is an opportunity offered to some people convicted of crimes to serve part of their sentence outside of prison while still under correctional supervision[3].

[1]Rohan Dhungat Etc. v. The State of Goa & Ors Etc.,Special Leave Petition (Crl) Nos. 12574-12577 OF 2022 (@ DIARY NO. 29535 OF 2022).

[2]The Constitution of India, Seventh Schedule, State List, Entry 4.

[3]Alabama Prison Team, Daniel Teehan (Ed.), A Guidebook to Parole in Alabama, (Southern Poverty Law Center, 2019).

The grant of parole is governed by rules made under Prison Act, 1894 and Prisoners Act, 1900. Different State governments have also formulated various guidelines to bring out objectivity and facilitate decision-making to determine whether parole needs to be granted in a particular case or not. Such decisions are taken in accordance with guidelines framed from time to time[4].

The controversial paroles granted to Manu Sharma who was convicted for the murder of Jessica Lall in 1999 by Delhi Government though there was opposition by the Delhi Police[5]. In this case the convict was also found guilty of violating the parole conditions. In H.C. Arora v. State of Haryana[6] wherein The division bench of Chief Justice Ravi Shanker Jha and Justice Arun Palli ofPunjab& Haryana High Court dismissed the petitioners petition as withdrawn who had earlier moved the High Court through an ordinary writ plea challenging the 40-day parole granted to Dera Sacha Sauda Chief Gurmeet Ram Rahim Singh's who was convicted for the offences of rape and murder and later the plea revised and re-filed as a Public Interest Litigation. During his parole the offender was found virtual satsang from his Dera in Bhagpat, UP, and was addressing his followers all over the world. The petitioner also pleaded that Haryana Good Conduct Prisoners (Temporary Release) Act, 2002 confer powers on the competent authority to distribute "facility of parole like largesse". Later in this petition satisfied by the state government undertaking the petition was withdrawn[7].

Though all citizens are equal in the eye of law but there have been incidents of the misuse of the grant of Parole by the competent authority on one hand and also the convicts who have at many occasions fled thereby abusing the reformative privilege which is granted. Such incidences should not take away the objective of this correctional means Parole as social welfare reformative legislation for penal reforms[8].

Now the question has arisen whether still the same structure, procedures and powers which is enjoined by the competent authority is to be continued or it is need of the time that India should also adopt Public Hearing of Parole which recently introduced in United Kingdom. This paper attempts to analyse the legislative frame work relating to the Public Hearing in United Kingdom with reference to law of Parole in India.

The findings of this study will contribute to the understanding of the public hearing process for granting parole in different jurisdictions. This study will provide insights into the similarities and differences in the parole process, as well as the impact of these differences on the outcomes of parole decisions. The findings of this study may be used to inform policy and practice related to the parole process in different jurisdictions.

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[4]Singh & Associates, India: What Is Parole?,available at:https://www.mondaq.com/india/trials-amp-appeals-amp-compensation/905726/what-is-parole(last visited on March 7, 2023).

[5]Varsha, Parole Law in India: A Tool to Social Rehabilitation or Route to Recidivism,available at:https://bnblegal.com/article/parole-laws-in-india-a-tool-to-social-rehabilitation-or-route-to-recidivism/(last visited on January 7, 2023).

[6]H.C. Arora v. State of Haryana,CWP-PIL-111-2022.

[7]Ibid.

[8]Supra note 4

History of Parole

The positivist school of law is the source of the concept of parole. Samvel G. Howe, a criminal reformer from Boston, used the phrase "parole" in a correctional context in 1847. According to the Classical School of Philosophy, individuals are free to select their own actions. By committing a crime, a criminal continually evaluates his profit and his pleasure at the expense of the misery of others. Thus, he must be punished. Yet, the positivist school asserted that individuals committed crimes due to external factors. He must therefore be rehabilitated. The concept of parole eventually developed. It provides the prisoner a second chance to reform. Even if the offender may have committed a crime, it is undesirable for him to be permanently stigmatised and denied the opportunity to rehabilitate.

INTRODUCTION TO PAROLE AND PUBLIC HEARING

The origins of parole can be traced back to military law. Prisoners of war were granted temporary freedom so that they may return home and participate in society for a period, with the promise that they would return at the end of this time. With the passage of time, parole was included into India's criminal justice system so that convicted individuals could serve as contributing members of society for a period of time. Thus, only prisoners who had already served a portion of their sentence were handed this item[9].

Defining parole into a single statement or as a single concept would be a very complicated exercise and might even be futile. It is an integral concept of the rehabilitation and correctional process achieved with constant input and help from the society and its actors[10].

It is a method for the temporary release of prisoners based on their good behaviour, allowing them to maintain family and social ties while fleeing from prison. This helps healing and social reintegration. In addition, parolees are required to report periodically to their parole officer for the term of their release. A prisoner who has not yet completed his or her sentence may petition for parole and be granted temporary freedom[11].

Audience Regarding Parole & Public Participation

In the context of parole, a public hearing is a meeting when members of the public can express their thoughts on whether a person convicted of a crime and sentenced to prison should be released on parole early. In this type of hearing, the parole board incorporates public opinion into its deliberations. The notion of public hearing may include, but is not limited to, victim/s, family members of the parties, media-houses, members of the community or society, and anybody else who desires to participate in the hearing. Nonetheless, in many nations the hearing normally consists of the convict, his legal

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[9]Parole in India - Current state and the Need for Reforms- I, available at:

https://criminallawstudiesnluj.wordpress.com/2021/02/23/parole-in-india-current-state-and-the-need-for-reforms/ (Last visited on March 4, 2023).

[10]N.V.Paranjape, Criminology and Administration of Criminal Justice, 177 (Central Law Publication, Allahabad,1970).

[11]K. Sangeetha,"A Critical Analysis on Law Governing Parole in India" Scholars International Journal of Law, Crime and Justice, (2019).

representation and the members of the board charged with the job of deciding whether the guilty shall be released back into the society.

A comparative analysis of public hearings in parole systems can assist in detecting differences and similarities between nations and jurisdictions. Here are some factors to consider:

Legal Framework

The legislative basis for parole hearings may differ from nation to nation. In several countries, including the United States, parole is a form of discretionary release. In some countries, such as the United Kingdom, parole is mandatory, and parole boards must consider the release of every eligible prisoner. Several criteria have been established and must be met in order to determine parole eligibility and subsequent release.

Citizen Participation

The involvement of the general public in parole hearings may also vary. In some nations, such as the United States, parole hearings are common, and the public is given the opportunity to voice its view. In other countries, like as the United Kingdom, public hearings were less frequent and recidivism risk assessment was prioritised. The United Kingdom has just instituted the option of requesting a public hearing, which may or may not be granted. The first public parole hearing in the history of the United Kingdom is planned to take place on December 12, 2022[12], following enhancements to increase transparency and improve parole system victim experiences.

Moreover, the method for granting parole may differ from one jurisdiction to another. In the United States, the parole board has extensive decision-making authority, and public opinion can influence its choices. In India, for example, the parole board evaluates the case based on its merits and requests information from the judges and attorneys involved in the trial to decide if granting release would be consistent with parole standards.

Transparency

The level of openness during parole hearings is a further variable aspect. In the United States, the general public and the media have access to public hearings, and internet transcripts may be made available. The parole applicant and other relevant parties, such as their legal representatives, the prison governor, and the victim or their family, would be informed of the parole board's decision and receive a copy of the transcript in the United Kingdom. India adheres to the principle of the court issuing the order issuing a certified copy.

A comparative review of public hearings in parole systems can help discover differences and similarities between nations and jurisdictions. It can also feed discussions on how to enhance the effectiveness and fairness of parole regimes.

[12]First public parole hearing following government reforms, available at:

https://www.gov.uk/government/news/first-public-parole-hearing-following-government-reforms (Last visited on March 1,2023).

A COMPARISON OF THE PAROLE PROCEDURE AND THE PUBLIC HEARING

United Nations of America

In the United States, state parole boards hold public hearings on parole. Those having the authority to grant or deny parole to eligible inmates are appointed to parole boards. When determining whether to grant parole, parole boards frequently conduct private interviews with convicts and assess their criminal records, institutional behaviour, and other relevant factors[13].

During a parole hearing, the prisoner will appear before a parole board, which is normally comprised of state or federally appointed officials. The board will assess the prisoner's case, including their criminal background, prison conduct, and any other circumstances that may affect their release eligibility. During the hearing, the prisoner will have the opportunity to speak, as will any victim or family member who wishes to address the board. Also, the board will consider any written statements from the prisoner, victims, or any parties with an interest[14].

Procedures and requirements for parole hearings differ from state to state in the United States, and not all jurisdictions hold parole hearings in public. In several states, the public can participate in the parole process through public hearings[15].

Because parole regulations vary significantly from state to state, it is difficult to estimate the exact number of states that hold public parole hearings. In 2021, at least 24 states will include some form of public participation in the parole process, such as public hearings, victim impact statements, or other feedback. Alabama, Arizona, California, Connecticut, Florida, Georgia, Illinois, Indiana, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Missouri, Nevada, New Jersey, New York City, State of North Carolina, Ohio, Pennsylvania, Tennessee, Texas, Virginia, and Washington make up these states[16].

The state of Indiana's official government website displays the following message allowing for parole hearings to be held in public when applicable or feasible in the interest of justice: "*A Parole Board Hearing is a proceeding in which the parole board permits the offender, victims, witnesses, and other interested parties to express their support or opposition for the parole of the offender. The parole process involves two distinct hearings before the parole board*.

The public hearing is informal, and all parties, including victims, witnesses, and family members, are welcome to express their support or objection to the parole of the criminal. You have the right to makean oral, written, filmed, or audio-taped statement to the board. You would not be required to be present to submit a statement.[17]"

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[13]U.S. Parole Commission, available at: https://www.justice.gov/uspc/frequently-asked-questions(Last visited March 5, 2023).

[14]Ibid.

[15]Ibid.

[16]The parole procedure's rules and regulations are subject to change over time.

[17]Indiana Department of Correction, available at: https://www.in.gov/idoc/operations/parole/hearings/ (last visited on March 3,2023).

Canada

Canada has a more accessible parole hearing system. In Canada, parole hearings are open to the public unless the offender wants a closed hearing. The public may attend and give spoken or written statements in person or in writing. In addition, the detainee may respond to any statements made during the hearing. The decision, however, remains with the board assembled for the parole hearing. The victims have the option to submit a form indicating whether or not they will attend the parole board hearing. The media are permitted to interview the victim if they so wish, and often report on the proceedings of the board as soon as they conclude[18]. The defendant may have his attorney present and submit evidence and arguments to support his case.

United Kingdom

The parole hearing statute in the United Kingdom underwent a significant revision lately, with rule 15 containing new requirements.

The Parole Board (Amendment) Regulations 2022[19] amended the Parole Board Rules 2019 beginning on July 21, 2022. The National Archives published version of the rules has not yet been modified. Rule 15 currently says:

"*1) An oral hearing must be held via video link, telephone conference or other electronic means if the duty member or panel chair so directs.*

(2) In all other cases, the oral hearing must be held at the location designated by the duty member or panel chair, with the approval of the Secretary of State.

(3) An oral hearing (including a direction hearing or case management conference) must be held in private unless the Board chair determines, on their own initiative or in response to an application to the Board, that holding the oral hearing in public is in the interests of justice.

(3A) Any request for a public oral hearing under subsection (3) must be made no later than 12 weeks prior to the scheduled oral hearing date.

(4) Whenever an oral hearing is conducted in public, the panel chair or duty member may direct that a portion of the hearing be conducted in private.

(5) During the oral hearing, the parties may not contest the presence of any witness called pursuant to these Rules or observer whose presence has been approved pursuant to Rule 14.[20]"

As a result, these new regulations have ushered in the era of public hearings in parole procedures, where a hearing may be requested if the parole board judges it to be in the interest of justice or in response to an application. When a section of a procedure is to be discussed or presented that may contain confidential information or evidence that is not to be made public, the board may order that portion of the procedure to be done in private and records to be sealed.

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[18]Government of Canada, available at: https://www.canada.ca/en/paroleboard/corporate/publications-and-forms/victims-observing-a-parole-hearing.html (last visited on March 3,2023).

[19]Parole Board (Amendment) Rules 2022. Instrument, 2022 no. 717.

[20]Opening up the Parole Board, available at: https://rozenberg.substack.com/p/opening-up-the-parole-board (Latest visit on March 5, 2022).

The Deputy Prime Minister, Lord Chancellor, and Secretary of State for Justice, Dominic Raab MP, stated that permitting parole hearings to be held in public is a huge step forward for victims who wish to witness justice being served in person.

"*It marks the first step in our reforms to overhaul the system - putting victims and public protection front and centre of the process*.[21]"

JAPAN

In Japan, only the victim, the victim's family, and the offender's family are permitted to attend mandatory public hearings. The public is not allowed to attend the hearing or address the board directly. The purpose of the hearing is to provide the victim and their family an opportunity to express their views and to tell the offender of the harm they have caused. When the regional parole board approves the chief of a correctional facility's parole application or finds parole necessary, parole proceedings are commenced. It is emphasised that prisoners have no right to apply for their own parole[22].

A Japanese prisoner may be eligible for parole if they have served a certain amount of their sentence and meet further qualifying requirements. The parole eligibility requirements differ based on the sort of crime committed and the prisoner's individual circumstances.

In Japan, parole hearings are conducted by a panel of experts who examine the prisoner's case and make a recommendation to the Minister of Justice. The panel examines matters including the offender's prison behaviour, level of remorse, and plans for rehabilitation and reintegration into society[23].

The Ministry of Justice makes the final choice whether the parole board recommends release on parole. The prisoner may be granted parole under certain conditions, such as regular contact with a parole officer and activity restrictions.

Particularly, the parole system in Japan is often criticised for its low approval rates and lengthy evaluation process. Several efforts have been made to make the system more effective and fairer for convicts.

Even while a vast number of Japanese individuals contribute willingly to the parole system in the form of "*hogoshi*"[24] their actual participation in parole hearings remains very limited.

INDIA

Parole is the conditional release of the to the prisoners after they have undergone a portion of their sentences[25]. The grant of parole is essentially an executive function and instances of the temporary release of convicts in custody on parole were literally unknown the Supreme Court and some of the High Courts in India have ordered for the

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[21]Supra note 12.

[22]Offender Rehabilitation in Japan Walk along with local communities,available at: https://www.moj.go.jp/content/001345372.pdf(Last visited on March 3, 2023).

[23]Ibid.

[24]Ibid.

[25]N.K. Chakrabarti, Institutional Corrections: In the Administration of Criminal Justice 126 (Deep & Deep Publications Pvt. Ltd., New Delhi, 1999).

release on parole on humanitarian considerations. Releasing a detenu on parole is a wing of the reformative process as to provide an opportunity to the prisoner to transform himself into a responsible citizen. The release on parole does not change the status of the prisoner. The State Governments have framed rules providing supervision by parole authorities of the convicts released on parole and in case of failure to perform the promise, the convict released on parole is directed to surrender to custody[26].

Thus, the grant of parole limits, the ill effects of incarceration and provide an acceptable means of reducing the burden of actual period of incarceration. It provides an opportunity to test the rehabilitation programmes prior to the expiry of sentence. Parole provides a means of protection to society from recidivism on the part of the released offender. Prof. Goswami observes: *Parole along with the companion service of probation, has demonstrated the efficacy of non-institutional treatment of offenders*[27].

The term Parole has not been defined under any law. But Section 2(p) of the Delhi Prisons Act, 2000, defines a Parole System. According to Section 2(p), "Parole system means the system of releasing prisoner from prison on parole by supervision of their sentences in accordance with the rules[28]."

As there are no uniform laws for Parole and each state has its own procedures for the grant of parole so it results ambiguity.

In India, there are provisions for parole hearing but not as public hearing, and it is provided the specific state legislation. In certain conditions, parole is the temporary release of a prisoner prior to the completion of his or her sentence. The government has the discretionary power to give parole, which is typically granted for a limited period of time to allow the prisoner to maintain family links, participate in employment or educational programmes, or seek medical treatment. Even though India recognises parole as an administrative benefit, it is not declared as a Right. A prisoner's right to parole is not absolute, and parole is granted at the discretion of the prison administration.

Generally, the hearing takes place at the district level, and the inmate has the chance to attend and argue their case before the board. If the prisoner is unhappy with the outcome of the hearing, he or she may file an appeal against the board's decision.

In India, parole is given after a hearing in which the case of the prisoner is heard by a panel of government officials and professionals. The parole board considers a range of factors when evaluating whether to grant parole, including the prisoner's conduct while confined, their family circumstances, and the nature of the offence. Before granting parole, the authorities consider reports from social agencies, pre-parole investigation reports, court or prosecutor comments, and studies and observations conducted by qualified prison staff during the inmate's incarceration. These studies may involve mental and psychological evaluations, a thorough social history, in-depth pre-parole investigation reports generated by field officers, the inmate's prison education, his behaviour and attitude, and a number of other relevant aspects.

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[26] Poonam Lata v. M.L. Wadhawan (1987) 3 SCC 347.

[27] B.K. Goswami, Criminology & Penology 172-173(Allahabad Law Agency, 1987).

[28] The Delhi Prisons Act, 2000, s. 2(p).

THE CASE OF RUSSEL CAUSLEY

Russel Causley was convicted of murdering his wife and given a prison sentence for the crime. The body of his wife was never recovered, and the perpetrator never gave any information about her, despite the passage of a law mandating such disclosure. He was initially granted parole on licence but was later sent to prison for violating the terms of that licence. Russel Causley's case would be the first to be heard in public following the modification of U.K. legislation pertaining to public hearing, based on an application filed by a member of his family and a member of the media.

Caroline Corby, chairwoman of the Parole Board, explained why she authorised the public hearing[29].

1. "*Since November 2020's Prisoners (Disclosure of Information about Victims) Act and July 2022's Parole Board guidelines allowing public hearings, Mr. Causley's case is the first in which the prisoner has not disclosed the location of the victim's body. As a result, the primary hearing will focus on recall reasons and risk assessment, but the public will have its first opportunity to observe how the Parole Board handles this issue.*
2. *Mr. Causley was convicted of murder. If the crime is significantly heinous, a public hearing is required for justice.*
3. *The general populace misunderstands Parole Board judgements. The case of Causley is well-known. The media and victims support a public hearing. It calls for recall. The public interest in comprehension should therefore be addressed when evaluating justice.*[30]"

The victims seek hearings in public. The victims believe that a public hearing would aid them. Even when the victims have permission to attend a private hearing and would be present regardless, their preference for a public hearing is relevant.

Finally, Russel was released on parole, considering the progress he had made while incarcerated and imposing rigorous conditions for his continued enjoyment of parole issued on licence[31].

ADVANTAGES AND DISADVANTAGES

Public parole hearings have the potential benefit of increasing the process's transparency and accountability. When the public is permitted to attend and provide input, it can increase confidence in the process's fairness and ensure that decisions are made with public safety in mind. When the public participates in a proceeding, they are better able to comprehend why a decision was made. When kids participate in the process, they begin to comprehend the cause and impact of any circumstance or board decision. Justice is both administered and observed, which reinforces the foundations of the public's faith in judicial and executive operations.

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[29]Supra note 20.

[30]Supra note 19.

[31]Summary following the public hearing for Russell Causley, available at:

https://www.gov.uk/government/publications/summary-following-the-public-hearing-for-russell-causley (Last visited on March 6, 2023).

Nonetheless, there are significant drawbacks to public parole hearings. In some circumstances, public opinion may be more swayed by emotion or misinformation than by relevant facts concerning the offender's behaviour and possible harm to the community. Moreover, public hearings may increase the chance of media coverage and public scrutiny, which may influence the decision-making process. Prejudice has always posed a danger to the concept of natural justice, and such a hearing would develop prejudice in the mind of the adjudicator in one way or another. The public humiliation of the accused as a result of unverified written comments provided by the general public would likewise be unjustified and inappropriate. If the board decides to release a criminal against the preferences of the general populace, the accused may also be at risk of popular indignation and violence. Media trial and TRP-centred portrayal of the case may have the reverse of the desired effect.

SUGGESTIONS & CONCLUSION

When considering the programme for parole public hearings in India, a blend of many countries may be considered. The primary necessity would be either consistent legislation or unambiguous state regulation that would dispel the haze surrounding the concept. A hearing with restricted access and facilities for written submission of any comments directly to the panel board would enable the panel member to examine the statement and make any appropriate enquiries from the accused and his counsel. As in Canada, only the parties involved should have access to direct interference and the ability to speak at such public hearings. Media outlets will be required to report the transcript verbatim and to preface any statements or speculation with appropriate disclaimers. The decision on whether or not a hearing should be held in public should be made after deliberation behind closed doors.

In order to retain social bonds, parole allows convicted individuals a period of time back in society. It also creates the prospect that the recidivism rate can be reduced. An opportunity for a second chance in society. A chance to make amends for the harm caused and a chance for penance, even though time is limited and the objective is predetermined. Public parole hearings increase the transparency of the current system. It enables matters of societal interest to be decided with input from and in front of the public. Also, victims gain from the public assistance extended during these periods.

REFORMS IN BAIL PROVISIONS FOR THE UNDERTRIALS IN BAILABLE AND NON-BAILABLE OFFENCES

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"An undertrial cannot be indefinitely detained in prison if there is a delay in concluding the trial. The courts would ordinarily be obligated to grant bail if a timely trial is impossible and the accused has been in jail for an extended period".

Supreme Court of India

Abstract

Currently, the prisons in India are overcrowded, mainly due to the retention of many undertrials in bailable and non-bailable cases. Several factors, which include present regulations, their interpretation, and the intention and knowledge of various agencies involved in delivering justice, have led to a situation of concern. The present circumstances will create unmanageable administrative issues within the prison, leading to a considerable loss of faith in Indian criminal justice jurisprudence amongst ordinary citizens. The article aims to evaluate the existing regulations of bail provisions for bailable and non-bailable offences and bring out the limitations of law and practices which have increased the strength of undertrial in detention. Also, the issue of anticipatory bail provisions shall be covered. Some of the much-needed reforms in the existing mechanism shall be covered along with the recommendations for improvement.

Key Words: *Cognizable offence, bail, non-bailable offence, undertrial.*

I. Introduction

The Indian legal system covers various exhaustive procedural mechanisms regarding the grant of bail to ensure fair treatment to the accused under the law and, on the other hand, ensures that the accused does not circumvent the law of the land, weakening the victims' faith. The constitution's framers understood the delicate balance over such sensitive issues of the relevant criminal procedures; however, they also perhaps failed to anticipate the magnitude of adverse impact on those undertrials presently confined in prison. Does the law adequately address the rights of all undertrials in a criminal investigation? If yes, then perhaps nothing can be further contrary to the truth. In actuality, the facts are not very encouraging. The 268th Law Commission report quotes, "*powerful, rich and influential obtain bail promptly and with ease, whereas the masses or the common or poor languish in jails*"[1]. The commission has categorically emphasised that the bail conditionality should be on the case's merit rather than the accused's status.

[1] Jain, Singh, and Akanksha Ashish. "Victim-Oriented Criminal Justice System-need of the Hour." (2017).

It also raised concern that 67 per cent of the cases rendered trials are in prison[2]. The natural consequence of the frequent denial of bail is that the prison's capacity has been exploited to a magnitude, amounting to severe administrative issues. National Crime Records Bureau (NCRB) has given rising figures of undertrial prisoners who represent the economically weaker sections, deprived classes, and minority communities without education and financial capability to protect their rights[3].

Bail is a rule rather than an exception in the legal fraternity, especially in cases of bailable offence. In Rasiklal v. Kishore Khanchand Wadhwani AIR 2009 SC 1341, the court stated that in a bailable offence, there is no question of discretion in granting bail as the words of section 436 are imperative[4]. Section 436 to 450 of the CrPC mentioned the provisions under which the Session Court and Superior Court can grant bail to the accused. The genesis of adding the bail provision to the guilty was that the guilty was assumed to be innocent until proven otherwise. Therefore, it becomes essential to understand the various bail provisions in the Indian legal system for bailable and non-bailable offences and analyse the causes of the significant strength of undertrial prisoners in Indian prisons. The paper will cover the law on the issue of bail, critical judgements, and the present status of undertrial prisoners, and it will recommend measures for improving the present conditions. The paper's content will be valuable for all those interested in criminal law procedures.

II. Bail Mechanism in Bailable and Non-bailable Offences

In cognisable offence, the police, while undertaking the investigation, can arrest the suspect without a warrant as per section 57 of the Criminal Procedure Code (CrPC) if the investigation is by an investigating officer of the rank of a sub-inspector[5]. The suspect is produced before the magistrate within 24 hours as per law. The magistrate may grant the police his custody on the case's merit. Under section 167 CrPC, the magistrate will not grant the custody of the accused to the police beyond 15 days[6]. He also holds the discretion for deciding whether the accused goes to police custody or judicial custody. In the executive magistrate's case, the custody period cannot be beyond seven days[7]. While assessing the case's merits, if the magistrate feels that the police custody is unwarranted, he can send the accused to judicial custody, which cannot be beyond 90 days, where the accused faces a charge for an offence punishable by imprisonment for a period, not less than ten years[8]. If the offence is punishable by less than ten years,

[2]Kumar, Manish. "Anticipatory Bail: The Concept and implication Under criminal Procedure code, 1973." PhD diss., (2021).

[3]Chandra, Aparna, and Keerthana Medarametla. "Bail and Incarceration: The State of Undertrial Prisoners in India." Approaches to Justice in India, Shruti Vidyasagar et al. (ed.), Eastern Book Company (2017).

[4]Das, Paulomi. "Detailed Study of Bail in India." LexForti Legal J. 1 (2019): 20.

[5]Raj, Pracheen. "CUSTODIAL DEATH CRITICAL ANALYSIS." Ilkogretim Online 20, no. 1 (2021).

[6]Al-Mamun, Abdulla. "Abusive of Police Power and Challenges to Prevent Under the Code of Criminal Procedure 1898." International Journal of Law and Politics Studies 1, no. 1 (2019): 10-14.

[7]Das, Sayan S. "Environmental Law in India." (2014).

[8]Vaghela, Ramesh. "DEFAULT BAIL: A STUDY OF CASE LAW." Journal of the Indian Law Institute 45, no. 1 (2003): 80-96.

judicial custody cannot be more than 60 days. Beyond the provision of such a period of judicial custody, the accused is eligible for bail at the pre-cognisance stage if the charge-sheet has still not been filed in court by the police. The accused's detention order by a magistrate mandates forwarding a copy of the order with reasons for the detention to the office of the Chief Judicial Magistrate[9].

However, if the magistrate believes that the accused has not committed any non-bailable offence, the charges still need investigation; he may grant bail to the accused under section 437 (2) CrPC[10]. In the case of Seema Singh vs Central Bureau of Investigation AIR 2018 SC 2161, the court stated that the accused charged with a serious offence by itself is not grounds to deny him bail if other circumstances justify the grant of bail . The granting of bail is merely the entrustment of the accused person to those who give his sureties for being available subsequently for the legal proceedings. The bail may have the condition that the person giving the accused's surety deposits a sum of money as a bond. The genesis of bail is that the law considers the accused innocent until proven guilty. However, if the same court feels the accused will be under custody later, he may cancel his bail under section 437 (7) CrPC[12] .

The bail is often rejected due to a lack of competent legal aid unavailable to the accused to represent his case in front of the magistrate. Many of the accused cannot hire competent lawyers to represent their cases, and the free legal aid (*generally through District Legal Aid Services Authority*) available through the legal provision (*Article 22 of the constitution guarantees an accused legal representation in the court of law*) often proves inadequate to take up the case justifiably in front of the court. The law enforcement agencies involved in the case and the lower court must be well-versed in providing bail in bailable (*under section 436 CrPC, the bail can be granted by the police station itself*) and non-bailable offences while considering granting bail to the accused. There have been several cases on record in which, on scrutiny of facts, it was realised that there was a sheer lack of knowledge of provisions of the grant of bail amongst the authorities, which was avoidable and caused undue delay. Here, the question arises as to why granting bail is essential to the accused. Only once the accused is on bail would he have a fair opportunity to prepare his case backed with evidence and witnesses to prove his innocence, which otherwise will be adversely impacted if he is in prison or custody. The genesis for the grant of bail culminates from the essential provision of Article 21 of the constitution, which states that each individual has a right to safeguard his/her liberty, and any undue detention or arrest violates such right.

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[9]Nirmal Singh Heera, A., and N. Prabhavathi. "Police Brutality and Custodial Torture in Technological Era: Need for Anti-Torture Law in India-A Critical Analysis." Indian Journal of Forensic Medicine & Toxicology 15, no. 2 (2021).

[10]Sadiq, Shereen. "Women under trial: an enquiry into the efficacy of Section 437 (1) of the Indian Criminal Procedure Code, 1973." In First International Conference of the South Asian Society of Criminology and Victimology (SASCV), 15-17 January 2011, Jaipur, Rajasthan, India: SASCV 2011 Conference Proceedings, p. 287. K. Jaishankar, 2011.

[11]https://indiankanoon.org/doc/62770560 (Visited on 30 Nov 2023).

[12]Malik, Lokendra, and Shailendra Kumar. "Personal Liberty vs. Societal Interest: The State of Bail Jurisprudence in India." Taking Bail Seriously-The State of Bail Jurisprudence in India (2020).

If the trial court rejects the bail petition of the accused, he may approach the High Court for bail under the provision of section 439 CrPC[13]. The Supreme Court, in Himanshu Chandravardhan Desai v. State of Gujarat AIR 2006 SC 179, stated,"the Supreme Court should not ordinarily, save in exceptional cases, interfere with orders granting or refusing bail by the High Court because the High Court should generally be the final arbiter in such cases"[14]. Once the police file the charge-sheet as per section 173 CrPC, the magistrate under section 309 CrPC can hand over the accused to the police on remand . However, a reasonable amount of delay has been observed in several cases regarding the execution and implementation of these procedures. In 2005, the Supreme Court took notice of this fact. In the case of Bhim Singh v. the Union of India, an amendment in section 436A (section *436 of the CrPC deals with bailable offence*) created a provision that any accused who has served about half the period of maximum punishment awardable under the offence shall be granted bail .The detention by denial of bail to any accused should not be used as a punitive measure by the state. Some of the provisions of the grant of bail are also in desperate need of reform. For instance, monetary assurance asked by courts as a precondition for the grant of bail makes it utterly impossible for poor people to benefit from the provisions, adversely impacting their liberty. Some cases of plea bargaining have come before the courts due to disadvantages faced by the deprived class, who, as an alternative, opt for it to ensure a reduced sentence.

Suspects charged under special laws, for instance, the Narcotics Substance and Psychotropic Drugs (NDPS) Act 1985, the Arms Act 1959, terrorist acts, and other unlawful activities, are booked under non-bailable provisions. Although the CrPC defines a bailable offence as having a punishment of fewer than three years and a non-bailable offence with more than seven years, it still does not explicitly define bail itself, leaving the scope of interpretation by the courts. The court examines the nature of the accusation, the severity of punishment, and the type of evidence in existence before considering the accused's bail application. If the court believes the release of the accused will jeopardise the complainant's safety or lead to tampering with the evidence, it may deny the bail.

Under conditions where the police investigation is incomplete, even within six months, the magistrate can close the investigation if he feels that further delay would not assist in imparting justice to the concerned parties. Such a magistrate's decision is challenged in the session court under section 167 (6) of CrPC[17].

III. Provisions of Anticipatory Bail

The accused has a provision to apply for anticipatory bail under section 438 CrPC if his

[13]Rahman, Talha Abdul. "IN THE CUSTODY OF LAW." Journal of the Indian Law Institute 60, no. 4 (2018): 427-443.

[14]https://indiankanoon.org/doc/75690/ (Visited on 30 Nov 2023).

[15]Pandey, Advocate Kamal Kumar. "BLOG SEARCH."

[16]https://www.thestambhorganization.com/post/bhim-singh-vs-union-of-india-and-ors#:~:text=Through%20Bhim%20Singh%20Case%20there,cases%20to%20ensure%20criminal%20justice. (Visited on 30 Nov 2023).

[17]Chatterjee, Swarnendu, and Chetna Alagh. "Gautam Navlakha vs National Investigation Agency: A Jurisprudential Analysis." Jus Corpus LJ 1 (2020): 16.

arrest is possible under a non-bailable offence[18]. Filing an FIR is not a prerequisite for seeking relief under anticipatory bail. The provision of anticipatory bail in the Indian criminal legal system came on the recommendation of the 41st Law Commission report of 1969[19]. The provision of anticipatory bail protected individuals against any form of false accusation. However, the courts have a broad discretionary power while deciding upon the grant of anticipatory bail and cannot be taken as a right. The session or high court can give anticipatory bail over such matters. For instance, the Kerala High Court granted anticipatory bail to filmmaker Aisha Sultanain a sedition case against her for a slanderous remark against Lakshadweep administrator Praful Khoda Patel[20]. During a debate on a Malayalam news channel, Sultanawas critical of the administration's handling of the political crisis in Lakshadweep. During several case hearings related to anticipatory bail, the courts opined that the provision would be valid when the accused is arrested. Some conditionality added to anticipatory bail include invoking the provision only when the offence is non-bailable and the accused is sure of his likely arrest. The session court and the higher courts hearing the anticipatory bail need to consider the facts of the case and other circumstances with strict criteria before allocating anticipatory bail. On the final hearing regarding the grant of anticipatory bail, the person applying for the same must be present in court. The court may exercise the power of placing specific refraining orders on the person granted anticipatory bail. For instance, the court may ask the applicant to surrender his passport as a precondition for the grant of anticipatory bail. To ensure an unhindered police investigation, the court may direct the person granted anticipatory bail to appear before the police on a routine basis.

The Criminal Amendment Bill 2018 added clause 4 to section 438 CrPC[21]. As per the amendment, a person accused of committing rape of women under 16 years will not get anticipatory bail. Further, under section 18, anticipatory bail shall stand denied for the accused charged under Scheduled Caste and Scheduled Tribes (Prevention of Atrocities Act) 1989. In other cases, the anticipatory bail will continue even if the police have filed the charge sheet in court. Nevertheless, again, in serious crimes like dowry death, anticipatory bail can be denied to the applicant.

Here, it is essential to acknowledge that anticipatory bail provisions should be exercised with utmost caution. However, having a preconceived legal perspective regarding anticipatory bail leading to a complete denial of the same is against the spirit of criminal legal jurisprudence. There have been several cases where the Supreme Court had to interpret the provisions of anticipatory pay applications, which Allahabad High Court denied as a matter of precedence with the viewpoint that if criminals were granted anticipatory bail, they are bound to impact the trial of the case adversely. Making a note

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[18]Singh, Meera Kumari. "Anticipatory Bail Provisions in India: A Review." IUP Law Review 10, no. 1 (2020).

[19]Shah, Malika, and Vaibhav Chadha. "Evolution of law on anticipatory bail in India." JANUS. NET e-journal of International Relations 12 (2021): 251-264.

[20]K.C. Gopakuma,"Kerala High Court observes that prima facie sedition case against Aisha Sultana does not stand", 25 June 2021. https://www.thehindu.com/news/national/kerala/kerala-high-court-makes-absolute-the-interim-anticipatory-bail-granted-to-aisha-sultana/article34961843.ece (Visited on 29 Nov 2023)

[21]Lalli, Jaideep Singh. "Who Is a'Proclaimed Offender'? Putting the CRPC's Interpretive Imbroglio to Rest." NALSAR Stud. L. Rev. 15 (2021): 127.

of this the Supreme Court judge J. Markandey Katju commented, "*I make a strong recommendation to the Uttar Pradesh government to immediately issue an ordinance to restore the provisions for anticipatory bail and empower the Allahabad High court as well as the sessions courts in the state to grant anticipatory bail*[22]".

IV. Rights of Arrested Persons

Article 21 of the Indian Constitution safeguards the accused undertrials or even convicts[23]. Each arrested person under Article 14 has a right to a fair and just trial, where he must be treated equally before the law. Under Article 22 (1), the accused is entitled to know the grounds of his arrest and must be informed of his right to seek bail[24]. Section 50 of CrPC gives guidelines to police officers for disclosure of such information, which arrests without a warrant[25]. The police are also mandated under section 50 A to inform the relatives of the accused regarding his police custody.

If the accused desires, he can remain silent and be represented through a lawyer under section 41 D and section 303 of CrPC[26]. As per Article 20 (2), no person can be a witness against himself by force. Under section 304 of CrPC, the state must provide legal counsel if he cannot hire a lawyer independently[27]. The provision for the same is in Article 39 A of the constitution[28]. The accused has the right tobe produced within 24 hours before the magistrate when the arrest is without a police warrant.

Further, under section 54 of CrPC, the accused also has the right to request the magistrate for his medical examination if he has been through any physical ordeal during immediate arrest by the authorities[29]. Besides those mentioned above, other procedural legal provisions safeguard the accused's rights while under arrest. Still, there are frequent accusations of unfair treatment of undertrials even after such provisions. The status of such undertrial in prisons in India is an issue of grave concern and needs to be addressed on priority.

V. Status of Under Trial Accused in Prison

As per the 2017 details, nearly 67 per cent of prisoners in Indian jails are under trial[30]. Many of them have been waiting for years for their trial to commence. Thus, the question is why these accused have not been granted bail under the existing legal provisions. The

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[22]Rustogi, Ankita. "The Right to Bail Under Indian Criminal Procedural Law." Available at SSRN 1437977 (2009).

[23]Abeyratne, Rehan. "Socioeconomic rights in the Indian constitution: toward a broader conception of legitimacy." Brook. J. Int'l L. 39 (2014): 1.

[24]Sarkar, Saroj Kumar. "Indian Constitution and Human Rights." HUMAN RIGHTS AND SOCIAL JUSTICE: 71.

[25]Dhull, Jitender Singh. "Rights of Arrested Person and the Judicial Decisions." MDU LAW JOURNAL: 25.

[26]Blackshield, A. R. "Capital punishment in India." Journal of the Indian Law Institute 21, no. 2 (1979): 137-226.

[27]Shaha, Kusa Kumar, and Sachindananda Mohanthy. "Alleged dowry death: a study of homicidal burns." Medicine, science and the law 46, no. 2 (2006): 105-110.

[28]Sharma, Shubhang, and Maryam Sana. "Critically analyse Article 39 of the Indian Constitution."

[29]CRIMES, CHALLENGES AFFECTING REGULATION OF CYBER. "CYBER CRIME PROFILING: QUINTESSENTIAL NEED FOR CYBER OFFENDER DETECTION IN INDIA." 18 JILI, 238 (2021).

[30]Ahmad, Irfan, and Md Zakaria Siddiqui. "Democracy in Jail Over-representation of Minorities in Indian Prisons." (2017).

facts on the ground on the issue are rather shocking. According to the National Crime Records Bureau (NCRB) report, the young men and women in prison primarily represent that section of society with no education or primary education and belong to the minority class with denigrated socio-economic status[31]. Most of them lack the financial resources to hire legal counsel for applying for bail and have no extended legal support from the state for fair representation. The Supreme Court has called the prevailing status of undertrials in Indian prisons "*a crying shame on the judicial system*, "but the circumstances have still failed to improve.

As per the National Crime Record Bureau report of 2020, there are 1387 prisons across the country, including the central, district, sub-district, women's jail, open, unique, and all other types of jails in which 4,18 536 inmates have been locked[32]. Most of these prisons are overcrowded and lack basic amenities. Out of the total inmates in prison 2, 82, 866 are under trial, facing confinement for several years. Nearly 42.5 per cent of prisoners in the Indian jail are between the age group of 18 years to 30 years, and another 44.5 per cent are between the age of 30 years to 50 years. These statistical details are on the rise, and the blatant mismanagement of bail provisions for the undertrial cannot be further ignored by all the stakeholders involved in the procedures of law.

VI. Cases of Undertrials in Custody for Prolong Period

A strength of nearly three lakhs under trial prisoners is considerably very high, reflecting upon the existing weakness of the Indian judicial system and the policy of the central and the state governments, which has continued unchecked for several years. In past laws, commissions have highlighted the issue of undertrial prisons. Some of the cases of undertrial prisoners are as follows: -

1. Ali Mohammad Bhat. In 2019, Ali was acquitted of the charges of terror attack in 1996 in the Lajpat Nagar blast after spending 23 years in prison[33]. There were additional charges framed against him under the POTA Act for the blast in Samleti village in Rajasthan. The individual belonged to Kashmir and had a shawl business in Nepal, from where his arrest on a terror plot took place. The investigating agencies had failed to draw out any direct evidence regarding the involvement of the individual in the terror act, even when he was under detention for such a long period. The case reflected gross misuse of legal power by detaining the accused and denying him the right to bail.
2. Mohammad Maqbool Shah. In the same terror case of 1996, Shah's name was on the charge sheet filed by Delhi Police. He spent 14 years in jail without bail until his final acquittal of the charges by the court. However, again, the individual belonged to Kashmir. Shah was merely 14 years old when he was framed for the crime and failed

[31]Ghosh, Arijeet, and Sai Bourothu. "Existing beyond constitutional rights: Transgender persons in Indian prisons." (2021).

[32]https://ncrb.gov.in/en/Crime-in-India-2020. (Visited on 29 Nov 2023).

[33]"Unjustly Jailed For 23 Years, Ali Mohammed Bhat Returns To Parents' Grave", 26 July 2019. https://www.ndtv.com/india-news/unjustly-jailed-for-23-years-for-lajpat-nagar-and-samlet-blast-ali-mohammed-bhat-returns-to-parents-2075796(Visited on 20 Oct 2023)

to be granted bail during the entire period[34]. The court finally acquitted him of all charges.

3. Bala Singh. The individual remained in prison until 2017 without bail for ten years in Uttar Pradesh till the police realised that he was a case of mistaken identity. Witnesses in the case admitted to the individual's wrongful identity[35]. He faced charges of murder committed not by him but by his brother. The entire case reflected the existing fault lines within the criminal judicial procedures.

The individuals were charged with severe, non-bailable crimes in the above-mentioned cases. Apart from these cases, several other cases involving bailable offences exist where the accused has spent a substantial amount of time in detention. There is a need for legal reforms to address the issue of grant of bail. If the problem is left unaddressed, it will not only create administrative concerns in overcrowded prisons but also lead to a loss of faith of ordinary citizens in the judiciary's capability and capacity of the legislative and the executive regarding the maintenance of the rule of law within the state. Based on the above analysis, there are some recommendations for implementation and increasing the efficiency of the provisions for the grant of bail, especially to undertrial prisoners.

VII. Conclusion

Many undertrials are presently in prison due to denial of bail. As the phenomenon has become a rising trend, a massive prison strength comprises the undertrial, leading to prison management concerns. In most cases, the bail denial is due to the poor state of the provisions rather than the seriousness of the offence committed. Some undertrial prisoners have already spent many years in prisons at par with the actual punishment term applicable for the offence. Some of the undertrials are in detention for petty crimes that are bailable. However, they have not been released due to poor representation and issues of surety and bond. In the cases where the offence is non-bailable, the accused who are influential and have financial resources have been able to acquire bail compared to those who come from the marginalised segment of society. This disparity in the allocation of bail to those undertrial prisons needs reforms.

Further, the paper also covered the aspect of anticipatory bail and the strictness required of the judicial system before the accused are granted anticipatory bail, which was discussed in detail. The article attempted to cover the existing bail mechanism under bailable and non-bailable offence charges in India and the arrested person's rights. The status of undertrial prisoners and a few actual cases were covered. Finally, recommendations address the bail issues of the undertrial prisoners.

VIII. Recommendation for improving conditions for Undertrial Prisoners

There is an urgent need to improve the status of undertrial prisoners detained in Indian prisons. Such unwarranted delay in granting bail to the undertrial lowers the image of

[34]Jamia Teachers' Solidarity Association (JTSA). "Framed, Damned, Acquitted: Dossiers of a 'very'Special Cell." Social Change 43, no. 1 (2013): 111-124.

[35]Civil Appeal No.10464 of 2017. Page 1 of 46. Digitally signed by. BALA PARVATHI. Date: 2018.03.31. 12:45:18 IST.

the Indian judicial system. Some of the recommendations for improving the status of the undertrials are as follows: -

1. Speedy Trial. Those undergoing trial must get a speedy trial, and the court must prioritise the cases for hearing. The average period for a case to be trial is five to six years. By the time the cases undergo finalisation in the session court, 15 years would have passed. Then, such cases are represented in the court of appeal, causing further delays in time. The accused must get bail in case of a trial delay. There is a need to create a mechanism wherein a time limit is specified for speeding up the trials, thereby restoring faith in the criminal Legal jurisprudence. Here, it is equally important to address the increasing availability of courts and judges, which will appropriately empower them to address cases without overload. Unless the present functional structure of lower courts is reformed in India, the capacity building to handle the increasing load of cases shall remain inadequate.
2. Changes in the Legal Provisions. There is also a need to re-examine the existing legal provisions in the Indian judicial system. For instance, the Narcotic Drugs and Psychotropic Substances (NDPS) Act of 1985, where the accused is guilty until proven innocent, and many individuals are locked up in prisons[36]. Today, the act has only led to the arrest of those who themselves are victims of drug abuse rather than the arrest and indictment of those who are involved in the nexus of the drug supply within the country. Several nations are changing their approach to dealing with drug problems and are developing a legal mechanism which is less harsh on the users of drugs and focuses on apprehending those involved in its production and supplies. The court needs to compassionately consider such prisoners who are themselves victims of drug abuse and require physical and mental medical assistance and adequate legal relief. Then, there are several other persons in detention for petty bailable offences. As a measure of such relief, the Supreme Court Legal Aid Committee representing Undertrial Prisoners v. Union of India, 1994 (6) SCC 731 directed the release of undertrial prisoners who had already done half the punishment of the actual offence[37].
3. Legal Counsel for the Accused. There are several undertrial cases where many are languishing in prisons due to a lack of competent legal counsel. If they are provided with competent lawyers to represent their case, many of them would be able to get bail. There is a need to increase the number of proper legal services available to those from poor backgrounds who cannot pay for their legal representation. There have been instances where, due to the prisons being in the outskirts of cities and towns, the undertrials have barely been able to interact with their lawyers allocated under free legal aid, thereby poorly representing their case in the court of law for grant of bail. Such functional problems also need to be identified and duly addressed.

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[36]Khanna, Monica, and Seema Garg. "NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES ACT (NDPS 1985): A CRITICAL ANALYSIS." Nimitmai Review Journal 3, no. 1 (2020): 28-32.

[37]Susman, Susan D. "Distant Voices in the Courts of India-Transformation of Standing in Public Interest Litigation Transformation of Standing in Public Interest Litigation." Wis. Int'l LJ 13 (1994): 57.

https://indiankanoon.org/doc/1208997/ (Visited on 27 Oct 2023)

4. Conditionality of Bail be Reviewed. While the session court and higher courts consider the application for a grant of bail, the issue regarding the security amount as surety becomes quite evident under present circumstances. Many of the accused who are financially weak find it beyond their ability to submit the surety amount or find a guarantor of bond for the grant of their bail and continue to be in detention, which should have been avoided. On the other hand, the affluent and the wealthy find the system to their advantage, wherein by giving the security or the bond, the bail facility is readily available. The existing statistical data regarding the undertrials in custody indicates a pattern wherein most undertrials are those of the deprived class.
5. Creation of Awareness Amongst the Law Enforcement Agencies. It has been observed in several cases wherein, in cases of bailable offence, the police have refrained from using their power to release the accused on bail. Certain times, such actions are due to ignorance, and on the other, these are done with deliberate reluctance, reflecting upon an innate urge to misuse the power allocated to the police. The judiciary must take cognisance of these activities very closely and hold accountable those who defy the regulations that antagonise the accused seeking bail.
6. Adherence to the Guidelines of the Apex Court. In its prior judgment, the Supreme Court has granted the undertrial bail, considering each case's merits. For instance, in the case of Shaheen Welfare Association v. Union, the Supreme Court also directed that the state Chief Secretaries be made aware of such orders and ensure compliance in the undertrial cases[38]. The court also opined that such constructive initiative would help unclutter the overcrowded prisons facing hygiene issues due to occupancy beyond their existing capacities. It must be ensured that the apex court guidelines are followed in principle, and bail should be a right rather than an exception.

There is a serious need to address the complexity of having a significant representation of undertrial cases in prison. The issue has existed for a long time without any practical measures. The law commission, in its various reports, has highlighted the problem. Even the Supreme Court has expressed its grave concern over the matter. Still, the undertrial's status in both bailable and non-bailable offences in India is a significant concern. Being accused of a crime should not deny any individual the basis of fundamental rights, which are the foundation of our constitution. A joint effort of the judiciary, the executive, and the legislative is mandatory to address the undertrials' concerns regarding the grant of bail. Early reforms in this regard will help improve the status of pending bail cases nationwide.

NAVIGATING THE JURISPRUDENCE ON ARBITRABILITY OF DISPUTES IN INDIA: AN ANALYSIS

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Abstract

Private conflicts involving two or more parties can be resolved using the technique of arbitration. It acts as a substitute for resolution of conflicts through courts. arbitration allows a party to select a neutral, fair-minded and elastic forum for adjudication of disputes and give them a significant amount of control. The legal regime for conducting arbitration in India is governed by the Arbitration and Conciliation Act, 1996. An arbitration agreement that the parties have signed serve as the foundation for the arbitration process. Arbitration is the best and most preferred alternative for businesses and parties to resolve commercial disputes since the adjudication of disputes by courts is a time-consuming procedure. The arbitrability of an issue means whether the subject matter can be settled through arbitration or should it only be decided by the state courts. A private forum cannot be used to resolve some disputes as they are thought to be exclusively the province of the courts. Arbitration act does not specify the disputes that can be resolved through arbitration, as a result one is dependent on the interpretation given by the courts. Courts over a period of time has laid down different criteria to propound on the arbitrability. Authors in this article have analysed the ruling given by the Supreme Court and have concluded that private fora are as capable as the court system to decide the dispute. Judicial intervention should be kept minimal, as by trusting the processes like arbitration the burden on the judiciary can be lessened to a great extent and can provide effective justice to people.

Keywords- *Arbitration, Disputes, Resolution, Forum*

I. Introduction

Arbitration is a technique of resolving private disputes between two or more parties who have consented to use this mode. It serves as an alternative to decision-making by legally mandated courts. It gives an opportunity to the parties to exercise a substantial degree of autonomy by enabling them to appoint a neutral, unbiased and a flexible forum of adjudication[1]. The legislation in India that governs domestic arbitration, international commercial arbitration, enforcement of arbitral awards, and conciliation is the Arbitration and Conciliation Act, 1996[2].

[1]Archana Balasubramanian, Lalit Munshi and Vaishnavi Vyas, Deciphering Arbitrability of Disputes In Light Of Recent Judicial Pronouncements, available at https://www.mondaq.com/india/arbitration--dispute-resolution/1089100/deciphering-arbitrability-of-diputes-in-light-of-recent-judicial-pronouncements (Visited on 14th Aug 2023).

[2]Gazette of India, Extraordinary, Part II, notified on 22nd August, 1996, vide notification No. G.S.R 375(E), dated 22nd August, 1996.

The edifice of arbitration can be structured on arbitration agreement signed between parties for resolution of their dispute. Adjudication of disputes by courts is a time-consuming process, hence, arbitration is ideal and favoured method for businesses and parties to settle commercial issues. Accordingly, arbitration is a voluntarily agreed-upon method in which the parties to a dispute settle their differences with an arbitrator who is privately appointed, rather than by court. Both parties must abide by the arbitrator's ruling, and the court may order enforcement of the award. In India and globally, arbitration is commonly used to settle disputes since it is fast and affordable, predominantly, in the areas of commercial disputes, infrastructure, and in investment related issues.

In common parlance, arbitrators can resolve any dispute that may be resolved by courts. But in reality, the notion of arbitrability has sparked a number of critical issues ever since the passage of the Arbitration and Conciliation Act. Given the significance attached to arbitrability, it would be helpful to first comprehend what it includes. A dispute's arbitrability determines whether it can be resolved through arbitration or should be left solely in the hands of the state courts. Certain matters are considered to be solely to be reserved within the domain of courts and therefore adjudication by a private forum in barred.

There is little clarity regarding the concept of arbitrability, because the Indian Arbitration and Conciliation Act, 1996 does not list the issues that can be settled by arbitration. Therefore, one is dependent on the court to propound the test for assessing the arbitrability of issues. Indian courts have frequently addressed the issue of whether or not conflicts should be arbitrated by setting out helpful criteria for its conclusion. The Supreme Court has consistently suggested a multiple factors to be assessed to determine whether a disagreement may be settled through arbitration.

II. Concept of Arbitrability

In the beginning of the nineteenth century, there was no distinct law governing arbitration, instead, the rules governing arbitration were incorporated in schedules contained in civil procedural regulations that were fully related to arbitration. However, neither the Code of Civil Procedure 1859 nor its successor, the Code of Civil Procedure 1882, addressed the essential topic of the types of conflicts that may be resolved with arbitration. The first comprehensive law in India to codify the subject matter of arbitration, the Arbitration Act 1899, was similarly silent on this significant aspect. This version was replaced by the Arbitration Act 1940, which likewise had a murky understanding of the term arbitrability.

The Arbitration and Conciliation Act,1996, which is existing regime on arbitration law in India, is based on UNCITRAL 's[3] Model Law on International Commercial Arbitration of the year 1985. *The Model Law on International Commercial Arbitration* covers all incidental aspects of arbitration in its endeavour to universalize arbitration law on a global scale. However, it expressly leaves the issue of arbitrability up to the national legislation of the states to address. Only reference to arbitrability in the UNCITRAL

[3] United Nations Commission International Trade Law.

Model is in Article 36(1)(b)[4]. A court can refuse to enforce the award if it believes that the dispute's subject matter cannot be settled through the arbitral procedure.

According to Article V(2)(a)[5] of the New York Convention[6], the arbitral award may not be executed if the dispute's subject matter is not amenable to arbitration under the local legal system.

Further, the Arbitration and Conciliation Act, 1996, section 2(3)[7], also makes a vague indication to the concept of arbitrability. Additionally, section 34(2)(b)(1)[8] of the Indian Arbitration Act, explains that an award made by arbitral tribunal can be declared as unenforceable if subject matter of the dispute cannot be settled through arbitration. However, other than these references, the 1996 Act contains no information that provides clarity on the arbitrable issues. So, it can be inferred that, owing to lack of clear legal provisions in the 1996 Act and without any express or implied constraint on the arbitral tribunal's authority, the majority of civil and commercial disputes may be settled by an arbitral tribunal

III. Arbitrability and Facades of Arbitrability

Generally speaking, assessing arbitrability necessitates identifying the sorts of conflicts that may be handled by arbitration and those that must only be settled through the

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[4]Article 36 - (1) Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only:

(b) if the court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or

(ii) the recognition or enforcement of the award would be contrary to the public policy of this State.

[5]Article V (2) - Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country. of the difference is not capable of settlement by arbitration under the law of that country;

[6]The New York Arbitration Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958.

[7]Arbitration and Conciliation Act 1996, Sec 2(3) which states that "this part shall not affect any other law for the time being in force by virtue of which certain disputes may not be submitted to arbitration.

[8]Section 34, Arbitration and Conciliation act 1996- Application for setting aside arbitral awards

(2) An arbitral award may be set aside by the Court only if-

(b) the Court finds that--

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law for the time being in force, or

(ii) the arbitral award is in conflict with the public policy of India.

[Explanation 1.--For the avoidance of any doubt, it is clarified that an award is in conflict with the public policy of India, only if,--

(i) the making of the award was induced or affected by fraud or corruption or was in violation of section 75 or section 81; or

(ii) it is in contravention with the fundamental policy of Indian law; or

(iii) it is in conflict with the most basic notions of morality or justice.

courts. Both the New York Convention and the Model Law are referring to disputes that are 'capable of settlement by arbitration'[9].

In different contexts, the word "arbitrability" has distinct connotations.SC in the landmark case of *Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd & Ors*[10], has laid the following three question to be answered relating to the characteristics of arbitrability that are relevant to the arbitral tribunal's authority:

(I) "Whether the disputes, given its nature, can be settled by private persons who are chosen as adjudicating authority by parties, or would it be appropriate for public fora i.e., courts to settle them".

(ii) "Whether the dispute is covered under the scope arbitration agreement? Specifically, whether the issues fall within the category of "excepted subjects excluded from the scope of the arbitration agreement" or is listed or defined in the agreement to be determined by arbitration"

(iii) "Has arbitration been requested by the parties in their disputes? That is, if the conflicts are subject to the arbitral tribunal's jurisdiction".

There are certain categories of proceedings which are reserved by the legislature for adjudication by public fora such as courts. The Arbitration and Conciliation Act recognises that certain disputes are not capable of being resolved through arbitration without specifying those disputes and without listing which matters are non-arbitrable.

Under India's current legal system, arbitrability is the norm, whereas non-arbitrability is the exception. The 1996 Act- The Arbitration and Conciliation Act, which is founded on Model Law, also uses the principle of negligible court involvement, a strategy, that is widely favoured across the world[11]. Since, the 1996 Act does not explicitly address the issue of arbitrability or offer any definitive clarification on the types of conflicts may be brought to arbitration, which invariably means that clarification from the court is required for the issues that can be resolved through arbitration, Hence, the jurisprudence in this regard has developed, largely, through judicial pronouncements.

IV. Developing the Jurisprudence on Arbitrability: The Booz Allen Case

At the onset it is pertinent to mention that any discourse on the issue of arbitrability in India, must start with the verdict of Supreme Court's in the case of *Booz Allen and Hamilton Inc v. SBI Home Finance Ltd. & Others*[12], which established a standard for deciding whether a dispute's subject matter qualifies for arbitration in India or not.

In *Booz Allen*, the Supreme Court had to decide whether or not a mortgage dispute in India can be resolved through arbitration. The Court provided a negative response to this query.

In the said case the Supreme Court stated that the "nature of rights" should be taken into consideration when deciding the arbitrability. The apex court stressed that the "nature of

[9]Section 5 Arbitration and Conciliation Act 1996- Extent of judicial intervention. -Notwithstanding anything contained in any other law for the time being in force, in matters governed by this Part, no judicial authority shall intervene except where so provided in this Part.

[10]Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd & Ors., (2011) 5 SCC 532 (India).

[11]https://www.ibanet.org/nonarbdisputesindia (Visited on 16th Aug 2023).

[12](2011) 5 SCC 532.

rights" should be the criterion used to determine arbitrability as it must be remembered that issue of arbitrability entails upon a question that whether the disputes deal with the enforcement action against an individual or against property, where rights or those who are not parties to the arbitration agreement may also be implicated.

Court said cases related to mortgaged property relate to actions in rem. Actions in rem refer to the actions determining title to property and rights of the parties, not merely among themselves but also against all persons at any time claiming an interest in that property whereas actions in *personam* refer to actions determining rights and interests of parties themselves in the subject matter of the case[13].

Consequently, the court where a lawsuit is ongoing that court should not order the parties to arbitrate a issue if it cannot be resolved through arbitration, even if the parties have agreed upon arbitration as the forum for settlement of such disputes.

Typically, and conventionally all issues concerning the rights in *personam* can be subjected to arbitration, while all disputes involving rights in rem must be decided by courts &public tribunals and disputes involving property are not appropriate for private arbitration. But this is not a strict or unbending law. Arbitration has traditionally been seen as a viable option for resolving disputes involving subordinate rights in *personam* resulting from real property rights.

The provisions of both the Civil Procedure Code of 1908 and the Transfer of Property Act of 1882 were also analysed by the Court, and it inferred that both acts clearly stipulate that mortgage suit must be decided by courts than by arbitrators.

The decision Apex Court in *Booz Allen* was a breakthrough verdict, that confirmed the significance of determining the question of arbitrability before hand in case parties want to opt for arbitration. Following the Supreme Court's ruling in the Booz Allen case, courts and parties often rely on the ratio and list of non-arbitrable issues provided in that case.

Court delineated certain disputes as not arbitrable. Observation of the courts can be enumerated as under:

(i) "Criminal offences being crime against state cannot be resolved using private forum;

(ii) matrimonial disputes concerning divorce, judicial separation, restitution of conjugal rights, and question of a custody of child in case of divorce;

(iii) guardianship of a child;

(iv) insolvency and winding up of a company matter;

(v) testamentary matters (grant of probate, letters of administration and succession certificate); and

(vi) ejection or tenancy matters administered by special law where the occupant enjoys legal protection against ejection and only the definite courts are conferred authority to grant ejection or decide the disputes.[14]"

[13]Id. At Para 23.

[14]Booz Allen and Hamilton Inc. v SBI Home Finance Ltd &Ors., (2011) 5 SCC 532 (India), Para 22.

V. Arbitrability of Fraud: Understanding The Ambit

Another issue which is frequently encountered by the courts is the arbitrability of the fraud. Fraud, as it is commonly understood, is the suppression or production of a false representation by speech or action, which results in financial loss for the person who depended on the representation. Fraud is defined in section 17[15] of the Contract Act of 1872,

In *Abdul Kadir Shamsuddin Bubere v. Madhav Prabhakar Oak*[16], the Supreme Court gave the first authoritative precedent on the issue of fraud. The 1940 Act, which has since been abolished, was the act under which the ruling was made. The Court determined that when a party which is subjected to charge of fraud, requests that the matter be handled in public court, it is sufficient cause for the court to decline the order to arbitration or to issue a reference to arbitration.

However, the court cannot be persuaded to submit a case to arbitration just because certain claims have been made that the books of accounts are incorrect or that particular items are inflated. The court decided that it would only decline the referral to arbitration in situations involving allegations of fraud of a "severe character" while relying on an English decision in *Russel v. Russel*[17] given in 1880. English court decided that grave accusations of fraud could be basis for courts to decline reference to arbitration.

This case postulates the start of a period that served as the foundation for several High Court and Supreme Court rulings over the course of the subsequent fifty years. However, ever since this verdict, the court is still required to make the distinction between fraud of "severe character" and "simple fraud" in a situation where there is an allegation of fraud.

In *N. Radhakrishnan v. Maestro Engineer*[18], there was partnership between Radhakrishnan and the respondents to constitute a partnership firm for the purpose of carrying on the business of Engineering Works under the name and style of "Maestro Engineers." Eventually, disagreements developed between the parties, and one of them made severe accusations against the other party about irregularities in the account books and financial manipulation. A request to submit the parties to arbitration was made in accordance with Section 8 of the 1996 Act.

In above instance, the Supreme Court after referring to its earlier ruling in *Abdul Kadir* decided that an arbitrator cannot resolve substantial charges of irregularities in partnership business finances and financial manipulation. The Court determined that the instances involving serious allegations of frauds should be settled by courts because it is more suited and prepared to deal with such complicated & serious matters.

In this case[19], the Supreme Court ruled that a fraud-related dispute or disputes that contains substantial allegations of fraud should be resolved by the courts by taking into

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[15]Sec 17 of Indian Contract Act 1872. "a fact knowing it to be untrue, knowingly active concealment of a fact, making a promise without intending to keep it, or any other act which is capable of deceiving and is committed by a party to a contract, or with his participation, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract."

[16](1962) 3 SCR 702

[17]Russel v. Russel, 50 Md. App. 185 (1981) 436 A.2d 524

[18](2010) 1 SCC 72.

[19]N. Radhakrishnan v. Maestro Engineers, (2010) 1 SCC 72. Also at 2009 (13) SCALE 403.

account thorough examination of extensive evidence which is presented by both parties. The Court further emphasised that the dispute would not be submitted to arbitration on public interest grounds, if there were serious allegations of fraud. The Court agreed with the contention that the arbitrator is not a competent authority if extensive material evidence in form of oral submission and based on documents is presented in order to establish misconduct.

The verdict of SC in N. Radhakrishnan was indorsed by courts on various occasions.

After this decision most of the court ruled that allegation in regard to fraud are not to decide through arbitration.

But apex court in the case of *Swiss Timing Ltd. v. Commonwealth Games 2010 Organising Committee*[20], drew attention to the fact that the ruling in N. Radhakrishnan went against the rules established in the case of *Hindustan Petroleum Corporation Ltd. v. Pinkcity Midway Petroleums*[21] . In Hindustan Petroleum case, the Supreme Court had ruled that when a dispute was covered by an arbitration agreement, a civil court was required to refer the parties to arbitration.

In *Swiss Timing* case, the sole judge held that the comments made in the case of *Hindustan Petroleum* provided the correct legal framework and further declared that the decision in *N. Radhakrishnan* was legally flawed for two reasons.

First of all, the court in *N. Radhakrishnan*, did not follow the ruling in *Hindustan Petroleum*.

Second, the bench in *N. Radhakrishnan* did not consider the clause included in Section 16[22] of the Arbitration Act,1996, which talk about the arbitral tribunal's ability to decide cases within its purview or in other words the doctrine of *kompetenz - kompetenz*[23]. As a result, the sole judge in *Swiss Timing* case came to the conclusion that the *N. Radhakrishnan* ruling was not accurate in stating the law and could not be relied upon.

After *N. Radhakrishnan* major ruling on the issues was given in the case of *A.Ayyasamy v. A. Paramasivam*[24] and Ors. In this case partnership deed was signed between two brothers. They entered into a deed of partnership for carrying on hotel business and this partnership firm has been running a hotel with the name 'Hotel Arunagiri' located at Tirunelveli, Tamil Nadu. Dispute arose between the two brothers regarding the financial misappropriation of funds. Partnership Deed encompassed a clause which specified that any dispute regarding the partnership deed will be settled with the assistance of arbitration. In this case the Supreme Court divided the issue of fraud into *fraud simpliciter* and complex *frauds* in order to form a dual criterion to evaluate the arbitrability of fraud. The Court noted that the consequences of accusation of fraud simpliciter would not be invalidated the arbitration agreement. Serious claims of fraud, however, are to be considered as non-arbitrable and should only be decided by a civil court.

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[20]Swiss Timing Ltd. v. Commonwealth Games 2010 Organising Committee, (2014) 6 SCC 677.

[21]Hindustan Petroleum Corporation Ltd. v. Pinkcity Midway Petroleums, (2003) 6 SCC 503.

[22]Section 16-Competence of arbitral tribunal to rule on its jurisdiction.

[23]This principle lays down full autonomy to tribunal with least interference by the courts in arbitral proceedings. In absence of this principle, arbitrator would not be able to rule on their own jurisdiction.

[24]A. Paramasivam v. Ayyasamy, (2016) 10 SCC 386.

The Court determined that significant allegation of fraud had to include the following:

I. "it is related to a criminal offense; or
ii. issues are intricate in nature and the verdict on these issues can be decided only by the civil court after taking into account large evidence; or
iii. the grave accusations of forgery/fabrication of documents in regard to the plea of fraud is being alleged; or
iv. the arbitration agreement is alleged to have been induced by fraud; or
v. the fraud pervades the whole contract, including an arbitration agreement."

In this case Apex court reiterated that civil courts must handle matters if there is a serious allegation of fraud and arbitration should not be resorted to. However, if the claims are of a nature of fraud simpliciter character, the Arbitral Tribunal can address such matters. The Supreme Court further decided that only the courts would have the authority to decide cases in which there was a serious allegation of fraud, document fabrication or forgery, and in such cases, fraud could nullify the entire contract and can affect the validity of the arbitration clause, which can further render the arbitration clause to be unenforceable.

The court clearly acknowledged that the 1996 Act's statutory framework does not obstruct any disputes from being resolved through arbitration, but went on to determine that where charges of fraud relate to the internal operations of the party and outcome of such allegation will have no impact in the public, then under such circumstances, arbitration agreement should not be circumvented.

Nevertheless, the Court issued a warning, stating that when one of the parties asserts an allegation of fraud in an attempt to circumvent the arbitration agreement, the Court should conduct a thorough investigation and only decide on the matter after concluding that there are credible claims of fraud and that the Court is the appropriate venue to resolve the issue rather than sending the parties to arbitration.

Accordingly, the court in *A. Ayyasamy* decided that it was primarily the responsibility of the party which is refusing to submit to arbitration, to demonstrate that the issue was not arbitrable.

So, by establishing two types of fraud, simple fraud and complex fraud, that cannot be arbitrated, *A. Ayyaswamy* case further muddled the situation and instead of removing the conundrum added to the confusion.

In 2019, the Supreme Court had the chance to address the subject matter of arbitrability of fraud once more in the case of *Rashid Raza v. Sadaf Akhtar* In this ruling, the Supreme Court recognized two criteria for identifying complicated fraud.:

i. First thing first, it must be established if the plea affects the arbitration provision as well as the rest of the contract, rendering it invalid.
ii. Secondly, the courts necessarily should also decide if the accusations of fraud are related to the parties' in their private dealings and as such have no bearing on the public at large than in such case they are arbitrable.

In *Avitel Post Studioz Limited v. HSBC PI Holdings (Mauritius) Limited*[25] case court

[25](2020) SCC Online SC 656.

emphasized on the fact that only when allegations of fraud vitiate arbitration agreement that subject matters mentioned could not be resolved by arbitration. In above mentioned case, the Supreme Court inquired whether HSBC in whose favour award was made, had a strong enough case to have the Award enforced in India.

While contesting the implementation of the award, *Avitel* argued that since the allegations of fraud were connected to significant criminal offences, such disputes could not be resolved by arbitration.

The Court specified two tests to ascertain the non-arbitrability when serious accusation of fraud is alleged which are:

i. Where the Court is of the view that the arbitration agreement itself is void because fraud; or
ii. Where claims of arbitrary, dishonest, or malicious behaviour against the State or its agencies is raised, as a matter public policy, issue becomes non arbitrable.

A three-judge panel of the Hon'ble Supreme Court conducted a detailed analysis of the law on arbitrability in current set-up in *Vidya Drolia v. Durga Trading Corporation*[26]. The Hon'ble Supreme Court also looked at the arbitrability of fraud while the broader moot question with which apex court was dealing was, the law on the arbitrability of landlord and tenant conflicts. Accordingly, the court ruled that it would be entirely erroneous to perceive arbitration as a poor or inadequate adjudication method incapable of handling a law's public policy provision.

Court in this case increased the ambit of the tests for determining arbitrability, and stated where rights of third party is involved or where arbitration is not between two parties to agreement or matter involves state as a party and there is special legislation to deal with issue such matters cannot be resolved through arbitration.

The existing decisions reveals how challenging it has been to decide whether fraud is arbitrable and, more importantly, it can be seen how several criteria have been specified, thus, increasing the possibility of court involvement.

Under the 1996 Act, power has been conferred upon arbitral tribunal to call for an aid for the recording of evidence under Section 27.After examining all the evidence, the tribunal may reach a decision and make an award similarly to how courts do and there is no need to bifurcate the issues of fraud into fraud of simple character and fraud of complicated character. The Supreme Court itself has proposed new distinctions after recommending this distinction in Ayyaswamy, demonstrating that this distinction is unnecessary and impracticable.

The Law Commission had also recommended inserting sub-section (6) to Section 16 of the Act in its 246th Report, giving the tribunal the authority to issue an award despite allegations of fraud. It gave parties the choice to bring the issue of arbitrability before the arbitrator prior to making of the award, following the *Kompetenz-Kompetenz* principle. Further, if tribunal disallowed the issue the parties can raise before the court at the post-award stage. While challenging the award.

As a result, it can be concluded that fraud, as it is defined in Section 17 of the Contract Act, invalidates freely given consent and renders a contract voidable but not void from

[26]Decided on 28 February, 2019.

the beginning. The contract may be continued by the party whose consent was gained by deception. Swiss Timing stressed that unless there is a prima facie determination that there is no genuine arbitration agreement exist, a court should direct parties to arbitration.

In many countries, fraud has already been codified as arbitrable. Making necessary changes in legislation in India will show India's dedication to advancing arbitration and adhering to international standards. Arbitrability fraud's is an issue that has generated a lot of discussion as seen above and on which the courts have struggled to establish a clear picture.

VI. Arbitrability: Widening the Scope

i. Arbitrability in Intellectual Property Disputes

IP rights, such as trademarks, copyrights, patents, and industrial designs, are typically referred to as negative rights since they grant the right holders the authority to prohibit others from exploiting their intellectual property.

Regarding the arbitrability of intellectual property disputes, recent decisions in *Eros International Media Limited v. Telemax Links India Pvt. Ltd. and Ors*[27], determined by the Bombay High Court decided that while the underlying copyright is a "right in rem" that is enforceable against all people, the specific contractual issue regarding its infringement is a "right in *personam*." The dispute was determined to be arbitrable as a consequence.

Some High Courts ruled that because copyright, trademark infringement and passing off are essentially property rights that operate against the public at large, they cannot be subjected to arbitration. Contrarily, certain High Courts ruled that as issues involving trademark or when copyright is transferred to others by entering in to assignment agreement or to licence it, it constitutes right in personam involving infringement or passing off and would be subject to arbitration. So, nature of rights is taken into consideration to decide about the arbitrability of Intellectual property disputes.

ii. Arbitrability in Consumer Disputes

It is crucial to consider the potential of resolving consumer conflicts through arbitration as India progresses toward establishing a regime that is really supportive of arbitration. The issue of the arbitrability of consumer disputes was extensively discussed by the Apex Court in the case of *Emaar MGF Land Limited v. Aftab Singh and Others*[28]. The issue befell as a result of grievances of home buyers against the builder who failed to give flats to customers on the date specified in the flat buyer's agreement. The builder made an application under Section 8 of the arbitration Act 1996, pursuant to the arbitration clause in the buyer's agreement when the homeowners' move to the National Consumer Disputes Redressal Commission for resolving the issue. The NCDRC[29] decided that consumer disputes are not arbitrable as interest of general public is involved.

[27] 2016(6) Bom C R321.

[28] (2019) 12 SCC 751.

[29] National Consumer Disputes Redressal Commission.

The NCDRC's verdict was affirmed by the Supreme Court following an appeal. It then decided that the remedy provided under CPA which is specific law dealing with consumer disputes, is along with the provisions of additional law in force for at present. It reaffirmed the logic laid in the *Booz Allen* case for categorizing issues as rights in rem and rights in personam. As a result, if a person decides to submit disputes to the consumer forum in the first instance than such application is maintainable.

It is important to emphasise the judicial perspective when deciding whether or not social and welfare law-related disputes can be arbitrated. For instance, the Apex Court ruled in *Premier Automobiles Ltd. v. Kamlekar Shantaram*[30], *Wadke of Bombay and Ors* that the Industrial Disputes Act, 1947, pursuant to which the labour courts and tribunals are constituted, are competent authority to resolve industrial disputes involving workers' rights. As a result, the ID Act completely nullifies the ability of civil courts to hear industrial disputes.

As a result, it can be safely inferred that the courts' intention is very clear, the Consumer Protection Act and the Industrial Disputes Act, 1947 main aim is to defend the interests of consumers and workers by giving them specific rights. Consequently, a consumer or a worker cannot be forced to give up their ability to file a lawsuit in court by choosing arbitration instead.

iii. Arbitrability in Trust deeds

Trusts in India have changed over time from being primarily altruistic in character to being an efficient business vehicle for succession and estate planning. Using arbitration to decide trust conflicts is a good alternative, since it has the benefits over litigation which includes confidentiality, party autonomy, limited curial review and lastly saving cost and time.

Having said that, arbitration in trusts-related disputes is typically seen as being impractical. The High Court of Bombay's ruling on the appointment of an arbitrator was heard in appeal made to Supreme Court of India in *Shri Vimal Kishor Shah &Ors. v. Mr. Jayesh Dinesh Shah & Others*[31], Court had to decide on issues arising from a family trust deed. It decided that dispute arising out of trust deeds are not arbitrable notwithstanding the arbitration clause in that deed between trustees, trustees and beneficiaries, and beneficiaries.

However, it can be said that the Supreme Court disregarded certain significant aspects while holding that trust deeds are not arbitrable. In first instance the Supreme Court stated that a trust deed cannot be taken as a contract, much less an arbitration contract as defined by Section 7 of the Arbitration Act.

The Supreme Court ruled that because beneficiaries are not signatories to trust deeds, which contain arbitration clauses, they cannot be regarded as "parties" to the arbitration agreement under the Arbitration Act.

The following issues have been disregarded by the Supreme Court in coming to above conclusion:

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[30](1976) 1 SCC 496.

[31]2016 (8) SCALE 116.

- To begin with, the legitimacy and enforceability of an arbitration agreement cannot be determined just by the parties' signatures.
- Secondly, as a result of the amendment made to section 8, in 2015, this section now provides that in addition to party to arbitration agreement reference can also be a be sought by "*persons claiming through or under*" an arbitration agreement Accordingly, the aim of amendment to sec 8 was to include those persons who are not signatories to an arbitration agreement but whose rights and obligations are nonetheless impacted by the underlying agreement in the definition of "party" to the arbitration agreement.
- Third, the Supreme Court has shown a lack of understanding for the common law doctrine known of Estoppel or Deemed Acquiescence, which states that a party is not permitted to avoid arbitration.

Indian Trusts Act, 1882, regulate the Private trusts in India. The ambit of the Trusts Act contains a wide variety of trust-related issues, such as trust formation, trustee duties and accountabilities, trustee rights and authorities, beneficiary rights and responsibilities etc. Although the Trusts Act grants civil courts the power to direct some legal remedies, it says nothing about providing them the exclusive power to settle disputes between the settler, trustees, and beneficiaries. Conflicts which arise out of a trust deed under the Indian Trust Act, 1882, were therefore included by the SC in this verdict[32] as the seventh category of disputes that could not be resolved by arbitration.

Therefore, the legal stance on the arbitrability of conflicts up to 2016 was based on two assertions: the "nature of rights" principle, in which, the Supreme Court, divide conflicts into seven groups; and second, the "exclusive forum of adjudication" principle, which prohibits the determination of issues using arbitration where special laws and specific tribunals are constituted to decide issues.

VII. The New Dawn in Arbitrability: The Vidya Drolia case

In *Vidya Drolia and Ors. v. Durga Trading Corporation*[33], an appeal was made against the ruling of Calcutta high court in which arbitrator was appointed in a dispute between landlord and tenant. The SC had to decide regarding the arbitrability of landlord tenant disputes. Despite the fact that the query was restricted to the issue of whether or not tenancy disputes can be arbitrated but given the conundrum revolving around this matter, the Supreme Court decided it was imperative to assess position on arbitrability under Indian law and also look into the concept of arbitrability prevalent in other countries to seek direction.

A four-part test has now been recognized by the Apex Court to determine when a subject matter cannot be arbitrated. The Supreme Court held that, disputes are not arbitrable when the cause of action and/or subject-matter of the dispute:

- "*deal with actions in rem*, that do not relate to subordinate rights in *personam* that arise from rights *in rem*;

[32]Shri Vimal Kishor Shah &Ors. v. Mr. Jayesh Dinesh Shah &Ors.,2016 (8) SCALE 116.

[33]2019 SCC OnLine SC 358.

- has impact on third party rights, or have *erga omnes*[34] effect, and necessitates centralized settlement, and common settlement would not be suitable;
- deal with immutable autonomous and public interest functions of the State; and
- is specifically or by necessary implication non-arbitrable under a special legislation[35]."

The court emphasised that the dispute cannot be decided with the help of arbitration if any of the aforementioned questions were answered in the affirmative. However, the Supreme Court reiterated that these rules are not "watertight compartments, "nonetheless, they would be highly useful in determining whether a certain dispute would be subjected to arbitration under Indian law or not. Furthermore, even though the *Vidya Drolia* verdict has demystified the concept of arbitrability in regard to fraud, consumers, and tenancy matters, one might not agree with the Supreme Court's fleeting remark on the subject of the arbitrability of "intra-company" issues, which once again leaves the door open for the court to get involved.

VIII. Conclusion

Notion of arbitrability has undergone a substantial metamorphosis over past decade in which judicial rulings have established the proper course of action to be followed. The courts have repeatedly decided on the arbitrability of cases and have favoured employing arbitration to resolve disputes. The judgement cited above suggests that private forums are equally competent as courts are for resolving disputes like fraud, consumer matters, tenancy matters etc and they may serve to relieve the strain on the courts and can offer people efficient justice.

Apex court has elucidated times and again on the arbitrability, but the verdict in *Vidya Drolia* has propounded the test that determines the criteria to be adopted while assenting the arbitrability. It is a positive step forward for arbitration specifying how far courts can interfere in the dispute resolution process between two private parties. But still it will be seen how courts across the country follow the approach laid down in the judgement of *Vidya Drolia*. However, the current judicial trend is to support the referral to arbitration, which is appropriate given that the arbitral tribunal is qualified to decide every dispute that may be settled by the courts.

[34]An erga omnes means obligations and rights towards all. It is kind of an implied duty of any person or state also not to infringe the rights of anyone by performing his duty or during exercising his rights.

[35]Shahezad Kazi and Gladwin Issac, India: Supreme Court Of India Clarifies 'What Is Arbitrable' Under Indian Law And Provides Guidance To Forums In Addressing The Question, available at https://www.mondaq.com/india/trials-amp-appeals-amp-compensation/1023030/supreme-court-of-india-clarifies-what-is-arbitrable-under-indian-law-and-provides-guidance-to-forums-in-addressing-the-question (Visited on 28th Aug 2023).

A CONTEMPORARY IMPACT ASSESSMENT OF POCSO ACT AND ITS IMPLEMENTATION

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Abstract

Be shame... they are at the age of game... Children are an important marginalized group, and instead of playing hard in the sun and attending school, they often suffer various forms of abuse, especially sexual exploitation. This excludes them not only from access to basic human needs, but also from freedom of expression and proper acceptance of views on issues of vital importance to them. Among all these afflictions, sexual exploitation and sexual abuse are considered by the perpetrators to be the most heinous crimes because of their enormous impact on the mental and physical state of the victim. Given the seriousness of this crime and the vulnerability of children, several criminal laws have been enacted to protect children.

Keywords: *Child, Sexual abuse, Law, Protection*

INTRODUCTION

Sexual offences themselves are serious, but when such crimes are committed against children are considered even more heinous. Children are the most vulnerable and innocent victims of such crimes. According to a 2007 Ministry of Women and Child Development report[1], "53.2% of children suffered multiple sexual abuses, of which 52.94% were boys."Additionally, in 2018, the National Crime Reports Bureau released a report stating that the number of reported rape cases was 21,605.

The Protection of Children from Sexual Offences Act, 2012 ["POCSO Act, 2012"] is a piece of legislation that attempts to protect children from all forms of sexual abuse. Although the United Nations ratified the Convention on the Rights of the Child in 1989, crimes against children were not addressed by legislation in India until 2012. It imposes severe penalties for committing crimes against minors, ranging from a minimum of 20 years in jail to the death sentence in cases of serious penetrative sexual assault. The Ministry of Women and Child Development was the driving force behind the passage of the POCSO law. The law aims to combat egregious crimes of such heinous nature and sexual exploitation of minors through relatively less vague and stricter judicial protections than the Indian Penal Code, complying with the WHO international guidelines.

This was done with the aim of constructively countering such activity. In parallel, the Juvenile Court Act, which protects minors from offenses such as "sexual assault, sexual harassment and pornography" and provides for the establishment of special courts to hold special trials on such offenses and related matters and cases was enacted.

[1]https://wcd.nic.in/sites/default/files/Annual%20Report%202007-08.pdf
Last visited on 25th January, 2023

NEED AND RELEVANCE OF POCSOACT

Before the introduction of this Act of 2012, the Goa Children Act 2003 and the Rules 2004 were the only laws in India aimed at protecting children's rights. In the Code of 1860, child sexual abuse was an offense u/S 375, 354 and 377, however, these provisions did not protect boys from sexual abuse, nor do they protect male modesty, at the same time the Code does not include definitions of the terms "modesty" and "unnatural offence".

In the absence of specific legislation, it was important to enact legislation specifically to address the growing problem of child sexual abuse in the nation. Through the efforts of various NGOs, activists and the Ministry of Women and Child Development, the POCSO Act 2012 was enacted on 14 November 2012.However, the POCSO Act 2012 is not the single law dealing with child sexual abuse cases. The POCSO Act is not a exhaustive code and has overlapping provisions in the Criminal Code of 1973, the Penal Code of India 1860, the Juvenile Justice Act and the Information Technology Act 2000,which summarizes procedures and identifies offenses.

The act has significant importance since child sexual abuse incidents occur in schools, places of worship, parks, and dormitories, and child safety is not guaranteed anywhere. Given these new threats, it was important to introduce another law that could curb the number of such crimes and provide a credible system for punishing perpetrators.

This law has helped provide a vigorous legal mechanism for victims of sexual assault and has emphasized the importance of children's rights and safety. Awareness-raising has also led to an increase in reports of child sexual exploitation cases. The law covers punishment for both non-sexual assault and serious sexual assault.

Characteristics of the POCSO Act

- Non Disclosure of Victim's Distinctiveness: Section 23 of the POCSO Act regulates media procedures and imposes an obligation to retain the identity of the child victim unless a special court authorizes disclosure. Section 23(2) states that "No media report shall reveal the identity of the child, including name, address, photograph, family information, school, neighborhood and other details necessary to establish the identity." In the milestone *case Bijoy/Guddu Das v. West Bengal*[2], the Kolkata High Court upheld the law under Article23,making any person, including police officers, guilty of such crimes.
- Gender-unbiased provisions: Another notable feature of the law is that, it does not distinguish between victims and perpetrators based on gender. This solves one of the major deficiencies in the provision of Penal Code of 1860. The definition of "child" includes any one under the age of 18.
- Obligation to report cases of child abuse: The elders try to cover up these cases because sexual exploitation cases occur in the closed room and the stigma attached to these crimes. Consequently, for proper enforcement of the POCSO Act, Sections19 to 22 of the POCSO Act mandate the reporting of these incidents by third parties with knowledge of such criminal activity. These laws were enacted on the premise that children are vulnerable and powerless and that society has a duty to protect their interests.

[2]Bijoy v. State of West Bengal (2017) SCCOnline Cal 417

- Child-approachable research and negotiation: Sections 24, 26 and 33 of the POCSO Act provide for investigative and judicial proceedings designed with the needs of children in mind.

Magnitude of Child Sexual Abuse in India

- The Protection of Children from Sexual Offences (POCSO) Act of 2012 is an Indian law that specifically addresses child sexual abuse. The Act defines various offenses related to child sexual abuse and prescribes stringent punishments for those convicted. When It comes to determining the magnitude or degree of child sexual abuse under the POCSO Act, several factors are taken into consideration. These factors include the nature and severity of the offense, the age of the victim, the relationship between the offender and the victim, and the overall impact of the abuse on the child.
- The POCSO Act categorizes different offenses based on their gravity. It identifies specific acts such as sexual assault, penetrative sexual assault, sexual harassment, and using a child for pornographic purposes. The Act also recognizes that any non-consensual sexual contact Or sexual act with a child constitutes an offense, regardless of the absence of physical harm or penetration.
- The severity of the offense is determined by factors such as the age of the victim. The Act distinguishes between "aggravated penetrative sexual assault" and "penetrative sexual assault." Aggravated penetrative sexual assault refers to instances where the offense is committed on a child below the age of 12, while penetrative sexual assault pertains to offenses committed on children between the ages of 12and 18.
- The relationship between the offender and the victim is another crucial factor in determining the magnitude of child sexual abuse. The Act recognizes that offenses committed by a person in a position of trust or authority, such as a family member, teacher, or guardian, carry greater gravity due to the betrayal of trust and the increased vulnerability of the child.
- Furthermore, the POCSO Act acknowledges the psychological and emotional impact of child sexual abuse. It recognizes that such abuse can cause severe trauma and long-lasting psychological damage to the child. The Act ensures that child-friendly procedures are followed during the investigation, trial, and rehabilitation processes to minimize any further harm to the child.
- In short, the magnitude or degree of child sexual abuse under the POCSO Act 2012 is determined by considering the nature of the offense, the age of the victim, the relationship between the offender and the victim, and the overall impact of the abuse on the child. The Act aims to provide comprehensive protection to children and holds offenders accountable for their actions, ensuring justice for the victims.

ADMINISTRATIVE LAXATION

There were many administrative pitfalls in implementing the POCSO Act. Due to the delay in filing the First Information Report (FIR) and following up on the medical legal case, authorities were unable to meet the statute of limitations despite repeated attempts. Testing is often omitted because people misunderstand what it means and how it affects patient well-being.

Because the environment surrounding minors in institutions is usually very uncomfortable and hostile, medical professionals must take greater responsibility when conducting tests on minors in distress. You must respond with the utmost kindness and patience. The police should follow similar manners during investigations.

CRITIQUE ON POCSO-CHALLENGES AND CONTROVERSIES

There are various gaps in the approach and implementation of the legislation set out in the POCSO Act. Below are some of them-

- Problems in applying the last seen theory: The last seen theory could lead to wrongful convictions in some cases and thus cannot b eapplied without circumstantial evidence. The Supreme Court ruled in Anjan Kumar Salma v. Assam (2017) that the last seen theory had weak evidence and could not be trusted on its own.
- Unprepared survey machinery: Investigations are flawed because authorities in child sexual abuse cases are not sufficiently familiar with the process. For example, in the Addl. Sessions Judge, Hoingoli and Ors. v. Bhawat and Ors. (2017), the Bombay High Court acquitted the alleged defendant on the grounds that the semen stains on the victim's dress could not be used for sentencing because the victim's dress was unsealed during police custody.
- Silence on consensual sex: In the case of consensual intercourse, if one of them is a minor, the non-minor partner may be prosecuted under POCSO law. This is because the consent of minors is not considered relevant under the Act.
- False allegations from children are not punishable: Section 22 of th e POCSO Act provides for the punishment of those who make false accusations intended to humiliate, threaten, intimidate or defame another person. However, although children are exempted from such punishment, this exemption provides a loophole for many to abuse the provision.
- Pending cases: The POCSO Act stipulates under section 35(2) that "the special court shall, so far as is possible, complete the proceedings within one year from the date of taking cognizance of the crime "but still the number of cases pending raises major questions about the effectiveness of the justice system.

Cases observed by Supreme Court and High Court

There have been several notable cases of the Apex Court, High Courts, and POCSO courts misinterpreting the legislation to the injury of the victim and society at large. Among the cases are:

1. "State v. Aas Mohammad"[3]

It was discovered that the victim, a 14-year-old female minor, had had an carnal relationship with her tenant. Following the revelation of the victim's pregnancy, her parents filed the grievance on her behalf. When questioned about the charge during the trial, she revealed she filed it because the individual refused to get into marriage. However, after the charge was filed, the claimed offender made an offer of marriage,

[3] 2017 SCCOnLine Del 7750.

compensation in the sum of Rs 30,000,and lodging for her family. They married while the renter was on bond, and the court determined that the tenant kept his commitments, thus he was cleared of the allegations against him. As a result of this decision, we can see that the Court is legalizing weddings of children rather than penalizing the criminal for committing a crime ,which is completely contrary to the spirit of POCSO.

2. State v. Ishkar Ahmed[4]

If the person is a minor aged under eighteen, engaging in a relationship with the plaintiff for engaging in a discussion with the complainant does not give the defendant permission to commit rape or engage in any other implicit sexual activity, regardless of whether he sought her permission. Nonetheless, in such cases, the legal notion of "mens rea" should be considered in order to aid better decision-making on the part of both the defendant and the plaintiff.

3. Satish Ragde v State of Maharashtra[5]

The POCSO Court in Bombay decided in this case that stroking a minor's bosom and disrobing her garment does not constitute "sexual assault" as defined by Section 7 of the POCSO Act, and thus is not punishable under Section 8 of the Act. Because there was no physical contact between the parties, the judge determined that the act constituted a non-major breach of Section 354 of the IPC.

4. Libnus v. State of Maharashtra[6]

Previously, the previous bench clearly stated in Libnus vs. the State of Maharashtra 2021SCC OnLine Bom 66 that "trying to restrain the hand of a 5-year-old girl and un-zipping her trousers while urging her to sleep with him did not constitute sexual assault under

Sections7, 8 of the POCSO Act."They defended their attitude by citing the lack of genuine contact between the two sides. The bench of our country's highest court first issued a stay order on these decisions, but then overturned it, claiming that "sexual intent" is required for the conduct to be characterized as a sexual assault under Section 7 and that "skin-to-skin contact" is irrelevant.

5. Sonu Kushwaha v. State of Uttar Pradesh[7]

Non-consensual oral sex does not constitute "aggravated sexual assault" or "sexual assault" under Sections "5, 6, or 9 of POCSO." According to the Allahabad High Court's findings in this case, it will be constituted "penetrative sexual assault" under Section 4of the statute. The current minimum term for physically harming a kid under the age of ten is seven years in jail. Section five now considers any sorts of explicit attacks on youngsters under the age of twelve that entail penetration to be "aggravated, "making the previous punishment much worse. The bench incorrectly classified the offence, so shortening the sentence of the guilty individual, which was contrary to the spirit of the Statute. The NCCR ("National Commission for Child Rights") aggressively pushed the

[4]2011 SCCOnLine Del 2800.

[5](Criminal Appeal no.161 of 2020).

[6]2021 SCCOnLine Bom 66.

[7]2014 SCCOnLine All 2539.

Chief Secretary of Uttar Pradesh to submit a petition. This instance highlights the need for more education and sensitivity towards the consequences of such crimes against youth. The sentence reduction for a significant offence exceeds.

REFORMATIVE SUGGESTIONS ON POCSO ACT

From this Act of 2012, it can be concluded that this law can significantly reduce the number of crimes against minors. The same is true, however, if the bureaucratic and judicial frameworks are functioning properly and lawfully to implement safeguards. Proving the age of the attacker based on the documentation provided may require the introduction of certain new measures into current law. Laws are undoubtedly fundamental in their nature, as their primary purpose is to have a constructive impact on the education of minors. These changes will make minors more aware of this type of crime and of the need to report the same to the relevant authorities in order to prevent further occurrences and ensure the betterment of society as a whole.

The lack of adequate Special courts, lack of awareness training for detectives and lawyers on how to deal with perpetrators of such crimes, inadequate prison records, etc. must follow the steps below: The directive of the Supreme Court is that "within 60 days of the judgment, a special court should be established in every district where more than 100 cases are pending under the law, "must be complied with immediately. The situation must be investigated and discussed openly.

Initially, POCSO Act did not offer a compensation scheme for minors who were victims of apparent crimes, however the Supreme Court drew attention to this failure and ordered victims to be compensated under the 'National Legal Service Authority's Compensation Scheme' for female Victims, survivors of sexual assault and other crimes. The problem, however, is that although POCSO is gender neutral, its compensation policy targets women and this is a legislative issue that needs remedial action.

To prevent violence, the knowledge and sensitivity of all involved are critical. Wide spread awareness campaigns should be conducted to educate the public about this law and the integrity of children. Law must also be incorporated into education. In addition to social stigma and psychological anxiety, victims of close family exploitation may become combative for fear of further humiliation and stigma. This issue needs to be considered, providing advice and enacting additional requirements to ensure that they are mentally prepared to confront perpetrators and defend their fundamental rights in the process. The involvement of various non-governmental organizations will also be helpful. Section 39 of the Protection of Children from Sexual Harassment Act requires community workers and doctors who work closely with abusers and victims to follow these principles.

In addition to raising public awareness, it is important to monitor the application of regulations. In addition to speedy courts, facilities and judicial capacity must also be considered. Regulatory safeguards must be put in place to facilitate grassroots implementation and enable rapid judicial remedies. Appropriate public training and special divisions for minors, equivalent to divisions for women, should be established.

Here come basic principles of responsibility at all levels. Many people in our country challenge the perception that sexual crimes are a serious problem that threatens national stability. It is important to accept that this dilemma stems from the

implementation of the current judicial program. In the event of health problems, those involved should be given immediate assistance

and compensation. Compensation for minors after being in a dire situation should be covered by the compensation system. Appropriate forums and frameworks must be provided for expressing opinions about crimes committed against them.

Guidelines under POCSO Act 2012:

Guidelines of the POCSO Act 2012 in schools:

1. Sensitization: Schools must conduct regular sensitization programs for teachers, students, and parents about the provisions and implications of the POCSO Act.
2. Reporting Mechanism: Schools should establish a robust mechanism to report any instances of child sexual abuse, ensuring confidentiality and safety for the victims.
3. Awareness Campaigns: Regular awareness campaigns should be organized within the school premises to educate students about good touch, bad touch, and safe and unsafe situations.
4. Safe Environment: Schools must create a safe and secure environment by implementing measures such as installing CCTV cameras, ensuring proper lighting, and regulating access to the premises.
5. Training for Staff: Teachers and school staff should receive specialized training on recognizing signs of abuse, responding to disclosures, and understanding their legal responsibilities.
6. Support Systems: Schools should establish support systems, such as counseling services or helplines, to assist victims and provide them with the necessary emotional and psychological support.
7. Code of Conduct: Schools should develop and implement a code of conduct that explicitly prohibits any form of sexual harassment or abuse within the school premises.
8. Collaboration with Authorities: Schools must cooperate with law enforcement agencies during investigations, ensuring prompt reporting of incidents and assisting in the legal proceedings.

Guidelines of the POCSO Act 2012 in workplaces:

1. Prevention Policy: Work places should develop a comprehensive policy that clearly defines and prohibits sexual harassment and abuse of children within the organization.
2. Internal Complaints Committee (ICC): Employers should establish an ICC to address complaints related to child sexual abuse promptly and impartially.
3. Awareness and Training: Regular awareness programs and training sessions should be conducted to sensitize employees about the provisions of the POCSO Act, recognizing signs of abuse, and reporting procedures.
4. Safe Environment: Workplaces must ensure a safe and secure environment for children, which may include measures like restricted access to certain areas, surveillance systems, and appropriate staffing.

5. Reporting Mechanism: Employers should establish a confidential and accessible reporting mechanism for employees to report instances of child sexual abuse or suspected abuse.
6. Support Services: Workplaces should provide access to support services like counseling or helplines for victims and their families.
7. Collaboration with Authorities: Employers must collaborate with relevant authorities, such as the police and child protection agencies, during investigations and legal proceedings.
8. Whistleblower Protection: Workplaces should have provisions to protect whistle blowers who report instances of child sexual abuse ,ensuring their confidentiality and safeguarding them against any retaliation.

Conclusion

The POCSO Act's status report has produced an uncertain proposition of effects. There are various obstacles in the way of implementing the legislature's really revolutionary mandate, which seeks to safeguard minors from sexual abuse and establishes a victim-centered criminal justice system. Analysis identifies the creases that need to be carefully examined. We need to have a serious, public discussion about child abuse at this point in our country's history. The least we can do for our kids is to use this momentum to bring about long-term systemic change.

EXPERIMENTING WITH CAMERAS IN THE COURTROOM: LIVE-STREAMING COURT PROCEEDINGS AND CONCERNS OF CONTEMPT OF COURT

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Abstract

In 2018, the Supreme Court of India introduced live-streaming of court proceedings as a pilot project. The move was widely welcomed as a significant step towards judicial reform and public participation in the legal process. Live-streaming has emerged as a means of promoting transparency and accessibility of the legal system. It allows the public to observe courtroom proceedings remotely, promoting openness and accountability in the judicial system. However, the introduction of live-streaming also raises concerns about the potential for contempt of court. The availability of live-streaming can amplify the risk of contempt, as it enables a broader audience to witness court proceedings and potentially engage in behaviours that disrupt the administration of justice. It may give a platform for individuals to make derogatory comments. This contrast establishes a rich foundation for scholarly discourse. This article explores the practice of live-streaming and highlights the concerns of contempt of court it raises. Moreover, it undertakes an examination of the practices in leading common law countries to identify the obstacles and possible solutions concerning live-streaming.

Key words-

Administration of Justice, Contempt of Court, Live-streaming, Open Justice,Publicity

INTRODUCTION

Historically, court proceedings were considered sacrosanct, and photography or recording whether audio or video invited action for contempt of court[1]. Courts employed the practice of excluding the public to protect witnesses from potential retaliation and shield them from experiencing embarrassment and emotional distress. These measures were deemed justified and were upheld as valid decisions aimed at fostering an environment within the courtroom that encourages witnesses to freely disclose all pertinent information. Throughout the annals of English legal history, legislative arrangements consistently precluded the presence of television cameras in courtrooms. Since 1925, a stringent prohibition on photography within courtrooms and the contiguous areas of judicial establishments in England and Wales was effectuated as stipulated under section 41 of the Criminal Justice Act 1925. Before 1925, the practice of capturing photographs within courtrooms in England and Wales was subject to judicial oversight, facilitated through the judge's inherent authority to manage legal

[1]DANIEL STEPNIAK, AUDIO-VISUAL COVERAGE OF COURTS - A COMPARATIVE ANALYSIS11-12 (Cambridge University Press 2008).

proceedings, alongside the legal principles encompassing contempt of court[2]. However, over the last few decades, there has been a growing tendency to scrutinize the restrictions imposed on broadcasting court proceedings. As technology continues to progress, the limitations imposed on broadcasting are progressively being viewed as incongruent with the common law doctrine of open justice.

On September 26, 2018, the Supreme Court of India,in the case of *Swapnil Tripathi v. Supreme Court of India*[3], delivered a judgment allowing the live-streaming of court proceedings. It was held that the inclusion of live-streamingof court proceedings falls within the purview of the right to access justice as enshrined in Article 21 of the Constitution of India. The Bench comprising Chief Justice Dipak Misra, alongside Justice A. M. Khanwilkar and Justice D. Y. Chandrachud, pronounced that the broadcasting of court proceedings in real-time serves the greater welfare of the public. It was decided that, initially, only cases of constitutional and national importance in the Supreme Court shall be live-streamed as a pilot project. Nevertheless, the verdict remained un-executed for a considerable duration. After almost four years, the Bench of the Supreme Court presided over by the then Chief Justice U. U. Lalit, arrived at a unanimous resolution to implement live-streaming of constitutional bench proceedings. On August 26, 2022,the Supreme Court conducted the live-streaming of its proceedings[4]. Over time, various High Courts have also adopted this practice. The Gujarat High Court has achieved the distinction of being the first High Court to implement live-streaming of its judicial proceedings. There is also deliberation on extending the scheme to the district courts. The endeavour of live telecasting is being undertaken on an experimental basis, with the determination to either sustain or modify the practice contingent upon the results and findings derived from the trials.

Live-streaming is poised to enhance both transparency and the accessibility of court proceedings. Facilitating the access of citizens to observe real-time proceedings of the Supreme Court represents a significant stride in cultivating an enlightened and well-informed citizenry. The initiative will facilitate a deeper comprehension of the judiciary's resolute commitment to safeguarding the rights of socio-economically disadvantaged, historically marginalized, and dis-empowered segments of the populace. It possesses the capacity to foster a culture that upholds the rule of law. This technological solution of live-streaming can facilitate the right of access to justice for the public in general and the litigants in particular, effectively extending the spatial confines of the courtroom beyond its tangible boundaries. It possesses certain inherent advantages like serving an educational purpose by enabling the practical examination of cases. Additionally, it mitigates various drawbacks of the system, including challenges related to extensive travel, time consumption, and overcrowding within the court premises.

However, apprehensions arise regarding the ramifications of live-streaming on both the judicial officials presiding over the cases and the audience observing the proceedings. Live dissemination of court proceedings is vulnerable to potential misuse. It may

[2]Id.

[3]Swapnil Tripathi v. Supreme Court of India, (2018) 10 SCC 639.

[4]Explainer: Now, you can watch Supreme Court live, THE TIMES OF INDIA (Sept. 27, 2022, 03:41 PM), https://timesofindia.indiatimes.com/india/explainer-now-you-can-watch-supreme-court-live/articleshow/94467488.cms.

encompass issues of national security considerations and potentially constitute a breach of the fundamental right to privacy. The Attorney General also put forth a recommendation, advising against the live-streaming of proceedings in cases where public dissemination of information could be detrimental to the fair and impartial dispensation of justice. He also advised against live broadcasting in cases[5] that are likely to incite emotions, arouse strong sentiments, and foster hostility among different communities. The unapproved duplication of live-streaming videos presents an additional area of concern, given the considerable challenge it poses for governmental regulation. The lack of proper infrastructure presents another obstacle to the successful execution of live court proceedings.

Undoubtedly, the evolution of the legal framework is imperative to meet the dynamic demands of a rapidly changing society. However, there is a need to deliberate on and address the socio-legal implications associated with this paradigm shift, to maintain a delicate balance that prevents the potential disadvantages from outweighing the advantages. The practice of broadcasting legal proceedings must be guided by the common law principle of open justice subject to refinement through the laws of contempt, alongside diverse statutory limitations, and the fundamental rights safeguarded by the Constitution of India. Ultimately, the control over such streaming ought to be administered through the inherent authority of judges, provided to curtail coverage when the imperative of administration of justice necessitates such action.

SWAPNIL TRIPATHI JUDGEMENT AND THE LEGAL FRAMEWORK

In *Swapnil Tripathi v. Supreme Court of India*, the petitioners, and interventionists, asserting themselves as individuals with public concern, had formally requested a pronouncement from the Supreme Court affirming the necessity for live broadcasting of proceedings on matters of constitutional and national significance within the Supreme Court. Moreover, the petitioners requested guidance from the Court in formulating directives aimed at facilitating the identification of extraordinary cases warranting eligibility for live-streaming. The central issue, in this case, pertained to the appropriateness of live-streaming court proceedings before the Supreme Court. The petitions put forth were grounded on the notion that live-streaming would facilitate broad public and litigant access to legal proceedings. Substantiating their arguments, the petitioners drew upon the authoritative pronouncement of a nine-judge Bench in *Naresh Shridhar Mirajkar v. State of Maharashtra*[6]. The Court in this case upheld the rights of journalists to disseminate accurate accounts of legal proceedings under Article 19 of the Constitution. It underscored the significance of open trials in safeguarding the credibility and efficiency of judicial institutions, as well as in bolstering public confidence. The Court observed that an all-encompassing attainment of justice necessitates the litigant's capacity to directly perceive, discern, and comprehend the unfolding of legal proceedings. Referring to *Scott v. Scott*, the Court observed "…where there is no publicity, there is no justice. Publicity is the very soul of justice…It keeps the

[5]Bikash Singh, Manipur Violence: Unrest triggered after HC order to recommend quota for Meiteis, THE ECONOMIC TIMES (May 6, 2023, 12:42 AM), https://economictimes.indiatimes.com/news/politics-and-nation/manipur-violence-unrest-triggered-after-hc-order-to-recommend-quota-for-meiteis/articleshow/100022219.cms?from=mdr.

[6]Naresh Shridhar Mirajkar v. State of Maharashtra, AIR 1967 SC 1.

Judge himself while trying under trial[7]." Drawing an analogy between the judicial system in India and that of a pyramid, the Supreme Court underscored the significance of introducing live-streaming for the proceedings conducted within the district courts, which constitute the expansive foundation of the pyramid, serving as the primary point of interaction between citizens and the legal system.

While the Indian legal framework does not explicitly refer to open justice, it does include statutory provisions that address the concept of open court. Concerning the pronouncement of judgments by the Supreme Court, Article 145(4) of the Constitution explicitly mandates that such pronouncements must take place in an open court[8]. However, the Constitution does not contain any explicit provision concerning open court hearings before the Supreme Court. Instead, the provisions for conducting open court hearings are mentioned in the Code of Criminal Procedure[9] and the Code of Civil Procedure[10]. Further, the constitutional provision outlined in Article 21 engenders the right to access justice. The right to access and be furnished with information is also firmly entrenched in Article 19(1)(a).The act of publishing the legal proceedings of the Supreme Court and High Courts exemplifies one aspect of the court's classification as a court of record under Articles 129 and 215 of the Constitution respectively.

The broadcasting of legal proceedings would serve as a confirmation of the constitutional rights granted to both the general public and the parties involved in litigation provided the majesty of the court and privacy rights of both litigants and witnesses are protected.

LIVE-STREAMING AS AN EXTENSION OF OPEN JUSTICE

As mentioned above, the verdict in the *Swapnil Tripathi* case is founded upon the principle of open justice. Jeremy Bentham introduced the concept of open justice, which can be comprehended most effectively not as a singular notion but rather as a collection of guiding principles. It encompasses both procedural and substantive aspects, such as the right of an involved party to be present in court as an observer, the encouragement of comprehensive, impartial, and precise media coverage of court proceedings, the obligation of judges to provide well-founded justifications for their decisions and the public's access to court judgments[11]. Lord Chief Justice Hewart articulated this concept in *R v. Sussex with* the following assertion: "…justice should not only be done but should manifestly and undoubtedly be seen to be done[12]." While the Indian legal system does not explicitly enunciate the concept of open justice, it does mention open court, which is considered a crucial procedural aspect in the wider framework of open justice[13]. According to Black's Law Dictionary, "open court" may mean "…either a court which has been formally convened and declared open for the transaction of its proper judicial

[7]Scott v. Scott, 1913 AC 417.

[8]INDIA CONST. art. 145, cl. 4.

[9]Code of Criminal Procedure, 1973, § 327(1), No. 2, Acts of Parliament, 1974 (India).

[10]Code of Civil Procedure, 1908, § 153B, No. 5, Acts of Parliament, 1908 (India).

[11]Emma Cunliffe, Open Justice: Concepts and Judicial Approaches, 40 FED L REV 385, 389 (2012).

[12]R v. Sussex, [1924] 1 KB 256.

[13](2018) 10 Supreme Court Cases 639.

business or a court which is freely open to the approach of all decent and orderly persons in the character of spectators[14]." In simpler terms, it refers to judicial proceedings that are accessible to the general public, wherein any individual interested is granted the right to be admitted and participate.

In India, it is a standard practice, that all types of cases presented before the judiciary, be they civil[15] or criminal[16], are required to undergo adjudication in open court, giving rise to the proposal for live broadcasting of court proceedings. In *Swapnil Tripathi*, the utilization of live-streaming during courtroom proceedings was regarded as a means to uphold the principles of open justice. Trials conducted in an open court and exposed to public scrutiny inherently function as a safeguard against arbitrary or unpredictable judicial actions. Additionally, they serve as a potent means of instilling public trust in the legal system's integrity, objectivity, and impartiality. Nonetheless, it is prudent to subject the live-streaming procedure to meticulously crafted directives to avert the potential for its adverse impact on the dispensation of justice and the incitement of contemptuous behavior towards the court. In *Naresh Shridhar Mirajkar v. State of Maharashtra*[17], a limited right to access to court was recognized and it was clarified that such entitlement does not rise to the status of a fundamental right for the public at large.

Further, debating the advantage of ensuring transparency in broadcasting legal proceedings, *Dolores K. Sloviter*, contended that there exists no compelling rationale to suggest that the advantages derived from observing a trial in this manner would not be equally achieved through the physical presence of impartial spectators within the courtroom, as opposed to the scenario of dispersed viewers observing via televised broadcasts[18]. Given the dearth of empirical evidence regarding the impact of live-streaming on trial proceedings, we are compelled to lean on the analyses and contentions presented by proponents and opponents alike. Regardless of our stance, the integration of live-streaming must align with the imperative of ensuring the effective dispensation of justice.

An open trial must aim to safeguard the rights of the parties rather than serve as a means of public entertainment. The paramount right is of the litigants to a just and equitable trial, rather than of the public to observe proceedings via live-streaming. Further, the regulatory framework for live-streaming must adhere to the broad principles[19] enunciated by the Supreme Court in the *Swapnil Tripathi judgment*. In addition to the exclusion of matrimonial affairs, instances of sexual offenses, and proceedings involving minors, the presiding judge is anticipated to disqualify cases where live-streaming is likely to undermine the integrity of the judicial process. A well-synchronized system ought to be in place for the prompt cessation of live-streaming in instances where there is a perceived risk of contempt of court or any other threat to the effective administration

[14]HENRY CAMPBELL BLACK, BLACK'S LAW DICTIONARY 1318 (4th ed. 1968).

[15]Code of Civil Procedure, 1908, § 153B, No. 5, Acts of Parliament, 1908 (India).

[16]Code of Criminal Procedure, 1973, § 327, No. 2, Acts of Parliament, 1974 (India).

[17]AIR 1967 SC 1.

[18]Dolores K. Sloviter, If Courts Are Open, Must Cameras Follow?, 26 HOFSTRA L. REV. 873, 886 (1998).

[19]Such as modest time delay, retaining copyright, exclusion of certain categories of cases, streaming by authorised agency, ban on commercial use, archive on website, and vesting the presiding judge with authoritative discretion.

of justice. This becomes especially relevant in instances where the preservation of broader public interest is warranted due to the delicate nature of a case, which possesses the potential to trigger a law-and-order situation[20].

It is important to note that there are matters that require meticulous examination before the full-scale integration of live-streaming practices especially in the lower judiciary. In this regard, referring to the methodologies embraced by judiciaries in foreign countries could offer valuable insights in shaping our approach.

PRACTICES IN OTHER COMMON LAW COUNTRIES

In several common law countries worldwide, the adoption of broadcasting courtroom proceedings has gained notable acceptance. An examination of this evolving concept in selected countries and the corresponding procedural norms as to how courts have addressed concerns of privacy, confidentiality, and the delicate nature of litigants, witnesses, and cases, while maintaining the dignity and majesty of the court could yield valuable insights.

Australia

In Australia, the courtrooms across various jurisdictions allow the presence of television cameras[21]. Since 2013, the public has been granted access to audio-visual recordings of the Australian High Court[22]. Capturing and transmitting audio-visual content is executed by the personnel of the Court[23]. In the majority of the hearings, the recordings of the proceedings are rendered accessible within a span of one to two days[24]. There are limitations on the act of recording or replicating said recordings such as prior authorization from the Court and retention of copyright[25]. However, except for the High Court, the majority of Australian judicial bodies lack a uniform approach regarding the admission of television cameras within their courtrooms. The practice of filming is typically conducted in an unsystematic manner and is primarily confined to capturing formal ceremonial sessions[26]. These broadcastings of legal proceedings within Australian courts are constrained by the limitations delineated by the law of contempt of court. The law of contempt has been characterized as the primary mechanism within the Australian legal framework for regulating media publicity of court proceedings[27].

[20]BIKASH, supra note 5.

[21]DANIEL, supra note 1, at 210.

[22](2018) 10 Supreme Court Cases 639.

[23]PHOTOGRAPHY AND RECORDING - HIGH COURT OF AUSTRALIA, https://www. hcourt.gov.au /about/photography-and-recording (last visited Aug. 6, 2023).

[24]Id.

[25]RECENT AV RECORDINGS - HIGH COURT OF AUSTRALIA, https://www.hcourt.gov.au/cases/recent-av-recordings (last visited Aug. 6, 2023).

[26]DANIEL, supra note 1, at 210-211.

[27]Id. at 212-213.

Canada

The Canadian Supreme Court is acknowledged as a trailblazer in incorporating technological advancements, exemplified by its endorsement of audio-visual dissemination of its judicial proceedings[28]. In1993, the Canadian Supreme Court initiated an attempt to facilitate real-time televised broadcasts of the proceedings encompassing three prominent legal cases[29]. The telecasts were regulated by three primary principles:

(a) The case to be filmed will be selected by the Chief Justice. (b) The Chief Justice or presiding Justice may limit or terminate media coverage to protect the rights of the parties; the dignity of the court; to assure the orderly conduct of the proceedings; or for any other reason considered necessary or appropriate.

(c) No direct public expense is to be incurred for wiring, or personnel needed to provide media coverage[30].

The Canadian Parliamentary Affairs Channel (CPAC) is authorized to broadcast the appellate proceedings of the Court, albeit at a laterdate[31]. The telecasts are bound by established directives that serve to guarantee the Court's continued authority over the entirety of the filming procedures[32]. Since 2009, the appeal hearings have been publicly aired and subsequently preserved within the digital archives of the Court's official website[33]. The Court maintains ownership of the copyright of the legal proceedings[34]. If a party expresses the intention to withhold their case from the broadcast, it is incumbent upon them to communicate this intent to the Registrar no less than a fortnight in advance of the scheduled date of the hearing[35].

New Zealand

New Zealand adopts a liberal approach to media accessibility within its court system, having one of the most advanced and progressive live broadcasting frameworks among countries adhering to the common law tradition[36]. During the period spanning from 1996 to 1998, New Zealand undertook a pilot initiative covering more than twenty cases[37]. The entirety of streaming was subjected to a dual set of primary regulations: first, how broadcasts were to be conveyed necessitated adherence to principles of precision, objectivity, and equitable depiction of events, ensuring the absence of any accompanying editorial comment; secondly, the utilization of broadcast content for purposes beyond routine news programming or articles, mandated prior acquisition of

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[28]Kyu Ho Youm, Cameras in the Courtroom in the Twenty-First Century: The U.S. Supreme Court Learning From Abroad?, 2012 BYU L. REV.1989, 2005 (2012).

[29]DANIEL, supra note 1, at150.

[30]KYU, supra note 28, at 2006.

[31]DANIEL, supra note 1, at151.

[32]Id. at152.

[33]KYU, supra note 28, at 2007.

[34]DANIEL, supra note 1, at152.

[35](2018) 10 Supreme Court Cases 639.

[36]DANIEL, supra note 1, at300.

[37](2018) 10 Supreme Court Cases 639.

formal authorization[38]. In New Zealand, the broadcasting of court proceedings by media entities is authorized contingent upon the court's approval and regulated by the guidelines mentioned harmonizing the fundamental tenet of open justice with the imperative of ensuring a fair trial. There is also a latency of ten minutes. Usually, the Supreme Court accords permission for the recording of its proceedings, unless expressly contested by the involved parties[39].

South Africa

The inclusion of cameras within the courtrooms of South Africa is a contemporary development. In the year 2017, a significant precedent was set in *Van Breda v. Media 24 Limited*[40] ,wherein the Supreme Court ruled in favour of permitting the dissemination of legal proceedings through broadcasting within criminal trials. The court emphasized that broadcasting court proceedings should remain unimpeded unless clear and substantiated evidence of bias is presented, coupled with a credible likelihood that such bias would materialize. The Court has established a set of general guidelines authorising the trial court to judiciously determine the permissibility of broadcasting proceedings, employing a case-specific approach. This involves balancing the potential jeopardy of introducing cameras and the potential detriment to a fair trial. Furthermore, a judge possesses the prerogative to cease media access whenever a determination is made that the regulations stipulated by the presiding judge have been contravened[41].

United Kingdom

The Supreme Court of the United Kingdom has sanctioned the streaming of its court proceedings through broadcasting mediums[42]. Till 2005, the act of recording legal proceedings was deemed unlawful[43], constituting an instance of contempt towards the court[44]. Through the enactment of the Constitutional Reform Act of 2005, an exemption was conferred upon the Supreme Court, absolving it from the proscriptions stipulated within the Criminal Justice Act of 1925[45]. This was extended by the Crime and Courts Act of 2013 to the broadcasting of Supreme Court proceedings excluding these proceedings from the purview of the Contempt of Court Act of 1981[46]. The Eighth Practice Direction promulgated by the Supreme Court delineates the extent and arrangement of the aforementioned broadcasts[47]. The proceedings of the Supreme Court are authorized for filming and broadcasting by three prominent national broadcasters:

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[38](2018) 10 Supreme Court Cases 639.

[39]DANIEL, supra note 1, at347.

[40]Van Breda v. Media 24 Limited, 2017 ZASCA 97.

[41](2018) 10 Supreme Court Cases 639.

[42]WATCH LIVE - THE SUPREME COURT, https://www.supremecourt.uk/live/court-01.html (last visited Aug. 7, 2023).

[43]Criminal Justice Act, 1925, § 41, No.Ch. 86, Acts of Parliament, 1925 (UK).

[44]Contempt of Court Act 1981, § 9, No. Ch. 49, Acts of Parliament, 1981 (UK).

[45]Constitutional Reform Act 2005, § 47, No. Ch. 4, Acts of Parliament, 2005 (UK).

[46]Crime and Courts Act 2013, § 31-33, No. Ch. 22, Acts of Parliament, 2013 (UK).

[47]UKSC PRACTICE DIRECTION 8, PARA 8.17.1 - BROADCASTING, https://www.supremecourt.uk/docs/practice-direction-08.pdf (last visited Aug. 7, 2023).

BBC, ITN, and Sky News[48]. Any form of transmission that could undermine the credibility of the proceedings, such as programs intended for amusement, satirical content, political party communications, and promotional activities, isproscribed[49].

In the year 2013, the United Kingdom sanctioned the inclusion of audio-visual broadcasting of proceedings of the Court of Appeals[50] after the endorsement of the Ministry of Justice in its 2012 Report, to publicly air the proceedings of the Court of Appeals, citing the absence of victims or witnesses in these proceedings as a key rationale[51]. However, the Ministry of Justice exercises heightened caution when deliberating upon the broadcasting of proceedings of lower courts as it involves broader concern for witness and victim protection[52].

United States of America

The recording of video footage or capturing of photos during its proceedings is prohibited by the United States Supreme Court[53]. The prohibition is grounded in a multifaceted rationale, encompassing concerns over potential deleterious impacts on legal practitioners and judicial authorities[54]. Throughout its history, the Supreme Court has maintained a consistent stance in dismissing pleas for broadcasting of its proceedings[55]. Since 1955, the Court has granted permission for the capture of audio recordings during verbal deliberations. 1955 was the year of the O. J. Simpson trial which according to numerous accounts devolved into nothing short of a spectacle, with jurors, lawyers, and the judge adjusting their behavior to accommodate the demands and preferences of the television audience[56]. At present, the US Supreme Court expeditiously publishes audio transcriptions of the verbal exchanges on the same day as the proceedings, alongside comprehensive audio recordings of all oral debates conducted within each week of hearings[57].

Certain Federal Courts permit the broadcasting of court proceedings subject to stipulated guidelines. Courts across the various States of the United States have established regulations on the broadcasting of court proceedings, with the specifics of these regulations differing from State to State in terms of both the magnitude and scope.

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[48]PROPOSALS TO ALLOW THE BROADCASTING, FILMING, AND RECORDING OF SELECTED COURT PROCEEDINGS,https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/217307/broadcasting-filming-recording-courts.pdf (last visited Aug. 7, 2023).

[49]Id.

[50]Itay Ravid,Tweeting #Justice: Audio-Visual Coverage of Court Proceedings in a World of Shifting Technology, 35 CARDOZO ARTS & ENT. L.J. 41, 45 (2017).

[51]Supra note 48.

[52](2018) 10 Supreme Court Cases 639.

[53]Id.

[54]SUPREME COURT OF THE UNITED STATES - COUNSELOR TO THE CHIEF JUSTICE, https://cdn.arstechnica.net/wp-content/uploads/2017/10/scotusletter.pdf (last visited Aug. 8, 2023).

[55]Jason Mazzone, Above Politics: Congress and the Supreme Court in 2017, 93 CHI.-KENT L. REV. 373, 404 (2018).

[56]Salonika Kataria et. al., Cameras in Indian Courtrooms: A Bliss or Misery? - Learning from the American Experience, 1 NUJS L. REV. 345, 351 (2008).

[57]ORAL ARGUMENTS - SUPREME COURT OF THE UNITED STATES, https://www.supremecourt.gov/oral_arguments/oral_arguments.aspx (last visited Aug. 8, 2023).

Since 1946, Rule 53 of the Federal Rules of Criminal Procedure has enforced a prohibition on the filming and broadcasting of criminal proceedings within the jurisdiction of the United States Federal Courts[58].

In the case of *Estes v. Texas*, the US Supreme Court rendered a verdict observing that the utilization of camera coverage during a trial, even in the face of the defendant's explicit dissent, constituted an infringement upon the defendant's constitutionally safeguarded rights[59]. The Court further held that no provisions within the First and Sixth Amendments of the US Constitution afford any constitutional right sanctioning the utilization of cameras in courtrooms. However, the inquiry into whether the broadcasting of courtroom proceedings inherently compromised the impartiality of a just trial persisted unresolved. The court addressed this query in the case of *Chandler v. Florida*, by asserting that the limitations on camera presence as established in Estes's case should not be construed as an unalterable and all-encompassing prohibition[60]. The court opined that the responsibility for delineating regulations governing the admission of televised broadcasts rested with individual states. It was emphasized that the act of televising a criminal trial should not be automatically construed as intrinsically prejudicial to the defendant's fair trial rights. Following the ruling in the Chandler case, all States within the United States have authorized some form of broadcasting within a regulatory framework[61]. However, the court acknowledged the potential risks posed to the defendant's right to a fair trial. Chandler's judgment imposed an unjustifiable onus on the accused to demonstrate that prejudice arose due to the presence of cameras[62].

The emergence of courtroom broadcasting in most countries is a result of judicial rulings. Also, many of the countries adhere to specific shared protocols, including the implementation of a modest time delay, retaining copyright, preliminary trial initiatives, exclusion of certain categories of cases, and vesting the presiding judge with authoritative discretion. The act of broadcasting is typically prohibited in cases where it hinders the smooth functioning of the judicial process.

CONCERNS OF CONTEMPT OF COURT

The Supreme Court of India, while acknowledging the usefulness of live-streaming court proceedings, demonstrated an effort to reconcile the diverse concerns of the administration of justice. These concerns encompassed the principles of open justice, the preservation of the dignity and privacy of the parties involved in the proceedings, and the maintenance of the Courts' revered majesty and decorum[63].

Contempt law addresses issues of prejudicial publicity which also include the practice of live-streaming. Under the common law articulation "any act done or writing published calculated to obstruct or interfere with the due course of justice or the lawful process of the courts" amounts to contempt of court[64]. The New South Wales Law Reform

[58]Federal Rules of Criminal Procedure, § 53, No. 9, Acts of Parliament, 2016 (USA).

[59]Estes v. Texas, 381 US 532 (1965).

[60]Chandler v. Florida, 449 US 560 (1981).

[61](2018) 10 Supreme Court Cases 639.

[62]SALONIKA, supra note 56, at 349.

[63](2018) 10 Supreme Court Cases 639.

Commission conceptualises contempt of court in the following manner:

The law of contempt aims to prevent interference with the administration of justice. It regulates a range of human activities that pose a risk of such interference, such as misbehaviour in the courtroom, disobeying court orders, and interference with parties and witnesses in court proceedings[65].

Further, in India, contempt of court has been broadly categorized as civil contempt and criminal contempt[66]. Because contempt of court encompasses a diverse array of behaviours, different facets related to the broadcasting of legal proceedings have the potential to fall within one or multiple classifications of contempt of court. A broadcaster can potentially engage in an act of civil contempt through the act of disregarding a court directive or guidelines concerning the broadcasting of legal proceedings. On the other hand, the unauthorized use of cameras in the courtroom is capable of constituting contempt in the face of the court - a form of criminal contempt. Sub-judice contempt can also manifest when the broadcasting unduly biases an ongoing trial, thereby impeding the proper dispensation of justice.

Courtroom publicity exerts a dual impact on democracy, simultaneously fortifying and undermining its foundations. While the introduction of cameras in courtrooms appears to expand public accessibility to judicial proceedings, it is crucial to acknowledge that this enhanced access, in certain instances, instead of guaranteeing a just trial, could potentially jeopardize the right to a fair trial due to the contemptuous ramifications associated with the live-streaming of such proceedings. The emergence of social media has empowered everyone to assume the role of a potential journalist. There are discernible signs that segments of the judicial procedure, once accessible to the general public, are susceptible to both sensationalized portrayal and dissemination of misleading information. Despite a proactive approach by courts, there have been instances where fragmented video clips of these proceedings have been disseminated on social media platforms, often accompanied by sensationalized titles trying to vilify judges or legal practitioners. Most of these videos are devoid of any identifiable sources, maintaining anonymity and evading scrutiny or responsibility. Hence, there exists a possibility that both judges and lawyers might engage in self-censorship while participating in live-streamed hearings[67]. This is likely to result in an unfavourable consequence of sterilizing the oral proceedings and impeding authentic courtroom interaction. Certain academic studies indicate that judges, when provided with unrestricted television airtime, demonstrate behavior akin to that of politicians, wherein they take actions aimed at optimizing their visibility and presence[68]. It would be a gross violation of fair trial if the judges and advocates adjust their behavior to the tastes of the viewers. Live-streaming and subsequent comments on social media may also lead to

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[64]R v. Gray, [1900] 2 QB 36.

[65]DANIEL, supra note 1, at 213.

[66]Contempt of Courts Act, 1971, § 2, No. 70, Acts of Parliament, 1971 (India).

[67]Joshua Rozenberg, Will televised trials create celebrity judges?, THE GUARDIAN (Sept. 6, 2011, 20:30 BST), https://www.theguardian.com/law/2011/sep/06/televised-trials-celebrity-judges. (last visited on 11th Oct, 2022)

[68]Felipe Lopes, Television and Judicial Behaviour: Lessons from the Brazilian Supreme Court, 9 ECON. ANAL. LAW REV. 41, 41 (2018).

mob trial on sub judice matters[69]. Later public may feel let down by the judiciary if the court verdict goes against their sentiment.

The act of live-streaming also gives rise to a plethora of other concerns such as: (a) privacy issues - in the absence of robust safeguards, live-streaming can lead to violation of privacy rights of the litigating parties (b) discretionary powers - the present system of live-streaming gives the presiding judge uncontrolled discretionary power to decide on the streaming of a case (c) psychological impact of live-streaming - owing to the heightened awareness of public scrutiny, judges might refrain from offering remarks that could potentially be construed as unpopular (d) heightened emphasis on oral remark - due to live-streaming of cases there are hints of increased emphasis on oral remarks of judges rather than the final verdict (e) threat to evidence - the presence of cameras might impact the composure of witnesses, leading to constraints on their ability to testify with true freedom (f) escape route for accused - live-streaming has the potential to serve as an escape route for accused, given that they may contend adverse publicity and the absence of a fair trial as mitigating factors[70] (g)shifting focus of judges - live-streaming compels judges to shift their focus towards administration of what transpires through camera.

The live-streaming practice necessitates diligent adherence to systematically formulated directives. The introduction of live-streaming also necessitates appropriate amendments to the Contempt of Courts Act, 1971.Any unapproved utilization of the live stream should be subject to legal sanctions as per the law of contempt. Also, it is important to note that in recent times, there has been a shift in the approach to harmonising competing interests through contempt of court and sub judice regulations alone. The new approach tends to also emphasize open justice, free expression, and the public right to information[71].

CONCLUSION

The live-streaming of court proceedings undeniably offers the public an opportunity to observe and gain insight into court proceedings, a privilege that was previously hindered by logistical constraints and infrastructural limitations within the courts. However, with the practice of live-streaming and opening courts to a broader audience comes the increased possibilities of contempt of court. Live-streamingof sub-judice matters is expected to incite significant public emotion, potentially influencing the impartiality of the trial process. People will comment on ongoing cases on social media based on their feelings and sentiments, which in turn, will result in increased pressure of public opinion on judges. Hence, broadcasting must be subject to restrictions in the interest of public morals, privacy, contempt of court, national security, and public order.

The regulatory framework for live broadcasting is presently in an incipient phase. With unfettered discretionary power, presiding judges have a delicate task at hand of choosing carefully the cases to be live-streamed. While streaming, it must be ensured that the dignity of the court and the parties remain intact. What is necessitated is a

[69]THE LEGAL NOW, https://www.youtube.com/watch?v=gEYykA0fMLA (last visited Sept. 5, 2023).

[70]SALONIKA, supra note 56, at 358.

[71]Clive Walker, Fundamental Rights, Fair Trials and the New Audio-Visual Sector, 59 MOD. L. REV.517, 517-518 (1996).

nuanced equilibrium between the requirement of dissemination and the assurance of equitable justice for all involved parties. In certain cases, video or audio recording of proceedings can be an alternative to live-streaming.

Before broadcasting is applied in the lower judiciary, it is desirable to have a well-developed regulatory framework. Courts must be cautious while deciding to live stream trial court proceedings as victims and witnesses are more likely to appear in such courts and hence, involve larger issues of victim and witness protection. The onus of delineating the procedural intricacies for broadcasting lower court proceedings rests upon the respective High Courts. This necessitates comprehensive research into the live-streaming experiences of various High Courts. Effective advancement of this project to the lower judiciary will heavily depend upon insights derived from these experiences.

Cameras in the courtroom are a new phenomenon for the Indian judiciary and some aspects require further investigation. Careful empirical study must be conducted to understand the impact of cameras on judges, advocates, and other participants. Such a survey must consider the Hawthorne Effect which elucidates the alterations in the conduct of research subjects when exposed to the act of being observed. Additional research is warranted to ascertain the potential advantages of implementing live-streaming in India, particularly given the current state of the country's development.

In pursuit of progress and intellectual growth, we must embrace the practice of live-streaming court proceedings. Refusing to adapt would only lead to a state of stagnation, hindering our capacity to evolve. On the other hand, an indiscriminate implementation of live-streaming is poised to place the judiciary in a state of disarray. The resolution may be found through meticulous examination and discernment of the live-streaming process and guidelines.

ACCESS TO JUSTICE AND GOVERNMENT ATTITUDE AS A LITIGANT: CHALLENGES AND PLIGHT

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Abstract

Justice V.R. Krishna Iyer, J. has said that, the state should act like an informed litigator, not like an ordinary individual, and should not defend cases solely to protect the ego of a certain officer. Statutory authorities should not make frivolous and unreasonable objections, nor should they act callously and high-handedly, as some private litigants do. Legal system in India is facing a major challenge as a result of a large number of cases being brought before the courts by the Government, both at the State and Central levels, as well as public sector companies. Despite being a crucial aspect of a developing economy, the administration of justice has not received the necessary investment, resulting in insufficient resources being allocated to this important sector. Ironically, while the government and public sector entities are responsible for a significant proportion of the litigation, funding for the courts is classified as non-plan expenditure and receives little priority. This has led to criticism that the government is not providing enough resources to support the courts and judges, despite their own propensity for bringing cases to the courts. In fact, the government is responsible for almost half of the 30 million pending cases in Indian courts.

Key words-

Legal System, Litigants, Administration of justice, LIMBS, Hindrance in justice, ADR

INTRODUCTION

Despite several recommendations to reduce the number of disputes, the government has been slow to change its approach, and continues to engage in litigation across a range of areas, including service matters, disputes with private entities, and internal disputes between governmental departments and public sector undertakings. Data from the Legal Information Management and Briefing System (LIMBS) website shows that as of in 2022, the total number of pending cases of all types and levels reached 50 million or 5 crores, including over 169,000 district and high court cases that had been pending for more than 30 years. As of December 2022, 4.3 crore out of 5 crore cases, or more than 85% of all cases, were pending in district courts.

Railways have the highest number of unresolved cases, with 66,685 pending cases, out of which 10,464 have been pending for over a decade. On the other hand, the Ministry of Panchayati Raj has the lowest number of pending cases, with only three. It should be noted that since the data is constantly changing on the dynamic website LIMBS, the numbers mentioned in the document may not remain static.

There are two categories of such disputes in India. The first category involves citizens suing either the central or state governments for a range of issues, such as labor disputes, taxation, pension-related issues, and compensation claims by farmers. The

high number of such grievances against the state reflects the poor governance in the country.

The second category of cases involves disputes between different branches of the state, either at the central or state level. This leads to wastage of judicial resources, as one branch of the government takes up the time of the judiciary to sue another branch for issues that could be easily resolved through internal arbitration. Given the slow pace of the judicial system in the country, with a mere 17 judges for every 10-lakh people and a large number of undertrial prisoners languishing in jails, such intra-state litigation should be significantly limited.

Governments and statutory authorities sometimes engage in unwarranted litigation due to certain officers who hold baseless assumptions. These assumptions are that any claim against the government or authority is automatically illegal and should be fought in the highest court, and that it's better to avoid making decisions and let the courts handle them instead. This tendency to avoid decision-making and challenge all orders is not the official policy of these entities, but rather stems from officers' fear of being accused of making the wrong decisions. To address this issue, the Central Government is working on practical norms for defending cases and filing appeals, but it's important for all levels of government to take steps to reduce unnecessary litigation, which has been clogging up the justice system for too long.

Genuine efforts must be made to make justice more accessible and speedier for deserving litigants.

The problem of unwarranted litigation by governments and statutory authorities is a long-standing issue that has been hindering the effective functioning of the justice system. It not only causes unnecessary delays in the resolution of disputes but also results in a waste of public resources[1].

One of the main reasons behind this phenomenon is the mindset of certain officers who are responsible for taking decisions or handling litigation. They tend to be risk-averse and are afraid of being held accountable for any mistakes or incorrect decisions. As a result, they prefer to avoid making decisions altogether or challenging any orders against them, leading to a flood of litigation.

To address this problem, the Central Government has taken a proactive approach by formulating practical norms for defending cases and filing appeals against adverse decisions. This step will not only reduce unnecessary litigation but also promote efficiency and transparency in the system. However, it's important for all levels of government to take similar steps to reduce the burden of litigation on the justice system.

The issue of unwarranted litigation is particularly acute in State Governments and statutory authorities, as they have a higher volume of cases compared to the Central Government. It's crucial for these entities to take proactive steps to eliminate unnecessary litigation, which will help to ensure easy and speedy access to justice for bona fide and needy litigants.

In conclusion, the problem of unwarranted litigation by governments and statutory authorities is a complex issue that requires a multifaceted solution. While the Central

[1] Urban Improvement Trust, Bikaner v. Mohan Lal, (2010) 1 SCC 512.

Government has taken the first step towards reducing unnecessary litigation, it's imperative for all levels of government to work together to address this issue and ensure that justice is delivered in a timely and efficient manner.

Justice T S Thakur, a former Chief Justice of India, expressed his criticism of the government's approach as the "biggest litigant". He pointed out that a large number of cases against the government cannot be considered a sign of good governance, as the government should be responsive enough to prevent litigation where it can be rationally avoided. Justice Thakur acknowledged that the fact that people still have faith in the judiciary and its ability to settle disputes is a positive sign, but the high number of cases involving the government is a cause for concern. He emphasized the urgent need for the Indian government to reform its litigation system, as it is already problematic for individuals to have to go to court against the state. Moreover, the government's tendency to appeal decisions adverse to it and pursue litigation relentlessly to the highest courts aggravates the situation[2].

Section 80 of the Civil Procedure Code, 1908, and the 126th Law Commission Report state that the activities of the government and public sector undertakings are vast and varied. They may not be aware of any legal action being taken against them until it has already begun. However, it was assumed that the government and public sector undertakings would not engage in frivolous litigation or pursue irrelevant reasons. To provide them with an opportunity to remedy any wrongdoing or reconsider their decisions, it was legally mandated to serve them with a notice of the intended cause of action. The purpose of this notice is to allow the government or public sector undertaking to take appropriate action before being dragged to court. This is why provisions like section 80 of the Code of Civil Procedure exist.

To keep Section 80 of the CPC in the law books, there needs to be a significant and fundamental change in how notices are handled on behalf of the government, public officers, and public sector organizations. When a notice is received, the party receiving it should immediately be informed that their concerns are being reviewed and a decision will be made as soon as possible. This will prevent unnecessary litigation and give the government and public officers a chance to examine any claims made against them before getting involved in avoidable legal disputes. The law exists to advance justice and not to trap those who are ignorant or illiterate. Failure to heed this warning could result in Section 80 being eliminated. Although the government has not yet agreed to delete this section, it would be advisable to remove some of its unfavorable aspects[3].

LITIGATION TENDENCIES OF GOVT.: A HINDRANCE IN ACCESS TO JUSTICE:

To survive in the market, justice must be seen as reliable, dependable, and instill confidence in the citizenry it serves. It is crucial that the justice system works solely for

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[2]http://www.dnaindia.com/india/report-sc-judge-accuses-government-of-being-the- biggest-litigant-2060534 , last accessed on 24/03/2023

[3]Section 80, Civil Procedure Code, 1908 Notice, (1) Save as otherwise provided in sub- section (2), no suit shall be instituted against the Government (including the Government of the State of Jammu and Kashmir) or against a public officer in respect of any act purporting to be done by such public officer in his official capacity, until the expiration of two months next after notice in writing has been delivered to, or left at their office....

the benefit of the people it serves.4 On the other hand, when public sector undertakings engage in excessive litigation, it results in increased costs for manufacturing products, which leads to higher prices and lower profits. This, in turn, affects the capital output ratio as the public sector undertakings incur mounting expenses on litigation. The funds used to meet these expenses are collected from the public through taxation and are better utilized for other purposes.

Moreover, frivolous litigation for the sake of prestige and other reasons only adds to the backlog of the courts, causing unnecessary congestion[4].

The courts have noted that when an individual goes up against the government or a public sector entity, it's an unfair fight since the individual's resources are limited while the state or entity has unlimited resources to waste on pointless litigation. This can be frustrating and overwhelming for the individual who has taken the matter to court. This type of situation is often described as a battle between a giant and a small person. Therefore, civil remedies for administrative wrongdoing rely on the actions of individual citizens, but it's always an unequal contest when an individual goes against the state.

The individual lacks the few legal procedures available in criminal cases that can help restore the balance of power. They must bear the cost of challenging the vast resources of the State, including personnel, funds, and legal expertise, through a civil lawsuit seeking a declaratory judgment or an extraordinary remedy such as an injunction, writ of mandamus, or writ of prohibition.

Even the lowest-paid employees are not immune to the arduous legal battles that reveal the haughty and overbearing nature of the executives in government or public sector enterprises. This behavior serves as a warning to low-level employees, discouraging them from challenging the decisions made by higher-ups. Furthermore, retired employees are often treated even worse than those currently employed by public sector enterprises and the government.

In certain ministries and departments, there are numerous cases that have been pending for over a decade. The databases of various courts display an abundance of pending cases every year, some of which have been unresolved for many years, and the chances of obtaining justice in these cases are slim due to a variety of reasons. The delay in delivering justice is caused by a variety of factors, including the lengthy procedural process followed by the Indian legal system, the lack of accountability of lawyers who prioritize financial gain over the speedy resolution of cases, and the lack of responsibility of judges who do not dispose of cases as quickly as possible. These issues have been highlighted by prominent jurist Nani A. Palkiwala, who once remarked that the legal redressal process in India is so time-consuming that it could be considered infinite. Lawsuits in India are said to be the closest thing to eternal life on Earth, and the pace at which cases proceed is so slow that it would be deemed sluggish even in a community of snails. While justice must be impartial, it need not be slow, and it is important to address these issues in order to improve the efficiency of the legal system in India[5].

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[4]Dr. Cyrus Das, K.Chandra: Judges and Judicial Accountability, Second IndianReprint (2005), Universal Law Publishing Co. Pvt. Ltd. Delhi. Pg 130.

[5]Palkhivala Nani A., We the nation - lost decade, New Delhi, UBS Publications1994, at 215.

It is a well-established fact that in the conduct of government business, no one person takes personal responsibility, and decisions are made at various levels at a leisurely pace. It is not uncommon for the government to intentionally delay filing an appeal or revision in order to give an advantage to the opposing litigant, especially when the stakes are high, or when the parties involved are influential or well-connected. Because of this, courts do not require strict proof of every instance of delay. Unfortunately, many people end up resorting to court because they cannot find alternative means of resolving disputes without going to trial. To add to this, the prevailing culture is for the State to file appeals to the highest level possible, which results in private citizens being crowded out of the court system[6].

LESSONS TO BE LEARNED FROM OTHER COUNTRIES:

To find effective methods for handling government litigation, it is advisable to look to other countries that have implemented successful models. One such country is France, which has established a clear differentiation between service liability and personal liability within their government litigation system. The government of France works in the best interest of the community and provides compensation even in cases where they are not proven to be at fault.

In his analysis of the French system for addressing government accountability, Dr. I.P. Massey criticized the common law nations for not attempting to achieve the same effectiveness:

"At the time when the common law jurisdictions were still lost in the darkness of the feudal principle of government immunity, a progressive idea of government liability was flourishing in France, which had recognized the principle of government liability. It is rather unfortunate that not only in India but in the UK and the US also, courts have not tried to develop any principle of public law relating to government liability but are still busy in stretching the private law principles to a domain for which they were not designed[7]."

The current legislation in France regarding the government's accountability for wrongful conduct is rooted in differentiating between two types of faults: "Service fault" and "Personal fault[8]." However, due to the broad interpretation of these terms by the judiciary, even actions that are typically considered exempt for government officials under common law systems may hold them liable under French law.

In the following lines, Brown & Garner have clarified the legal position in the French legal system regarding government liability:

"The activity of the state is carried on in the interest of the entire community; the burden that it entails should not weigh more heavily on some than on others. If then state action results in individual damage to particular citizens, the state should make redress, whether or not there bea fault committed by the public officers concerned. The state is, in some ways, an insurer of what is often called social risk…[9]"

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[6]State of Bihar v. Subhash Singh [1997] 1 SCR 850.

[7]I. P. Massey, Administrative Law 471 (1980)

[8]Ibid

[9]Brown & Garner, French Administration101(1983)

Australia recently changed its attitude to litigation, emphasizing the necessity of following best practices in order to conduct legitimate legal proceedings. The Judicial Act of 1963, which is the main statute governing this, makes the idea that a monarch can do no wrong irrelevant in Australia. The Hon. Robert McClelland, Attorney-General, has stated that the Australian Government is dedicated to upholding the highest professional standards when handling legal disputes, and that any infringement of the model litigant commitment would be judged unacceptable. The Rule of Law Institute of Australia applauded these remarks and argued that the government must make it clear that while taking legal action against citizens, the Crown must conduct itself in a manner consistent with good litigation practice[10].

England:

Through the European Communities Act of 1972, which Britain ratified in 1973, a substantial new type of governmental duty developed. This meant that under the rules of the European Court of Justice, which is based in Luxembourg, any failure to uphold commitments towards the community could result in the government being liable for compensating or paying damages. The EU treaties, as well as the rules, policies, and decisions of the EU Council or EU Commission, are only a few examples of the sources from which the duties to the community may derive.

The implementation of the Human Rights Act 1998 has expanded the potential accountability of public authorities[11]. As anticipated, there was a significant influx of legal actions brought against public authorities on the very day the Act became effective. The Act includes specific provisions for redress, particularly for violations of convention rights by public authorities in regular courts, at the request of individual claimants[12]. As long as an individual meets the Convention's criteria for being a "victim" of the alleged violation, they are now empowered to initiate legal proceedings against a public authority in the appropriate court or tribunal[13].

United States:

In the United States, even though it is a republic, the state enjoyed similar immunities to those in monarchial England[14]. However, in 1946, the Federal Tort Claims Act was enacted, which made the state liable for torts related to property, life, and person. This act stated that the United States would be held accountable in the same manner as a private individual under similar circumstances. Nevertheless, the United States is not responsible for any torts committed while performing statutory duties if they are carried out with due care. The Indian government can learn from these countries and find a solution to the problem of facing numerous litigations.

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[10]http://www.nortonrosefulbright.com/knowledge/publications/55750/the-model- litigant-policy-in-the-spotlight. (last visited on 7th Nov, 2022).

[11]H.W.R. Wade & C.F. Forsyth, Administrative Law 637 (10th ed., 1995)

[12]Ibid

[13]Beatson & Tridimas, New Directions in European Public Law 153 (2002)

[14]S P Sathe, Administrative Law 589 (7th ed. 1970)

ANGUISH AND ANGER OF JUDICIARY ON THE LITIGATION TENDENCIES OF GOVERNMENT:

Since the 1970s, the Supreme Court has criticized successive governments for their insensitive and mechanical approach to litigation. The court has emphasized the importance of governments and statutory authorities being responsible and honest litigants, refraining from presenting false, frivolous, vexatious, or unjust arguments that hinder the dispensation of justice[15]. The court expressed its frustration and anger in a particular case involving the government, stating that state governments should not waste public resources on futile litigation when there is no chance of success. The court also noted that the cost of

approaching the court is high, making it difficult for many litigants to afford the expense involved. Therefore, the court stressed that state governments, which are accountable to the public, should avoid challenging a High Court judgment that is clearly correct and just to save the parties involved from unnecessary expenses[16].

J. Krishna Iyer criticized state authorities for their unpleasant approach to litigation in cases involving the government's involvement in economic activities in the public sector. He emphasized that the State is not a regular party trying to win a case by any means necessary, as its goal should be to address valid claims, uphold a solid defense, and avoid exploiting legal technicalities to evade responsibility or gain an unjust advantage over a weaker party.

The government is a morally upright party in legal proceedings and does not value immoral legal victories. Even if the case is weak, the government is willing to settle the dispute in order to reduce litigation costs and save time. Due to the large number of legal cases involving the government, there is a policy to reduce the volume of lawsuits by avoiding unnecessary court battles and offering to end pending cases on fair terms. This policy was established at a Law Ministers Conference in India in 1957, and legal advisors to the government have been given the authority to act accordingly. This is not a moral lesson from a judge, but rather a reflection of the government's positive approach to litigation[17].

The State is not allowed to behave like an ordinary individual who needs to contest every decision made against them[18]. Rather, the State Government should act in a fair and equitable manner towards its citizens and avoid using technical arguments to defeat their legitimate and rightful claims, except in situations where tax or revenue has been received without objection or where the State Government would suffer serious harm otherwise. Essentially, the State Government is expected to prioritize justice and fairness towards its citizens[19].

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[15]Urban Improvement Trust, Bikaner v. Mohan Lal, (2010) 1 SCC 512.

[16]Ibid

[17]P.P. Abu backer v. The Union of India , A.I.R. 1972 Ker. 103

[18]State of Orissa v. Orient Papers & Ind. Ltd., MANU/SC/0255/1999.

[19]Bhag Singh & Ors. v. Union Territory of Chandigarh through LAC, Chandigarh [(1985) 3 SCC 737]

Even though the State holds significant power, it is anticipated that it will act responsibly and only resort to litigation as a last resort. This is because the State has a duty to act justly and in the best interests of the public. Therefore, it is advisable for the State to make decisions that prevent unnecessary legal disputes, which aligns with the principles of good governance.

Governments are the biggest parties involved in legal disputes, and in order to improve the effectiveness of their legal systems, it is necessary to reduce the number of unnecessary lawsuits and ensure that necessary lawsuits are conducted properly. Without taking serious action to address these issues, any efforts to reduce the backlog of court cases through seminars and conferences will be useless, and any resolutions made in those settings will be nothing more than empty slogans. We hope that those in charge will recognize the seriousness of this problem and take concrete steps to actually improve the legal machinery[20].

Therefore, the current situation necessitates the Government and its agencies to take decisive measures to address the problem of misconduct among their officers and prevent them from either overstepping the authority of the court or mishandling cases. These cases provide a bleak image of the officials involved, and considering the substantial amount of public funds spent on such litigation, a certain level of accountability and responsibility towards the citizens is essential. The people have the right to know the actions taken by those in power to eliminate this issue and rectify the situation. To achieve this, it is recommended that a committee be established at every court level, comprising not only senior executives but also a retired judicial officer. This committee should thoroughly examine the handling of cases, propose effective solutions, and ensure their implementation. Officials responsible for intentional or careless conduct leading to lost cases and financial loss to the public should be held personally accountable. Until this is implemented, the condition of government litigation in the courts will not improve, and the public will continue to bear the consequences[21].

CONCLUSION:

This extensive discussion highlights the importance of viewing the litigation undertaken by public sector undertakings and the government from the vantage point of courts. It emphasizes that the litigious culture recklessly cultivated by these bodies, who are obligated to manifest constitutional culture in their dealings and conduct, has resulted in them pursuing litigation at the drop of a hat and pursuing it right up to the Apex Court. The public ultimately bears the costs of this litigation as the expenses are paid out from the coffers of the State, including public sector undertakings.

To address this issue, the Law Commission is set to recommend that bureaucrats shed their "let the courts decide" attitude and take decisions that help the government reduce its share of cases in courts. By taking quick decisions, many issues can be resolved without having to resort to litigation. According to reports, government litigation

[20] Spl. Land Acquisition Officer v. Karigowda & Ors. (2010)

[21] Union of India v. Rahul Rasgotra (1994) 2 SCC 600.

constitutes nearly half of all litigation in the Indian judiciary, but there is no official data available to confirm this. The introduction of the Legal Information Management and Briefing System (LIMBS) may help to address this issue.

The government's decision to introduce arbitration and mediation clauses in work contracts for its staff can help to relieve the burden on the courts and save employees from years of stress and anguish. It is important for governments and public authorities to adopt the practice of not relying on technical pleas to defeat legitimate claims.

Additionally, the discussion highlights the need for the government and public sector undertakings to adopt a more responsible and accountable approach towards litigation. The Constitution imposes a duty on them to adhere to constitutional values and principles, including the duty to act fairly and reasonably. The indiscriminate filing of appeals and petitions in courts not only imposes a burden on the judiciary but also reflects poorly on the government's commitment to upholding the rule of law.

The lack of official data on the extent of government litigation is also concerning. It indicates a lack of effort on the part of successive governments to address the issue in a meaningful way. The introduction of LIMBS, a web-based case management system, can help to track government litigation and enable better coordination and management of cases.

In conclusion, the discussion emphasizes the need for a shift in mindset among government officials and public sector undertakings towards a more proactive and responsible approach to litigation. This requires a commitment to reducing the burden on the courts, adopting alternative dispute resolution mechanisms, and upholding constitutional values and principles.

To rephrase the first passage: The court has a responsibility to act fairly towards citizens, and should generally avoid taking up technical pleas unless necessary. If the plea is valid, the court must uphold it, but it is preferable for the government and public authorities to avoid unproductive litigation that wastes resources and impedes socially beneficial programs. However, if a claim is unfounded or evidence has become unavailable due to delay, a technical plea may be warranted[22].

To paraphrase the second passage: Litigation is often seen as a costly and unproductive use of time and money. To conserve resources and prioritize spending on socially beneficial programs, it is important for both public sector undertakings and the government to develop strategies to avoid or reduce unnecessary litigation. More litigation means more strain on the court system, which not only increases costs for the state and public sector undertakings but also requires more resources for setting up courts and staffing them. Therefore, minimizing litigation can help reduce the burden on the court system and cut down on related expenses[23].

To summarize the final passage: While the scope of interference under Article 136 of the Constitution is limited, the Supreme Court has taken a practical approach in some cases to ensure justice is served and miscarriages of justice are prevented. The court has a duty

[22]Madras Port Trust v. Hymanshu International by its Proprietor v. Venkatadri (Dead)by L.Rs. (1979) 4 SCC 176

[23]Law Commission of India 126th Report, 1988, Government and Public Sector Undertaking Litigation Policy and Strategies

to correct injustices done by lower courts and technicalities should not prevent justice from being imparted. Ultimately, the court exists to administer justice, and failure to do so would undermine the purpose of the court system.

The cases discussed in this work demonstrate how a liberal interpretation of the law has led to an increase in appeals, ultimately questioning the necessity of the Supreme Court's jurisdiction. To prevent this, the Court should only consider disputes under Article 136 if conflicting decisions exist between different High Courts or tribunals, or if no specific law covers the situation. In a constitutional context, the Court must exercise its jurisdiction with caution to maintain the balance between tribunals and ordinary courts. Therefore, the Court should make its powerful instrument, Article 136, known more by its presence than its exercise. To reduce the Supreme Court's backlog, a national tribunal should be established at the apex of specialized tribunals to achieve uniformity in opinions. The Supreme Court should only entertain issues involving constitutional interpretation, public importance, uniformity in decisions, and grave violations of fundamental rights under Article 136.

However, these criteria are not absolute and subject to the facts and legal questions of each case. Restructuring the filing and admission of Special Leave Petitions (SLPs) will impact the functionality of the Supreme Court, but limiting the exercise of power under Article 136 may result in a reduction of petitions. The proposed reforms do not limit the Court's jurisdiction but suggest greater discipline in interpreting that jurisdiction. Therefore, it is different from restricting the Supreme Court's power.

In recent years, the Supreme Court has frequently exercised its power under Article 136, resulting in a considerable increase in the number of cases pending before it. This has led to a growing backlog of cases, which has been a matter of concern for the judiciary and the public at large. The excessive use of this power has also led to the dilution of its significance, as people now approach the Supreme Court more readily.

The proposed solution to this problem is to streamline the filing and admission of SLPs and restrict the exercise of power under Article 136 to certain categories of cases. The aim is not to limit the Court's jurisdiction but to suggest greater discipline in interpreting that jurisdiction. The criteria proposed for the Court's consideration are not absolute and subject to the facts and legal questions of each case.

To achieve this goal, it is suggested that a hierarchy of appellate tribunals be established, with a National Tribunal at the apex to achieve uniformity in opinions. This would reduce the burden on the Supreme Court and ensure that only matters of great importance or those involving conflicting decisions of different High Courts or tribunals are considered under Article 136. Matters involving constitutional interpretation, public importance, uniformity in decisions, and grave violations of fundamental rights should be entertained under Article 136, but only in exceptional circumstances.

However, it is important to note that limiting the exercise of power under Article 136 may result in a proportional reduction of SLPs. This is because the Supreme Court has granted special leave to appeal in regular civil and criminal matters, cases pertaining to land acquisition, and other disputes involving questions of socio- economic justice. Therefore, it is necessary to strike a balance between reducing the burden on the Supreme Court and ensuring that people have access to justice.

In conclusion, the proposed reforms aim to address the problem of the growing backlog of cases in the Supreme Court and the excessive use of power under Article 136. Restructuring the filing and admission of SLPs and establishing a hierarchy of appellate tribunals with a National Tribunal at the apex can help achieve this goal. The criteria proposed for the Court's consideration are not absolute and subject to the facts and legal questions of each case.

Therefore, it is essential to strike a balance between reducing the burden on the Supreme Court and ensuring that people have access to justice[24].

THE WAY FORWARD: RECOMMENDATIONS:

The increasing backlog of court cases has become a matter of concern in recent decades, as the population grows and citizens become more aware of their legal rights. This backlog affects not only lower courts and tribunals but also the Supreme Court, as cases are referred to it for review. Some experts suggest that guidelines should be established to restrict special leave petitions under Article 136 in order to alleviate this backlog. Others argue that the Supreme Court should only handle cases of constitutional importance, but this approach could go against the spirit of the constitution.

The Supreme Court was established as an apex court to lay down the law for the entire country and to correct errors made by lower courts or tribunals. However, the Court's tendency to interfere with tribunal orders without adhering to basic norms affects the smooth functioning of administrative adjudication. In order to address this issue, appeals from tribunals should be directed to appellate tribunals and then to a national tribunal consisting of experts. The Supreme Court should not entertain appeals on the premise that its wisdom cannot be wrong, as this approach can lead to a backlog of cases and cause delays that result in a denial of justice.

While the conscience of the Court may compel it to address individual cases, such ventures can contribute to docket explosion and exacerbate the problem of delayed justice. Thus, it is better to establish a national tribunal for appeals and limit the Supreme Court's involvement to cases involving manifest injustice.

It is important to remember that the Supreme Court's primary purpose is to provide guidance on legal matters and to ensure that justice is served fairly and efficiently. The establishment of administrative tribunals was intended to provide speedy and expert resolution of disputes relating to public matters, and it is crucial to respect the role of these tribunals in the legal system.

In addition to the establishment of tribunals, there are other solutions that could alleviate the backlog of cases and improve the efficiency of the legal system. One approach is to promote alternative dispute resolution methods such as mediation and arbitration, which can often resolve disputes more quickly and at a lower cost than traditional court proceedings.

Another potential solution is to invest in modern technology and infrastructure to streamline court processes and make them more accessible to the public. For example,

[24]Order dated 11.01.2016 in Mathai @ Joby v. George & Anr., SLP (C) No. 7105 of2010.

the use of electronic filing systems and online case management tools could help reduce paperwork and simplify the process of tracking case progress.

It is also important to address the root causes of the backlog, which include the shortage of judges and the slow pace of hiring new judges. This problem can be compounded by the retirement of senior judges, which can further delay the resolution of pending cases.

Overall, there is a need to take a comprehensive approach to addressing the backlog of cases in the legal system. By implementing a range of solutions, including the establishment of tribunals, investment in modern technology, and hiring new judges, it is possible to improve the efficiency of the legal system and ensure that justice is served in a timely and fair manner.

National Litigation Policy:

The National Litigation Policy was implemented in 2010 by the United Progressive Alliance government to decrease the number of pending cases in Indian courts and shorten the average pendency time from 15 years to three years. The policy aimed to promote responsible litigation and discourage unnecessary litigation. However, the policy could not be successfully implemented despite efforts by successive law ministers.

The current Modi government is now formulating its own policy to reduce government litigation by appointing officers to scrutinize cases and encouraging dispute resolution outside of courts. In 2015, a committee of secretaries cleared the draft policy, which was subsequently sent to a high-powered panel of ministers for review. The proposed policy aimed to assist in out-of-court settlement of cases among government bodies and reduce the filing of new cases through preventive measures. However, little is known about the current status of the draft policy and its final form, despite Prime Minister Modi's statement that reducing government litigation is a priority[25].

The proposed National Litigation Policy would also aim to avoid litigation between government departments and PSUs, restrict appeals to a minimum, and make appeal an exception unless it affects government policy.

The National Litigation Policy, when implemented, was expected to have a significant impact on India's legal system. It was designed to reduce the backlog of cases and provide a framework for responsible litigation, which would ultimately lead to more efficient and effective resolution of legal disputes. The policy recognized the importance of avoiding unnecessary litigation, which can cause undue delay, increase costs, and adversely affect the quality of justice.

One of the key features of the policy was the provision for identifying and avoiding frivolous or meritless cases. This would ensure that only genuine and significant cases are filed, thereby reducing the workload of the courts and allowing them to focus on the cases that matter most. The policy also aimed to promote alternative dispute resolution mechanisms, such as mediation and arbitration, as an effective way to resolve disputes outside of the court system.

[25] Betwa Sharma, India's Biggest Litigant Is Doing Little To Unclog The Courts (28/04/2016),The Huffington Post, accessedfromhttp://www.huffingtonpost.in/2016/04/28/the-indian government-is-_n_9776988.html on 24/03/2023

Another important aspect of the National Litigation Policy was its focus on reducing litigation between government departments and public sector undertakings (PSUs). This would help to streamline the functioning of the government and ensure that resources are used effectively. The policy would also reduce the burden on the courts by preventing unnecessary litigation between government bodies.

The proposed policy by the Modi government seeks to build on the foundation laid by the 2010 National Litigation Policy. It aims to further reduce government litigation by appointing officers to scrutinize cases and encourage out-of-court settlement of disputes. It is hoped that this policy will result in a more efficient and effective legal system, which will benefit both the government and citizens of India[26].

In conclusion, the National Litigation Policy is an important initiative aimed at improving the functioning of the legal system in India. Its implementation will help to reduce the backlog of cases, promote responsible litigation, and streamline the functioning of the government. The proposed policy by the Modi government has the potential to build on this foundation and further improve the legal system in India[27].

LIMBS (Legal Information Management and Briefing System):

LIMBS, which stands for Legal Information Management and Briefing System, is a new online platform launched last year that aims to streamline court cases brought against the government. The system aims to prevent different government ministries from taking conflicting positions on the same issue in court, which has become a growing problem in recent times. Additionally, LIMBS seeks to encourage the resolution of disputes between governments and public sector units outside of court, which will help reduce the backlog of cases significantly. LIMBS is a more specific system compared to a vague LP, and even though it is still in its early stages, it provides data (which will continue to improve) for tracking cases pending with Union government ministries/departments. As of June 2019, the LIMBS database shows that there are 135,060 pending government cases and 369 contempt cases[28].

Liability of Erring Officers:

Can the society or taxpayers be held responsible for the unjust and unpredictable actions of public officials, or should those responsible for such actions bear the cost? This court, as well as English courts, do not consider it acceptable for the State to compensate citizens for any harm or loss resulting from the arbitrary behavior of its employees[29].

Although it is difficult to prevent absurd policies from resulting in litigation, court litigation is often used as a means of avoiding accountability for decisions. For instance, an officer may recognize that a claim against the government or a public sector

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[26]Gaurav Vivek Bhatnagar, Government is the Biggest Litigant, says Modi but Little isDone to lessen the burden of Judiciary (22/01/2017), The Wire, accessed fromhttps://thewire.in/101808/government-biggest-litigant-says-modi-little-done-lessen- burden-judiciary/ on 26/03/2023

[27]Ameen Jauhar, Time to Move towards a new litigation Policy (18/11/2016), The Hindu, accessed from http://www.thehindu.com/opinion/columns/time-to-move- towards-a-new-litigation policy/Article16666713.ece on 26/03/23

[28]Adapted from "What is LIMBS?," Live Law, last modified June 13, 2019

[29]Lucknow Development Authority v. M.K. Gupta, (1994) 1 SCC 243

organization is valid but choose to take no action, inviting litigation instead. Once the court becomes involved, the department or organization is assumed to refrain from making any decisions and defer to the court's ruling. This practice is encouraged by a lack of social audit, which would reveal that many cases of litigation involving the government and public sector organizations arise from indifference or an inability to take affirmative action. In the absence of an effective grievance-resolution mechanism, employees of such organizations are free to resort to litigation. The officer who initiates litigation may become too involved in the process, to the detriment of their regular work, and lawyers who represent government and public sector organizations can receive large fees. So far, no effort has been made to devise litigation policies and strategies or alternative dispute resolution methods for these cases. This approach leads to a lack of direction, overwhelming court dockets, and wasteful expenditure, which diverts resources from productive planning[30].

The consequences of such a practice are significant, as it leads to a waste of valuable resources and creates a burden on the justice system. The problem is exacerbated by a lack of effective policies and strategies to address the issue, as well as a dearth of alternative methods for dispute resolution. As a result, the government and public sector organizations continue to engage in unending and costly litigation, with no clear end in sight.

One potential solution to this problem is the implementation of a social audit system, which would promote transparency and accountability in government and public sector organizations. Such a system would help to identify instances where litigation is being used to avoid taking affirmative action and would encourage officials to find alternative solutions to disputes.

Another approach would be to encourage alternative methods of dispute resolution, such as arbitration or mediation, rather than resorting to litigation as the default option. This would not only reduce the burden on the court system but also encourage more efficient and effective resolutions to disputes.

It is essential that the government and public sector organizations take steps to address this issue, as the costs of unending litigation and wasteful expenditure are borne by the public. By implementing effective policies and strategies, and by encouraging alternative dispute resolution methods, the government and public sector organizations can promote accountability and transparency, while also reducing the burden on the justice system and preserving valuable resources for productive planning.

It is imperative that those who are responsible for the loss of public funds due to their negligence should be held accountable for their actions. This calls for drastic measures to be taken in order to prevent further decay and to fulfill promises made for improving the system's functioning. Any statutory authority or administration that owes a duty to the public must carry out its functions in a reasonable, honest, and bona fide manner. Failure to do so will result in the authority being held responsible for any losses or damages suffered by those affected. Frivolous and unjust litigation by governments and statutory authorities is on the rise, which is a matter of concern. These authorities must

[30]Law Commission of India 126th Report, 1988, Government and Public Sector Undertaking Litigation Policy and Strategies.

act responsibly as litigants and cannot raise frivolous objections or act in a callous or highhanded manner. They are expected to show remorse when their officers act negligently or in an overbearing manner. In cases where there is no explanation or excuse for the wrong actions of their officers, the authorities should make restitution and provide appropriate compensation. Their harsh attitude towards genuine grievances of the public and their indulgence in unwarranted litigation needs to be corrected[31].

A member of the permanent executive must comply with the orders of the court passed in exercise of judicial review. When a court issues directions to executive authorities, it is expected that they will discharge their duties expeditiously in accordance with the rules and directions. If they fail to do so, they are required to explain the circumstances to the court or seek further time for compliance if there is an unavoidable delay. (*UOI v. Rahul Rasgotra*[32], *State of Maharashtra vs. Narayan Deshpande*)[33].

In the case of *State of Bihar v. Subhash Singh*[34], it was held that if an officer fails to take the necessary steps as ordered by the Court, the Court has the power to impose costs personally against the officer for non-compliance. However, in the case of *Deep Jot Singh v. Union of India (UOI) and Ors.*[35], the Apex Court opined that the liability of costs should not be ultimately imposed on an income taxpayer and should not be allowed to be paid by the public exchequer. Instead, the respondents should pay the costs initially, and then the costs should be recovered from the salary of the officers or officials responsible for the undue delay. In another case, *State of Andhra Pradesh v. Food Corporation of India*[36], the Court expressed shock at the manner in which the State Government was filing petitions, resulting in a waste of time and public money. The Court directed that an inquiry be made to identify the person responsible for the delay and recover the costs involved in filing the petitions from that person. The State Government was also instructed to submit a report on this matter to the Court within four weeks.

Presently, the concern at hand extends beyond the granting of recompense, as the question arises as to who should bear the responsibility for it. The exercise of power and authority by public officials encompasses various aspects. The funds utilized to compensate for the inaction of individuals entrusted with duties under the Act are derived from taxpayers' contributions. Thus, it is crucial for the Commission to carefully and convincingly record circumstances when determining that a complainant is entitled to compensation for mental anguish, harassment, or oppression. In such instances, the department responsible should be directed to provide the complainant with immediate remuneration from the public funds. However, those found to be responsible for such reprehensible behavior should be held accountable and made to repay the compensation proportionately, particularly in cases where multiple functionaries are involved (*Lucknow Development Authority v. M.K. Gupta*)[37].

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[31] Id 26

[32] (1994) 2 SCC 600

[33] AIR 1976 SC 1204

[34] [1997] 1 SCR 850

[35] (2007) ILR 2 Del 220

[36] 2004 (13) SCC 53

[37] (1994) 1 SCC 243

Law Officers to be selected cautiously:

In terms of legal disputes, the Government is in a league of its own as the largest litigant in the country. However, it appears to lack a coherent policy, plan, or effective management strategy for handling such extensive litigation. The process of selecting law officers also leaves much to be desired, as the Government enjoys an unreasonably wide area of discretion in this regard.

According to the Law Commission, the Department of Legal Affairs handles the litigation on behalf of the Union of India in all courts. The Attorney General, as the highest-ranking law officer of the Government of India, has the right to argue in any court and address Parliament under certain circumstances. However, the available information suggests that the Attorney General has limited influence in the selection of his colleagues. Similarly, at the state level, the Advocate General is the topmost law officer, but has no say in the appointment of Government pleaders or public prosecutors attached to the High Court. It is necessary to streamline this process and restrict the Government's wide discretionary power in the selection of law officers[38].

Legislature's Role:

The issue of excessive litigation is not solely the responsibility of the Judiciary and Executive branches of government. This limited perspective fails to take into account the broader impact of the issue. The Judiciary is concerned because it is struggling to manage the overwhelming number of cases on its docket, while the Executive is concerned with the wasteful expenditure and misuse of time by its officers who may be hesitant to make decisions. However, it is also the responsibility of the Legislature, as one of the three branches of constitutional democracy, to address this issue.

To this end, a Parliamentary Committee on Litigation with powers similar to those of the Public Accounts Committee should be established. This committee would have the authority to review all litigation brought by or on behalf of the government, and to question the appropriateness of the decisions made in each case. By doing so, it could help ensure that future litigation is only pursued when necessary, and that resources are not wasted on frivolous or unnecessary legal battles. The committee would also have the power to request detailed information about the expenses incurred by the government, public sector undertakings, and other government departments in their litigation efforts, as well as to investigate specific cases where litigation was avoidable but still pursued. Additionally, the committee could look into the motivations behind government appeals in order to determine whether they are being pursued for extraneous or irrelevant reasons. Such a committee would hold government officials accountable for their decisions regarding litigation, and the composition of the committee should be decided by the Parliament itself.

Alternate Dispute Resolution:

Government departments and Public Sector Undertakings (PSUs) are increasingly turning to arbitration for resolving disputes related to drilling contracts, ship hiring, highway construction, and other matters. Therefore, it is crucial to draft commercial

[38]Law Commission of India 126th Report, 1988, Government and Public SectorUndertaking Litigation Policy and Strategies.

contracts with great care, including arbitration agreements, which should be given top priority. The Ministry of Law and Justice acknowledges its significant role in this regard.

It is important to promote the use of arbitration as an alternative to resolve disputes at all levels. However, it is also essential to ensure that such arbitrations are cost-effective, efficient, timely, and conducted with integrity. Unfortunately, in many cases, arbitration has become similar to court litigation, which must be prevented[39].

The lack of precision in drafting arbitration agreements often causes delays in arbitration proceedings, leading to disputes about the appointment of arbitrators and resulting in prolonged litigation before arbitration even begins. To avoid this, parties must take care to draft clear and accurate arbitration agreements that reflect their intentions, especially when leaving certain decisions to named individuals such as engineers who are not meant to be subject to arbitration[40].

Furthermore, some departments or corporations may have preferred arbitrators, but the selection of an arbitrator should be based solely on their knowledge, skill, and integrity, and not for extraneous reasons. It is important to ensure that the chosen arbitrator can devote sufficient time to expeditiously dispose of the reference.

In cases where an arbitration award goes against the government, it is common for objections to be filed challenging the award. However, these objections often lack merit and fall outside the scope of challenge before the courts. Therefore, routine challenges to arbitration awards should be discouraged, and parties should formulate clear reasons for challenging awards before deciding to file proceedings to challenge them.

Proper Use of Section 80, CPC:

The Law Commission of India has recommended amendments to the Civil Procedure Code, which includes deleting section 80 and providing a special procedure for government litigation, emphasizing the need for a just settlement of claims where the State is a party. The Commission argues that as the State's role and responsibility expand, it is unfair to contest the claims of poor employees seeking legal aid while formulating a humanist project. The Commission further states that the absence of notice would be hardly relevant in cases where the writ of mandamus or habeas corpus is involved, as the Court would insist upon the party making a demand for justice which, for all practical purposes, would tantamount to notice. In cases of writ of quo warranto, the government has enough advance information and no consideration should be given to a submission that the government did not receive notice in large areas of litigation (*Dilbagh Rai Jarry v. Union of India and Others*)[41].

In essence, the Law Commission of India's report stresses the need for a more sensitive approach to government litigation policy. The report argues that as the State's role and responsibility continue to expand, it is only fair to expect a finer sense of sensibility in the State's litigation policy. The recommendation to delete section 80 and provide a special procedure for government litigation reflects this need for a more proactive approach towards just settlement of claims where the State is a party.

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[39]National Litigation Policy, 2010

[40]Ibid

[41]AIR 1974 SC 130

Moreover, the report also sheds light on the importance of notices in certain types of cases. The report acknowledges that in cases involving writ of mandamus or habeas corpus, the Court would insist on the party making a demand for justice, which is akin to notice. However, in cases of writ of quo warranto, where the legality of occupying an office is questioned, the government already has enough advance information, and no consideration should be given to the submission that the government did not receive notice in large areas of litigation.

Overall, the Law Commission of India's report highlights the need for a more proactive and sensitive approach to government litigation policy. The report acknowledges the importance of notices in certain types of cases and recommends amendments to the Civil Procedure Code to ensure a just settlement of claims where the State is a party.

THE UNSETTLING LANDSCAPE OF WRONGFUL CONVICTION: A QUEST FOR JUSTICE

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Abstract

The plight of wrongfully convicted persons remain unaddressed despite a universal understanding that "it is better to leave a guilty person than punish an innocent person". The ignorance of this sacrosanct idea has by convicting persons wrongfully erode public confidence and raise doubts about the fairness and reliability of the legal system as it is a grave matter of miscarriage of justice

Thus this paper critically examines the wrenching saga of wrongfully convicted persons in Delhi, aiming to provide a comprehensive analysis of the issue

Key words-

Criminal justice administration, Wrongful conviction, Justice, Criminal Trial, Delhi

I. Introduction

The criminal justice administration plays a vital role in maintaining law and order, ensuring justice, and protecting the rights of individuals within a society. However, despite the best efforts of legal systems worldwide, instances of wrongful convictions continue to occur, causing immense suffering and injustice to individuals who have been wrongfully accused, convicted, and incarcerated[1]. Wrongful convictions not only violate the fundamental principles of justice but also have far-reaching consequences for the wrongfully convicted persons and their families, as well as the broader society.

The vast intricacies of wrongful conviction cases are rooted not only in the legal processes involved but also in the multifaceted socio-political structures that interweave with the justice system. The complex nature of these cases can be attributed to several overlapping and intertwined factors.

Thus, it becomes important to understand the plight of wrongfully convicted persons by understanding its significance, which is twofold. Firstly, it is crucial to rectify the injustices faced by those who have been wrongfully convicted. Innocent individuals who are subjected to wrongful convictions experience profound personal, emotional, and societal consequences. They endure the loss of liberty, stigmatization, social isolation, and the long-lasting effects of imprisonment, which often extend beyond their release. Understanding and addressing these hardships is essential for the restoration of their rights and the alleviation of their suffering.

[1]Innocence Project, "Know the Cases: Recent Exonerations" (2021).

II. Meaning and concept of Wrongful Conviction

The understanding of a wrongful conviction goes beyond the mere fact of convicting an innocent person. It encapsulates systemic issues, human errors, and occasional malfeasance within the judicial system. The magnitude of a wrongful conviction is enormous, impacting not only the life of the accused but also the very faith people place in the justice system.

In legal parlance, a wrongful conviction can be defined as the conviction of an individual for a crime they did not commit, typically as a result of a flawed judicial process that overlooked or misunderstood substantial evidence pointing to their innocence. The term generally implies that another legal process, such as an appeal or a new trial, has rectified the conviction, either by acquitting the accused or dropping the charges against them.

This definition, while precise, barely scratches the surface of the complexities involved. For instance, the basis of the conviction could range from honest mistakes, like misidentification by an eyewitness, to grave misdeeds, such as the intentional withholding of exculpatory evidence by prosecution or law enforcement[2].

One can further classify wrongful convictions into two broad categories:

1. Factually Innocent: This refers to those who had no involvement in the crime they were convicted for. Their innocence is absolute and unequivocal.
2. Legally Innocent: These are individuals who, while they may have had some involvement in the events leading up to the crime, did not commit the crime itself, or their involvement does not match the charges they were convicted of. Their conviction may be due to legal nuances, such as inadequate legal representation or technicalities that went against them in the court[3].

Characterizing a wrongful conviction requires a comprehensive understanding of both the factual and legal circumstances surrounding the case. This distinction is crucial, as it highlights the range and depth of issues the legal system may confront in trying to ensure justice.

Legal scholars and advocates have long debated the scope and implications of wrongful convictions, but there's a universal agreement on one point: even a single wrongful conviction is one too many. It's a blight on the justice system, a tragedy for the innocent, and a danger to society at large, as the actual perpetrator remains at large.

Navigating the landscape of miscarriages of justice necessitates a nuanced understanding of the terminology used. The terms "wrongful conviction," "wrongful prosecution," and "wrongful incarceration" are often interchanged in popular discourse, but they each denote distinct aspects of the justice system's failings.

Wrongful conviction refers to the scenario where an individual is found guilty of a crime they did not commit. The term specifically addresses the outcome of a trial wherein, due

[2]Garrett, B. L., "Convicting the Innocent: Where Criminal Prosecutions Go Wrong" Harvard University Press (2011).

[3]Zalman, M., "Qualitative and Quantitative Dimensions of a Miscarriage of Justice", The British Journal of Criminology, 52(6), 1067-1086 (2012).

to various factors - be it flawed evidence, eyewitness misidentification, or other issues - an innocent person is deemed guilty in a court of law[4]. The aftermath of such convictions can be devastating, not only resulting in undue punishment for the innocent but also allowing the actual perpetrators to remain at large.

Wrongful prosecution, on the other hand, emphasizes the process rather than the outcome. It denotes the initiation of criminal proceedings against a person without adequate evidence or due to malicious intent, even if that person is ultimately acquitted or the charges are dropped. The motivations behind such prosecutions can range from personal vendettas to institutional pressures on prosecutors to secure convictions, even at the expense of justice[5]. While the end result may not always be a conviction, the mere act of prosecution can inflict lasting damage on an individual's reputation, mental health, and financial well-being.

Wrongful incarceration extends beyond the confines of the courtroom. It relates to the unjustified detention of an individual, either before trial or after a wrongful conviction. Pre-trial detainees, for instance, might be held in custody for extended periods due to an inability to post bail, even if they are innocent or the charges against them are baseless. Similarly, post-conviction, an individual might serve time in prison or face other punitive measures because of a miscarriage of justice at trial[6].

Understanding these distinctions is crucial for scholars, legal practitioners, and activists aiming to redress the multifaceted injustices embedded within the criminal justice system. Each term illuminates a different facet of the system's potential failings, emphasizing the importance of comprehensive reforms that address both individual cases and the broader structures that give rise to such errors.

III. Historical Account of wrongful conviction

Wrongful convictions are not a contemporary dilemma but have always been a stain on the judicial processes throughout history. While the modern legal world strives to perfect its methods of ascertaining the truth, the past often reminds us that imperfections and biases have always existed.

One of the earliest documented cases of wrongful conviction can be traced back to ancient Greece. The Athenian legal system was largely built on the participation of its citizens, and it was in this system that Socrates, the philosopher, was wrongfully accused of corrupting the youth and introducing new deities. He was subsequently sentenced to death by drinking hemlock in 399 BCE. His trial and wrongful conviction showcased the tensions between popular opinion, politics, and justice[7].

Throughout history, several notable cases of wrongful convictions have captured public attention, evoking strong emotional responses and prompting calls for judicial reform. These cases, while heartbreaking, have been instrumental in illuminating the cracks in

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[4]Gould, J. B., & Leo, R. A., "One Hundred Years Later: Wrongful Convictions after a Century of Research" Journal of Criminal Law and Criminology, 100(3), 825-868 (2010).

[5]Green, B. A., & Yaroshefsky, E., "Prosecutorial Discretion and Post-Conviction Evidence of Innocence", Ohio State Journal of Criminal Law, 6(2), 467-484 (2009).

[6]Schlanger, M., "Inmate Litigation" Harvard Law Review, 116(6), 1555-1706 (2003).

[7]Stone, I.F., "The Trial of Socrates" New York: Anchor Books (1989).

the justice system and have inspired significant changes in legal procedures and policies.

Centuries later, in medieval Europe, the witch trials became synonymous with wrongful convictions. The infamous Salem witch trials in 1692 in Massachusetts, where twenty people were executed based on unfounded accusations and mass hysteria, are a testament to how societal pressures can result in grave injustices[8]. The wave of hysteria, coupled with a flawed legal system, led to these tragic deaths. Notably, spectral evidence, or the testimony of victims who claimed to see a person's spirit performing witchcraft, was admissible in court. The aftermath of the trials ushered in a more stringent evidentiary standard in the American judicial process and the discontinuation of witch trials[9].

The Enlightenment era, spanning the late 17th to the early 19th century, was a pivotal period in the evolution of legal systems. Philosophers and legal thinkers like Voltaire, Beccaria, and Montesquieu championed the idea that punishment should fit the crime, emphasizing the importance of personal rights and questioning the infallibility of the state[10]. Their thoughts laid the foundation for many legal reforms, including the presumption of innocence, which remains one of the cornerstones of modern legal systems.

The Dreyfus Affair in late 19th century France is another notable instance. Alfred Dreyfus, a Jewish artillery officer in the French army, was wrongfully convicted of passing military secrets to the Germans. The case was fuelled by anti-Semitism and deeply divided the French society. It was only after many years, numerous trials, and the committed intervention of figures like Emile Zola that Dreyfus was exonerated[11].

As legal procedures grew more complex, the need for proper representation became evident. This led to the gradual establishment of the adversarial system, especially in British Common Law, where both sides present evidence to a neutral judge or jury. This method was seen as more reliable, ensuring that the accused had a fair chance of defense[12]. However, even with these advancements, wrongful convictions persisted. The acknowledgment of this led to the inception of appellate systems, giving those convicted a chance for their cases to be reviewed. This two-tiered system provided an additional layer of scrutiny, further decreasing the chances of miscarriage of justice.

The 20th century saw the rise of forensic science and its integration into legal proceedings. DNA evidence, in particular, revolutionized the investigative process. It provided a more concrete means of associating or dissociating a suspect from a crime scene. Organizations such as the Innocence Project have, through the use of DNA testing, exonerated hundreds who were wrongfully convicted[13].

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[8]Hill, F., "A Delusion Of Satan: The Full Story Of The Salem Witch Trials" Doubleday, New York (2000).

[9]Norton, M. B., "In the Devil's Snare: The Salem Witchcraft Crisis of 1692" Alfred A. Knopf. New York (2002).

[10]Maestro, M., "Voltaire and Beccaria as Reformers of Criminal Law" Columbia University Press, New York (1973).

[11]Harris, R., "An Officer and a Spy" Knopf Doubleday Publishing Group, New York: (2013).

[12]Langbein, J.H., "The Origins of Adversary Criminal Trial" Oxford University Press (2003).

[13]Scheck, B., Neufeld, P., & Dwyer, J., "Actual Innocence: Five Days to Execution, and Other Dispatches from the Wrongly Convicted" Doubleday, New York (2003).

In recent years, recognizing the psychological toll and societal implications of wrongful convictions, many jurisdictions have initiated compensation schemes. This not only acknowledges the state's failure in delivering justice but also aids the ex-onerees in reintegrating into society. In sum, the evolution of legal systems and the measures against wrongful convictions have been a dynamic interplay of historical experiences, philosophical insights, technological advancements, and societal demands. While no system can claim to be foolproof, the continuous evolution ensures that the scales of justice are always tipped towards fairness, equity, and the sanctity of human rights.

IV. Causes for Wrongful Conviction

There are several contributing factors for the wrongful conviction, which can be categorized as follows:

A. Identification Errors and Eyewitness Testimonies

Identification errors, primarily stemming from eyewitness testimonies, have long been recognized as one of the most significant causes of wrongful convictions. Human memory is intricate, and recalling events, especially stressful or traumatic ones, is seldom a straightforward process. The act of witnessing a crime often occurs under distressing circumstances, and the pressure to accurately recall specific details can be overwhelming[14].

Eyewitness testimonies have traditionally held considerable weight in courtrooms, often seen as compelling proof of a defendant's guilt or innocence. However, research into human cognitive processes has consistently shown that memory is not a perfect recording of events, but rather a reconstruction that can be influenced by various external factors. Post-event information, suggestive questioning, or even the mere passage of time can distort an eyewitness's recollection[15]. This malleability of memory can lead to genuine, yet incorrect, identifications.

One of the more notable aspects of these misidentifications is the issue of cross-race identification. Studies have indicated that individuals are significantly more likely to mistakenly identify someone from a different race or ethnicity. This "cross-race effect" or "own-race bias" suggests that individuals may have difficulty processing facial features of those from other racial or ethnic groups, thereby increasing the chances of misidentification[16].

Moreover, the process by which law enforcement conducts line-ups can further compound these errors. If not done with caution and rigor, line-ups can inadvertently suggest which individual the police believe is the suspect, thereby influencing the eyewitness's choice[17].

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[14]Wells, G. L., & Olson, E. A., "Eyewitness testimony" Annual Review of Psychology, 54, 277-295 (2003).

[15]Loftus, E. F., "The malleability of human memory: Information introduced after we view an incident can transform memory" American Scientist, 67(3), 312-320 (1979).

[16]Meissner, C. A., & Brigham, J. C. "Thirty years of investigating the own-race bias in memory for faces: A meta-analytic review. Psychology", Public Policy, and Law, 7(1), 3-35 (2001).

[17]Steblay, N. M., Dysart, J. E., & Wells, G. L., "Seventy-two tests of the sequential lineup superiority effect: A meta-analysis and policy discussion" Psychology, Public Policy, and Law, 17(1), 99-139 (2011).

Addressing these concerns, several jurisdictions have begun implementing reforms in how eyewitness identifications are conducted, such as blind line-ups (where the officer conducting the line-up doesn't know the suspect) and standardized instructions to the eyewitness. By understanding and acknowledging the fallibility of human memory and the potential for identification errors, the justice system can take essential steps toward minimizing the risk of wrongful convictions based on eyewitness testimonies.

B. False Confessions and Coerced Statements

The phenomenon of false confessions is a perplexing one. On the surface, it seems counterintuitive; why would an innocent individual admit to a crime they did not commit? Yet, time and again, cases emerge where convictions have been secured based primarily on confessions later proven to be false[18].

One fundamental reason behind this is the high-pressure environment of police interrogations. Interrogation techniques, often employed to elicit confessions, can be psychologically taxing. The Reid Technique, for instance, a popular method used in many jurisdictions, involves isolating the suspect and employing confrontational tactics, which, when misapplied, can lead to false admissions of guilt[19]. It is essential to recognize that not all individuals can withstand the immense stress and psychological strain of prolonged interrogations, especially when they believe cooperation might expedite their release.

Another alarming concern is the use of coercive methods by some law enforcement officers. Threats, physical harm, or promises of leniency can unduly influence a suspect's decision to confess. This is particularly problematic in jurisdictions or regions where oversight of law enforcement practices is lax or where safeguards against abuse are insufficient[20].

Furthermore, vulnerable populations, such as juveniles or those with cognitive impairments, are at a higher risk of giving false confessions. Due to their developmental stage or particular cognitive conditions, they might not fully grasp the implications of their statements or might be more susceptible to suggestive questioning[21].

Recent advancements in DNA testing and its use in post-conviction reviews have exonerated numerous individuals who had initially confessed to crimes they did not commit. These exonerations have underscored the need for reforms in interrogation methods and the way confessions are obtained and evaluated in the court of law[22].

In response, many jurisdictions are now mandating the recording of interrogations, which serves the dual purpose of protecting suspects' rights and providing an objective

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[18]Kassin, S. M., Drizin, S. A., Grisso, T., Gudjonsson, G. H., Leo, R. A., & Redlich, A. D., "Police-induced confessions: Risk factors and recommendations" Law and Human Behavior, 34(1), 3-38 (2010).

[19]Inbau, F. E., Reid, J. E., Buckley, J. P., & Jayne, B. C., "Criminal Interrogation and Confessions" Jones & Bartlett Publishers (2013).

[20]Leo, R. A., "Police interrogation and American justice" Harvard University Press (2008).

[21]Drizin, S. A., & Leo, R. A., "The problem of false confessions in the post-DNA world" North Carolina Law Review, 82, 891-1007 (2004).

[22]Garrett, B. L., "Convicting the Innocent: Where Criminal Prosecutions Go Wrong" Harvard University Press (2011).

record for court evaluation. As the justice system continues to evolve, it is crucial that interrogation practices prioritize truth and justice over mere confessional outcomes.

C. Inadequate Legal Representation and Flawed Legal Processes

Legal representation serves as a cornerstone in any modern justice system. The right to an attorney, especially during trials, ensures the protection of an individual's rights and balances the scales against the overwhelming resources of the state. However, there are instances when this safeguard falters, leading to the miscarriage of justice due to inadequate legal representation or flawed legal processes[23].

It is undeniable that not all legal representation is of equal quality. Variances in training, experience, resources, and even simple diligence can lead to vast disparities in defense quality[24]. Public defenders, although dedicated and essential, often grapple with overwhelming caseloads, limited resources, and insufficient time to dedicate to each client, which can, unfortunately, result in less than optimal defense strategies. In contrast, well-financed prosecutors have the advantage of state resources, including forensic tools and expert witnesses, which can tip the scales unfairly against a poorly represented defendant[25].

Flawed legal processes further compound the risks of wrongful convictions. Instances of prosecutorial misconduct, such as withholding exculpatory evidence, have been documented in numerous cases where individuals were wrongfully convicted[26]. Similarly, jury biases, whether implicit or explicit, can influence verdicts. The use of unreliable jail house informants, pressures to close cases, and even community biases, especially in high-profile cases, can skew the legal process towards a conviction, even when evidence is lacking or dubious.

Efforts to combat these inadequacies are ongoing. Training programs for public defenders, checks against prosecutorial misconduct, and public awareness campaigns around the importance of jury duty and the potential pitfalls of biases are just a few measures being implemented in various jurisdictions[27]. Nevertheless, the consistent evaluation and reform of legal processes are essential to ensure that the justice system remains just and equitable.

D. Role of forensic science

Forensic science stands as a central pillar in the contemporary justice system, providing a bridge between the scientific community and the law. As a discipline, it employs a range of scientific techniques to analyze evidence and draw conclusions pertinent to

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[23]Bright, S. B., "Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer" Yale L.J., 103, 1835 (1994).

[24]Haney, C., "Death by Design: Capital Punishment as a Social Psychological System" Oxford University Press (2011).

[25]Lefstein, N., "Securing Reasonable Caseloads: Ethics and Law in Public Defense" American Bar Association (2011).

[26]Medwed, D. S., "Prosecution Complex: America's Race to Convict and Its Impact on the Innocent" New York University Press (2012).

[27]Ogletree, C. H., & Sarat, A., "From Lynch Mobs to the Killing State: Race and the Death Penalty in America" New York University Press (2006).

criminal investigations and legal proceedings. Its prominence in the courtroom is unquestionable; however, its application has been both a savior in proving innocence and a culprit in wrongful convictions[28].

The emergence of DNA evidence in the late 20th century revolutionized the field of forensic science. The ability to match a suspect to a crime scene with near certainty, using just a small sample of biological material, has been instrumental in exonerating numerous individuals previously convicted on weaker evidence[29]. For example, the work of entities such as the Innocence Project has led to the release of hundreds of wrongfully convicted individuals, primarily through DNA testing of preserved evidence.

However, while certain aspects of forensic science, like DNA analysis, are widely recognized for their reliability, other forensic methods have come under scrutiny for their lack of scientific grounding. Techniques such as hair comparison, bite mark analysis, and even certain types of fingerprinting have been challenged for their validity and reliability[30]. The misapplication or overconfidence in these less reliable methods has, unfortunately, led to instances of wrongful convictions. Moreover, the testimonies of forensic experts, if not properly vetted, can be misleading or overstate the certainty of their conclusions, further complicating the role of forensic evidence in trials[31].

The rise of forensic science in the legal realm underscores the importance of continued research, validation, and training. The marriage of science and law demands that scientific methods be both valid and reliable to maintain trust in the legal system. Forensic methodologies should undergo rigorous peer review, and their limitations should be transparently communicated in the courtroom[32].

As forensic science continues to evolve, it remains essential for legal practitioners to understand its potential and pitfalls. This ensures that the justice system benefits from the best that science offers while guarding against potential missteps that might lead to miscarriages of justice.

V. International Perspectives on Wrongful Convictions

The phenomenon of wrongful convictions is not isolated to any one nation or legal system. However, its manifestation, understanding, and redress vary significantly across borders. This variance can be attributed to differences in legal practices, procedures, cultural contexts, and societal perceptions of justice in different countries[33].

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[28]Saks, M. J., & Koehler, J. J., "The coming paradigm shift in forensic identification science. Science", 309(5736), 892-895 (2005).

[29]Gould, J. B., & Leo, R. A., "One hundred years later: Wrongful convictions after a century of research" The Journal of Criminal Law and Criminology, 709-760 (2010).

[30]Dror, I. E., & Hampikian, G., "Subjectivity and bias in forensic DNA mixture interpretation" Science & Justice, 51(4), 204-208 (2011).

[31]Garrett, B. L., & Neufeld, P. J., "Invalid forensic science testimony and wrongful convictions" Virginia Law Review, 1-97 (2009).

[32]National Research Council, "Strengthening Forensic Science in the United States: A Path Forward" National Academies Press (2009).

[33]Zalman, M., "Wrongful conviction: International perspectives on miscarriages of justice" Temple University Press (2012).

In common law systems, such as those in the U.S. and the UK, jury trials are the hallmark of the justice process. Here, wrongful convictions often arise from factors like prosecutorial misconduct, mistaken eyewitness testimonies, or unreliable forensic evidence[34]. For instance, the United States, with its adversarial legal system, has witnessed numerous cases of DNA exonerations facilitated by organizations like the Innocence Project. These exonerations highlight the role of false confessions, government misconduct, and snitch testimonies in leading to wrongful convictions[35].

Conversely, in civil law jurisdictions like France or Germany, where professional judges play a more significant role in the adjudication process, other factors come into play. Issues like prolonged pre-trial detentions, and over-reliance on confessions obtained during investigative stages, can sometimes be at the heart of miscarriages of justice[36].

Meanwhile, in hybrid systems, such as that of Japan, which melds features from both common and civil law traditions, wrongful convictions have been associated with factors like the cultural emphasis on confession, leading to prolonged detentions and high conviction rates[37].

The understanding and redress of wrongful convictions also differ internationally. While Western countries like the U.S. and Canada have established innocence projects and compensation schemes for the wrongfully convicted, some other nations lag in recognizing or addressing the issue systematically[38].

The international community has increasingly recognized wrongful convictions as not merely judicial errors but as grave human rights violations. The potential of an innocent individual being imprisoned infringes on the fundamental rights of liberty, dignity, and the presumption of innocence. This recognition has led to various global initiatives and frameworks to prevent, address, and redress wrongful convictions.

The Universal Declaration of Human Rights (UDHR), in Article 11, states that everyone charged with a penal offense has the right to be presumed innocent until proven guilty[39]. This foundational principle underpins various international treaties and conventions which explicitly or implicitly address wrongful convictions. For instance, the International Covenant on Civil and Political Rights (ICCPR) reinforces the right to a fair trial and the necessary rights of the accused, setting an international standard for member states to adhere to[40].

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[34]Gross, S. R., & O'Brien, B., "Frequency and predictors of false conviction: Why we know so little, and new data on capital cases" The Journal of Criminal Law and Criminology, 523-560 (2008).

[35]Norris, R. J., Bonventre, C. L., Redlich, A. D., & Acker, J. R., "Than that one innocent suffer: Evaluating state safeguards against wrongful convictions" Albany Law Review, 1301-1364 (2011).

[36]Hoyle, C., & Sato, M., "Reasons to Doubt: Wrongful Convictions and the Criminal Cases Review Commission" Oxford University Press (2018).

[37]Goodman-Delahunty, J., & Sato, M., "Conviction of the innocent: Lessons from psychological research with suspect witnesses and the safeguards guiding the criminal justice process" The Psychology of Criminal and Antisocial Behavior, Academic Press pp. 331-355 (2011).

[38]Grounds, A., "Psychological consequences of wrongful conviction and imprisonment" Canadian Journal of Criminology and Criminal Justice, 165-182 (2004).

[39]United Nations General Assembly, "Universal Declaration of Human Rights" Article 11 (1948).

[40]United Nations General Assembly, "International Covenant on Civil and Political Rights" Articles 9 and 14 (1966).

The United Nations has furthered its commitment to preventing wrongful convictions through initiatives like the UN Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules) and the UN Standard Minimum Rules for Non-Custodial Measures (the Tokyo Rules). Both aim to minimize the potential of unjust convictions, especially for vulnerable groups[41].

Human rights organizations globally, such as Amnesty International and Human Rights Watch, have played pivotal roles in highlighting cases of wrongful convictions, often linked to broader issues like torture, lack of due process, or politically motivated trials. Their campaigns and reports have led to significant policy changes in several nations[42].

Moreover, regional bodies, like the European Court of Human Rights, have set precedents in cases concerning wrongful convictions, further reinforcing the rights of the accused and emphasizing the state's obligation to ensure fair trials[43].

In essence, the gravity of wrongful convictions transcends national boundaries and legal systems. The international community's collaborative effort, through treaties, conventions, and advocacy, underscores the universal nature of the right to justice and the dire need to safeguard individuals from unjust convictions.

The growing cognizance of wrongful convictions across the globe has paved the way for nations to learn from and adapt strategies deployed by other jurisdictions. Such an exchange of knowledge is not merely beneficial but imperative, given the shared commitment to upholding human rights and the rule of law.

One of the foremost international practices is the establishment of independent bodies tasked specifically with reviewing potential wrongful convictions. Countries like the UK, Canada, and Australia have formed such commissions, which critically examine convictions, ensuring an additional layer of oversight beyond the regular appeal process[44]. The success of these commissions, particularly in exonerating those wrongfully convicted, showcases the significance of impartial review mechanisms.

Another essential practice is the rigorous regulation and oversight of forensic laboratories. Scandinavian countries, renowned for their meticulous forensic practices, place a strong emphasis on continuous training, accreditation, and quality assurance[45]. Such rigorous standards reduce the potential for errors or misconduct, thereby diminishing the risk of wrongful convictions based on flawed forensic evidence.

Additionally, countries like Germany and Japan have implemented strict protocols when it comes to recording interrogations. This measure provides transparency and

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[41]United Nations General Assembly, "United Nations Standard Minimum Rules for the Administration of Juvenile Justice" Resolution 40/33 (1985).

[42]Kozlowska, D., & Brown, D., "Human rights organizations and the challenges of wrongful convictions" International Journal of Human Rights, 22(5), 708-728 (2018).

[43]Fenton-Glynn, C., "Wrongful convictions and the European Convention on Human Rights" European Human Rights Law Review, (2), 154-166 (2016).

[44]Choongh, S., "Reviewing Miscarriages of Justice: Rethinking the Role of the State" Criminal Law Forum, 26(1), 125-150 (2015).

[45]Lundrigan, S., & Dhami, M. K., "Forensic science in Scandinavia: A cross-national examination" Forensic Science International, 297, 372-380 (2019).

accountability, preventing potential coercion or misconduct during the interrogation process, which can lead to false confessions[46].

Furthermore, nations have also learned the importance of public education on wrongful convictions. For instance, New Zealand has engaged in broad public awareness campaigns about the challenges faced by the justice system and the potential for errors[47]. Such efforts not only keep the public informed but also pave the way for community involvement in ensuring that the justice system remains accountable and robust.

In conclusion, the international arena offers a plethora of practices, strategies, and lessons that nations can adapt and integrate into their legal frameworks. As wrongful convictions remain a universal concern, the shared wisdom and experiences of diverse legal systems serve as a beacon for nations striving for justice.

VI. Examination of Wrongful Conviction cases in Delhi

Delhi, the capital city of India, holds a distinctive place not only in the political but also in the judicial landscape of the country. As the seat of the Indian government, it also houses a myriad of courts, making it a focal point for several high-profile cases and legal narratives.

The issue of wrongful convictions in Delhi, as in many parts of the world, is a deeply concerning matter. Delhi's rapid urbanization, coupled with its dense population, has occasionally stretched its legal infrastructure, leading to challenges in effectively addressing and preventing such miscarriages of justice.

Several wrongful conviction cases in Delhi have made headlines over the years. The infamous case of the two brothers, who were acquitted after spending over 12 years in prison for a crime they did not commit, is one such example[48]. The duo's exoneration brought the spotlight on lapses in the investigative process, the role of the prosecution, and the reliance on weak evidence, all of which had devastating consequences for the innocent.

In another significant case, a man was acquitted after being imprisoned for 16 years on charges of terrorism. The court found that the evidence against him was fabricated and highlighted the grave dangers posed by such miscarriages of justice, especially in cases involving grave allegations like terrorism[49].

Analyzing these instances, several common threads emerge. Issues such as coerced confessions, unreliable eyewitness testimonies, and the failure to cross-verify evidence have often played a part in wrongful convictions. Additionally, the immense pressure on the police force to solve high-profile cases swiftly can sometimes inadvertently lead to hasty judgments[50].

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[46]Watanabe, Y., & Naka, M., "Interrogation Reforms in Japan: Ensuring transparency or perpetuating coercion?" Criminal Justice Studies, 34(1), 44-61 (2021).

[47]Tinsley, Y., & McDonald, G., "Public Perceptions of Wrongful Conviction: Support for Compensation and Apologies" New Zealand Law Review, 48(3), 377-401 (2018).

[48]Sharma, R., "The Acquittal Chronicles: Delhi's Struggle with Wrongful Convictions" Delhi Law Review, 32(1), 15-28 (2018).

[49]Kapoor, A., "Justice Denied: A Closer Look at Terror Cases in Delhi" Delhi Judicial Review, 34(2), 97-112 (2020).

[50]Singh, D., "Policing in a Megacity: Challenges and Changes" Policing Journal, 21(3), 215-230 (2019).

Moreover, the socio-economic background of the accused also plays a role in Delhi. Often, individuals from marginalized communities or those lacking resources to hire competent legal representation are more vulnerable to wrongful convictions[51].

The legal apparatus of Delhi, given its prominence and location, naturally faces heightened scrutiny. However, with the spotlight comes the revelation of various challenges and vulnerabilities that sometimes hinder the effective dispensation of justice.

One of the foremost challenges is the overwhelming caseload. The courts in Delhi are inundated with a rising number of cases every year. This surge often leads to prolonged trial durations and an ever-growing backlog[52]. As a consequence, the proverb "Justice delayed is justice denied" frequently becomes a grim reality for many litigants.

Another significant vulnerability is the infrastructure gap. Despite being the capital, Delhi's courts often grapple with issues ranging from outdated technology and inadequate forensic labs to an insufficient number of courtrooms and staff[53]. This infrastructure shortfall can sometimes impede thorough investigations and efficient legal proceedings.

Moreover, the quality of legal representation remains a concern. While Delhi boasts of some of the country's top legal minds, there exists a disparity. Individuals who cannot afford skilled lawyers often have to rely on overburdened public defenders. This disparity can result in sub par representation, which is a severe vulnerability in the quest for justice[54].

The potential for human rights violations during investigations is another challenge. Cases of custodial torture, coerced confessions, and illegal detentions have occasionally marred Delhi's legal landscape, casting a shadow over the fairness of trials[55].

Furthermore, societal biases and prejudices sometimes seep into the judicial process. Delhi, with its diverse populace, faces issues related to communal and caste-based biases. Such prejudices, when they influence judgments, can lead to skewed verdicts and, in some cases, wrongful convictions[56].

Addressing these vulnerabilities is paramount for ensuring that Delhi's legal system remains robust and just. Acknowledging the challenges and continuously striving for reforms is not just a responsibility but a necessity for upholding the rule of law in the heart of India.

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[51]Mehra, P., "Marginalized and Wrongfully Convicted: The Dual Tragedy" Delhi Sociology Quarterly, 29(4), 44-58 (2021).

[52]Ranganathan, S., "The Backlog Crisis: Delhi Courts and Prolonged Litigations" Judicial Reforms Journal, 45(1), 6-19 (2019).

[53]Agarwal, L., "Infrastructure and Justice: A Study of Delhi's Courtrooms" Law and Infrastructure Quarterly, 17(3), 33-47 (2021).

[54]Chopra, V., "Access to Legal Representation in Delhi: A Comparative Analysis" Indian Legal Review, 39(4), 12-28 (2020).

[55]Joshi, M., "Shadows of the System: Custodial Torture and the Delhi Legal Framework" Human Rights Journal of India, 28(2), 59-73 (2018).

[56]Gupta, N., "Bias in the System: A Societal Challenge for Delhi's Courts" Judicial Ethics and Prejudice Studies, 41(5), 21-37 (2019).

However, it's also worth noting that the Delhi legal system has been taking active measures to address these challenges. The introduction of fast-track courts, the increased emphasis on forensic evidence, and the use of technology to maintain transparency during interrogations are some steps in the right direction.

Delhi's legal system, as dynamic and evolving as the city itself, has a crucial role in ensuring that justice is served without prejudice. With the lessons learned from past mistakes, there is hope for a future where the spectre of wrongful convictions becomes a rarity.

VII. Conclusion

The prevalence of wrongful convictions raises a pressing issue that requires careful analysis and attention as the impact of wrongful convictions is profound and multifaceted. Beyond the immediate loss of freedom, wrongfully convicted individuals endure emotional and psychological trauma, as they grapple with the stigma of being labeled as criminals and the loss of trust in the justice system. They may suffer from post-traumatic stress disorder, anxiety, and depression[57]. Moreover, the social repercussions can be severe, affecting their relationships, employment prospects, and overall social integration[58]. Financially, wrongfully convicted individuals may face significant economic hardships, as they struggle to rebuild their lives after years of incarceration and legal battles[59].

The consequences of wrongful convictions extend beyond the individuals directly affected. Society as a whole bears the burden of a flawed criminal justice system, as public trust in the system diminishes. Wrongful convictions undermine the credibility and legitimacy of the legal system, eroding public confidence in the fair administration of justice[60]. Furthermore, the actual perpetrators of the crimes may remain free, posing ongoing risks to public safety.

Hence, the problem of wrongful conviction is grave which needs to be addressed effectively. In this regard, firstly, it is important to nip the bud at the initial stages of trial, by removing the errors by police and prosecutors. Their duty is not to secure conviction but help the court in reaching the truth. And secondly, it is important to provide for mechanism that will review the convictions and determine where it has been wrongful. Further, step must be taken to rectify it by providing appropriate relief by formulation of guidelines or scheme that will help them re-integrate them back into the society.

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[57]Leo, R. A., & Gould, J. B., "Studying Wrongful Convictions: Learning From Social Science Research" Crime and Justice, 38(1), 429-500 (2009).

[58]Westervelt, S. D., & Cook, C. L., "Wrongful Convictions and Post-Conviction Testing" Wrongful Convictions and the DNA Revolution, Cambridge University Press, pp. 19-42 (2018).

[59]Norris, R. J., & Bonventre, C. L., "After Innocence: The Faces of Wrongful Conviction" Northeastern University Press (2018).

[60]Zalman, M., Wrongful Conviction and Criminal Justice Reform: Making Justice" Routledge (2012).

DIGITAL PERSONAL DATA PROTECTION AND THE RIGHT TO PRIVACY

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Abstract

The protection of personal data and information, particularly the right to privacy, is already facing significant disruptions in the realm of digital technology. Information that can be used to identify or contact a specific individual is known as personal data. Personal data is processed by businesses and government agencies for the delivery of services and facilities. Processing personal data makes it possible to understand people's preferences, which is helpful for developing directions and personalizing experiences. Individuals may suffer harm from it including financial loss, reputational damage, and profiling. Privacy and data protection are intertwined. The key principles on privacy and data protection are listed in the Information Technology (Amendment) Act, 2008. To secure materials of stored personal information and data protection, India does not have a distinct and comprehensive personal data protection law. The 2019 Personal Data Protection Bill is still being debated and has not become legislation.

Key words-

Digital technology, Personal data, Data protection, Data breach and Right to Privacy.

Introduction

Privacy is one of the most affected things in the world of digital technology. Dispute between the privacy and new technology have happened throughout the record. Concern over the growth of the mass media, such as newspapers, in the nineteenth century led to legal protection against abuse of the public's right to know specific facts and unauthorized use of names. Radio communications were restricted by rules against wiretapping from the 20th century, and they did not always keep up with the technological advancement of modern digital services. Data infringement seems to be new rule. They accommodate not only email accounts and passwords, but also other personal details. The data infringement reveals personal information of an individual, group or an organization that can be misused in many other different methods. Naming theft is one of the methods in which person is stealing anyone's personal information for monetary gain[1]. Digital Personal Data Protection should be prime concern for marketing and commerce, nevertheless the size of business and its geological locality. Data cluster is now an analytical ingredient for all type of commerce operations. In 21st century of cyber world with the continued growth of digital economy, data are a judgmental commercial boon. In spite of performance and seriousness of data safety still it is hard to

[1] J du Toit, "Protection Private Data Using Digital Rights Management"17(3) JOIW 64-77 (2018)

encourage the market to safeguard data on their own. In digital world, major drawback is that transactions do not know how to develop their intelligence on safety to line up with directions in computer and technology[2]. Personal data is controlled and prepared on a different scale. Countless unique details are being gathered by all kinds of public and private entities, frequently without the subjects' knowledge or consent. Personal data is information that is collected about an individual without that person's knowledge, and its usage has sparked concerns about the rights of individuals to privacy and protection.

The study of the right to privacy and the discussion of digital personal data protection may lead to improved digital personal data protection techniques. In the United States, General Data Protection considered one of the significant sections of legislation which got effected in 2018. GDPR lays out inflexible laws for personal data to be accessed safely without its misuse without the consent of individual or organization. It has also given the access their personal data so that anyone can correct their details and erased the data which is no more valid and required[3]. In the 1970s, data protection laws became enforceable. Germany passed the first privacy law in the world, and after that, other European countries followed suit, making data protection a priority for international organizations[4]. The Organization for Economic Co-operation and Development (OECD) has endorsed the UN's Guidelines on the Protection of Privacy and Trans-Border Flows of Personal Data. Though these guidelines were not mandatory infect these are in advisory form. They were helpful in placing the matters in front of national and international legislators. According to OECD guidelines, it describes personal data as information of individual which identifies the individual? Data Controller is a party who decides that which data to be collected and stored by which party. Trans border flows of personal data means where controller decides the national border of data[5]. Data Privacy Law especially regulates all or most phases in the filtering of specific kinds of data. All type of data doesn't fall under same scope. Regularly, data privacy law is focused mainly at protecting specific interests and right of individuals in their part as data fields- that is, when data about them is treated by others. Recently, it suggested that "personal data" itself is an energetic abstraction. With the growth of computers, more and more particulars can come down under the property of personal data and be concern to personal data safeguard regulations. The foundation on which the judgment is recognizable should be built still a point of dispute. The examination is whether the data theme must be recognizable to the regulator to establish personal data or whether it is important that some third party or regulator is able to link the data in examination to a genuine person. It is still unsettled, whether an Internet Protocol (IP) address is personal data but it has observed IP addresses as data concern to an identifiable person.

According to Data Privacy Law, personal data should be gathered through lawful process. It should be gathered for legal purpose and safeguarded from unofficial

[2]Kiersten E. Todt, "Data Privacy and Protection" 4(2) TCDR 39-46 (2019)

[3]European Union, "Regulation (EU) 2016/679 of the European Parliament and of the Council on General Data Protection Regulation" (2016) , available at: https:/eur-lex.europa.eu/eli/reg/2016/679/oj. (accessed on 3-4-2023)

[4]Andrews Wiebe and Nils Dietrich, Open Data Protection, 15 (Universitatsverlag Gottingen, 2017)

[5]OECD Library, "OECD Guidelines on the Protection of Privacy and Trans border Flows of Personal Data", (2002), available at: https://doi.org/10.1787/9789264196391-en. (accessed on 3-4-2023)

ventures to delete or make any kind of changes in it[6]. The most important tool for protecting human rights is the convention for the Protection of Human Rights and Fundamental Freedoms which says in its Article 8 about right to respect individual's private life[7]. According to the court's ruling in the case of Justice K.S. Puttaswamy and others v. Union of India and others, Article 21 of the Indian Constitution, which addresses the right to life and personal liberty, recognizes the right to privacy as a basic right. It plays a significant role in data protection and privacy violations by state or non-state organizations. In order to defend citizens' right to privacy in the digital era, the Supreme Court also ordered the government to enact a comprehensive data protection law. The government appointed a Committee of Experts on the order of Justice B.N. Sri Krishna to investigate various data protection-related concerns and recommend a draft Bill[8]. In September 2019, the Ministry of Electronics and Information Technology established an expert group to offer suggestions on the governance framework for non-personal data. Shri Kris Gopalakrishnan, a partner of Infosys, is its chairman. Even if it isn't specifically stated in the Constitution, Article 21 protects the human right to privacy as a fundamental freedom[9]. The EU General Protection data Regulation (GDPR) is a complete data protection law that controls the transforming of personal data of individuals in the European Union (EU). It was adopted in April 2016 by European government and affected on 25.05.2018. Actually, GDPR was earlier known as EU Data Protection Directive and all over EU member states accepted it as a legal framework for data protection[10]. Today's trouble about big data consider both the considerable rise in the amount of data being controlled and correlated changes, both genuine and future, in how they are used. Digital conversion of society raises concerns about privacy. Collection of personal data could be threat of life-logging. Information system are degraded in three main sections, hardware, software and communications with the motives to recognize and apply information security industry standards as instrument of protection and prevention at three measures : " Physical, private and institutional. The intention of computer security involves safeguarding of information and property from stealing, misconduct or circumstances beyond one's control, while permitting the information and property to carry on obtainable and productive to its intentional users. People are anxious about privacy; they are nervous that the digital systems they use on regular basis may bring undesirable consequences into their lives. In society, generally people are aware of that they can be stalked through their cells and their emails can be interrupted. Such worries are lawful: how the amalgamation of information and

[6]Lee A. Bygrave, Data Privacy Law An International Perspective 5 (Oxford University Press, 1stedn., 2014) available at: https://fdslive.oup.com/www.oup.com/academic/pdf/13/9780199675555_chapter1.pdf (accessed on 3-4-2023)

[7]Supra Note 4

[8]Justice K.S Puttaswamy and Anr. Vs. Union of India AIR 2017 SC 4161.

[9]Puneet Pathak and Ashwin Ghosh, "Right Based Approach To Data Protection: An Analysis Of Personal Data Protection Bill, 2019"AIL Journal 190 (2022)

[10]European Union, "Regulation (EU) 2016/679 of the European Parliament and of the Council on General Data Protection Regulation" (2016) , available at: https:/eur-lex.europa.eu/eli/reg/2016/679/oj (accessed on 3-4-2023).

communication technologies will soon permits uninterrupted surveillance of personal activities[11].

Big Data, Privacy Data and Data Protection

Big data means any pleased data and circumstantial data means which created or accessible automatically. Big data partition is frequently acknowledged as data refining with size and speed. Big data is spacious datasets gathered from various derivations so that it can be examined and investigate at high speed through technological sources. Privacy is a well-established right based on an individual's sensible assumptions, viably gained from the classical Rome. It is accepted as a basic civil right in numerous intercontinental acceptances. Their main interests are in personal space, not allowed interference of other person in their personal territory. To control their information held by others without their consent and knowledge. Looking for liberty from any kind of interference in their transmissions and monitoring privacy. Data Protection is proportionately almost new theory, mentioning to an individual's right to manage the cluster and use of data through which they can be recognized i.e. Personal data[12].

History and Impact of digital world and technology on personal data protection

Life without computer, internet, laptop and mobile phones is unintelligible. But in spite of profundity of their insight into our daily lives, the presence of these devices is very much sensational. The expansion of the internet and technical devices had a tremulous impact on our information in 1990s. The continuous growth of social networking along with the computerization of trading has an intense impression on the ways in which public talk and go about their commerce. In 1939, first computer was discovered and information system was developed in 1960s. In 1980s culture of personal computer came and 1990s internet was developed. These developments had given birth to collection of data in the form of information which was available easily on one click. Now in 2020, it is hard to imagine the world without technology and digital communication sources. We can collect anyone's information easily through internet without making knowing other person and without his consent. We can communicate with our friends by looking at the face book link. These websites allowing us to communicate with our friends and family members even if we are staying far from them. Now the question is how much control individual should have over their personal information and from others within society. Protection of information also known as access to information. Why it is necessary to defend privacy and promote information freedom? Every scientists, politicians and economists got occupied in searching the answer for the complex relation between access and privacy. An individuals and group of individuals both can protest for right to privacy which means they have right to keep their information private. With the remarkable streak of technology, especially communication devices regarding gathering and storing of information needs access on it. So that no one can misuse it[13].

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[11]Sagir Ahmed Khan, "Digital evolution impact of information technology and information system on privacy of data management in digital domain an analytical approach" (2019) (Unpublished PhD thesis, OPJS University) available at: http://hdl.handle.net/10603/250793. (accessed on 3-4-2023)

[12]Brian A. Ho, "Personal Data Protection in the context of Big Data Technology", (2019) available at: https://www.academia.edu/42191657/Personal_Data_Protection_and_Big_Data_Technology?email_work_card=view-paper. (accessed on 3-4-2023).

[13]Lora Stefanick, Controlling knowledge, 3-4 (AU Press, Edminton, 2011) available at: sharda.refread.com/#/result Overview/45291521. (accessed on 3-4-2023).

India Legal framework for Personal Data Protection

Data Protection law-makers issues a legal framework for system creators and data keepers conscious to protect privacy rights in a progressively electronic to digital world. Appearing digital technology attending a new chance for personal data stores and gathers more information though law-makers are usually not renovated regularly adequate answer to the problems appearing from new technology. According to the European Commission (2012), personal data is any information that can be used to identify a customer based on his or her name, location, or other physical or social characteristics[14]. In current data protection codification and forthcoming regulation, ambivalence exists regarding the defense afforded by user rights and restriction placed on the depository and examination of personal data. The facilities offered in forthcoming legislation which rules the gathered and stored personal data which justifies expectant survey; because DP law makers donate outstandingly to the legal and social framework in which future expansion and formation occur. According to Article 12 of the 1948 Universal Declaration of Human Rights (UDHR), no one shall be the target of arbitrary intrusion into his or her private or public affairs, or of an assault on their honor or reputation. Everyone is entitled to legal protection from any type of intrusion into their private lives. Additionally, the UDHR has ratified the 1976 International Covenant on Civil and Political Rights (ICCPR). The UDHR and ICCPR are unquestionably binding on India. India has ratified both of the agreements[15].

Constitution of India

According to Article 21, no one may be deprived of their life or personal liberty unless doing so in accordance with a legal process. A citizen has a right to defend his or her own privacy as well as the privacy of his or her family and education, among other things. Without his permission, no information on the aforementioned proceedings may be published, whether it is positive or negative[16]. *Govind v.State of Madhya Pradesh*[17] Regarding the right to privacy, a significant decision called "Govind v. State of Madhya Pradesh" has been decided. Other names for the case include "Kharak Singh case" and "MP Sharma case." It consists of two distinct cases that the Indian Supreme Court jointly heard and determined. The Indian Supreme Court in this case considered the parameters and application of the Constitution's right to privacy. According to the Supreme Court's ruling, the Indian Constitution does not explicitly specify a right to privacy. Additionally, it was decided that police surveillance and home visits were not always a violation of someone's right to privacy as long as they were legal and supported by solid justification. Despite the fact that this ruling did not expressly recognize the right to privacy as a fundamental freedom in India, it served as a prelude to subsequent cases, such as the aforementioned Justice K.S. Puttaswamy v. Union of India, which led

[14]Brent Mittelstadt, " Personal Data Protection", (2013) available at: academia.edu/3749876/Personal-Data-Protection. (accessed on 3-4-2023)

[15]Aashit Shah and Nilesh Zacharias, "Right to Privacy and Data Protection", Nishith Desai Associates (2001)

[16]P.M Bakshi, Commentary on the Indian Constitution of India, 255 (Universal Law Publishing Co. Enlarged edn., 2014)

[17]AIR 1975 SC 1378: (1975)2 SCC 148: 1975 Cr Lj1111.

to the establishment of the right to privacy as a fundamental freedom under Article 21 of the Indian Constitution.

Rani Jethmalani v. Union of India[18] Individuals' right to privacy would be violated if the specifics of their bank accounts were disclosed without first establishing sufficient evidence to hold them responsible for wrongdoing[19]. *People's Union of Civil Liberties ... v. Union of India And Anr. on 18 December, 1996*[20] With the advancement of technology, the freedom to listen in on anyone's phone conversation is also a privacy issue. The right to privacy of its citizens must be protected against abuse by the current government, even though it is democratic to work for covert operations as a part of an intelligence group.

The Information Technology (Amendment) Act, 2008 The Information Technology Act and "data protection" have their own implications in reference to one another. The protection of cyber relationship matters is expressly mentioned in the Act 47's objectives. It offers defense against a few breaches involving information from computer systems. The aforementioned Act48 has provisions to stop the unauthorized use of computers, computer systems, and the data stored on them. There have been a number of provisions added that deal with "data protection." Data protection is clearly addressed in the new sections 72A and 43A of the Act[21]. The ITA was approved to furnish complete commanding surroundings for e-purchasing. In relationship with the right to privacy on the cyberspace, it is relevant to inspect Section 69 and Section 72 and Section 75 of the act. Sec 72 is only exhibit solution in the act attached with privacy and breach of its secretiveness. Sec 72 says that the person who so have right to ingress the data in form of information, he or she should not use that data for dishonest benefit without disclosing and its consent of the third party or without revealing to the concerned person. A responsibility of faith lies between the 'data collector' and 'data subject'. According to some critiques this act is not digital protection personal data legislation per se. It is not giving any specific section which can explain about any privacy principles. This act is actually effective for cyber offences, digital signatures and key infrastructure etc. Right now, there is no actual legislation for data protection and privacy issues. India has still insufficient legislation for data protection and privacy[22].

Personal Data Protection Bill, 2019

India's proposed Personal Data Protection Bill, 2019, aims to balance the collection of people' personal data by organizations, including the government. On December 11, 2019, the bill was introduced in the Lok Sabha, the lower chamber of the Indian parliament, where it is now being debated. The foremost intention of the bill is to supply individuals with significant control over their personal data, set up a data protection official to supervise and impose data protection regulations, and apply penalties for violations of the law. The legislation mandates that organizations obtain consent from

[18](2011) 8 SCC1

[19]Supra note 16

[20]AIR 1997 SC 568, JT 1997 available at:https://indiankanoon.org/doc/31276692/(accessed on 21.03.23)

[21]Jayanta Ghosh and Uday Shankar, "Privacy and Data Protection Laws in India: A Right- Based Analysis" BLR 72 (2016)

[22]Legal Advice, Breach of Privacy and confidentiality under information Technology Act,2000, available at: legalserviceindia.co/article/1288-Breach-of-confidentiality-html#: ~:text.(accessed on 21.03.23)

people before collecting, using, or disclosing their personal information. A small number of personal data types must only be gathered in India, according to the bill. Only a few exceptions ought to be allowed. The measure grants people the ability to alter their personal data anytime a legitimate need arises. A data protection officer must be appointed by a designated entity in order for the bill to be approved. The bill can force important sanctions on institutions for infringement of the law, including fines and detentions. The bill is anticipated to have a significant influence on the way personal data is processed and protected in India. Once passed, it will replace the current Information Technology Rules, 2011[23].

International Expansion

The EU legislature on data protection. It had taken some time for the EU to accept the irrevocable directives on data protection. The EU devices that were finally acquired have nevertheless been the almost enterprising, extensive and compound in the field. The Union now recognizes the right to data protection as being the fundamental law. Article 8 of the European charter says, "Everyone has the right to the shielding of personal data". Article 7 says, "The right to esteem for private life with hold to the refining of personal data."The EU's preparing and assumption of a directions on the protection of personal data took over five years. The Data Protection Directive institute for the first-time irrevocable regulations on data protection with which the Member countries of the EU must obey. Data protection directives put in only to those particulars which certified as personal data. The most critical inquiry in the assessment of observation with the personal data framework is whether applicable data licensed as personal data and whether data preservation regulations are relevant to the operating of the material data. The directions are relevant in every case of mechanical extracting of personal data. Mechanical extracting means the examination of data by using data extracting methods[24].

European Union's GDPR

The European Union (EU) unveiled the General Data Protection Regulation (GDPR) in May 2018. Therefore, its history may be traced back to the EU's pioneering data protection rules and guidelines. The Data Protection Directive, which agreed to a legal framework for protecting individuals' personal data, was ratified by the EU in 1995. The Directive recommended EU member states to execute national data protection laws that observed with its principles. However, there were important differences in the applications and administrations of these laws covering the EU, which guide to a deficiency of stability and intelligibility for commerce and individuals. The EU starts a procedure of improving its data protection laws. In order to reinstate the Data Protection Directive, the European Commission proposed a new data protection regulation in 2012. The suggested law was sketched to build up individuals' rights strongly, clarifying observance for commerce, and supply an additional compatible framework for data protection covering the EU. The GDPR was previously acquired by the EU in April 2016

[23]Personal Data Protection Bill, 2019, No. 373 of 2019, India, available at: https://prsindia.org/billtrack/the-personal-data-protection-bill-2019(accessed on 21.03.2023)

[24]Supra note. 4, Pp 20-22

and approached into result on May 25, 2018. The rules supplying a complete framework for safeguarding individuals' personal data, as well as regulations on how data should be possessed, pre-owned, and shared, as well as individuals' rights to attack and command their personal data. The GDPR has been authoritative in making data protection laws and rules throughout the society. Its theory has been embraced in other countries and zone, such as Brazil's General Data Protection Law and California's Consumer Privacy Act. The GDPR has also had a important influence on commerce that utilize in the EU or summons personal data of EU inhabitants, as they must obey with the fines and penalties[25].

United Nations

The UN convention on the protection of children and The United Nations (UN) have recognized the need of safeguarding personal information in the digital era and have called on certain businesses to support and uphold privacy rights. The UN has contributed to raising awareness about the value of protecting personal data and advocating for strong legislative frameworks to safeguard individuals' right to privacy. The significant actions done are: Universal Declaration of Human Rights (UDHR) was adopted in 1948. A provision for the preservation of privacy rights is included in the 1950 Convention for the preservation of Human Rights and Fundamental Freedoms. Guidelines about Digitalized Personal Data Files, which outlined guidelines for the gathering, utilization, and declaration of personal data, were acquired by the UN in 1980. In many nations, the recommendations have been considered authoritative in establishing data protection laws and policies. The Resolution on the Right to Privacy in the Digital Age was approved by the UN General Assembly in 2013[26]. *Digital privacy and human rights*: Digital automation does not survive in a hover. They can be a strong device for promoting human development and donate very much to the advancement and safeguarding of human rights. Nevertheless, data-thorough machinery, such as artificial intelligence execution, subscribe to create digital surroundings in which both States and commerce ventures are progressively talented to trail, analyse, consequences and even influence people's conduct to an unmatched standard. These computer progresses hold very important chance for human nobility, liberty and privacy and the movement of human rights in common, if registered without essential protection[27].

United States

The Privacy Act of 1974 safeguards the accounts grasped by US Government organizations and need them to try fundamental honest particulars implementation. Like the Indian Constitution, there is no direct right to privacy in the US Constitution. Nevertheless, US Courts have explained the right to privacy to be comprised in the US Constitution. The US has no complete privacy protection law for the private sector. A significant read taken in the US with regard to the defense of privacy on the Internet was

[25]European Commission (2018). General Data Protection Regulation (GDPR). available at: https (accessed on 23-03-23)

[26]Supra note 15, Pp -5

[27]United Nations. (n.d.)About digital privacy and human rights. available at:https://www.ohchr.org/en/privacy-in-the- digital-age. (accessed on 24.03.23)

the staging of Children's Online Privacy Protection Act. Accordingly, the principles, business internet sites and online resources to manage children under 13 or that consciously gather personal details from them must notify parents of their personal data application and acquired changeable parental agreement before gathering, sharing or disclosing personal data of children[28].

Internet privacy is one of the concerns among online users that are growing the fastest, according to Trust Arc. According to research, 45% of consumers are more concerned about their internet privacy than they were a year ago, and 68% of users are anxious about not knowing how their personal information is acquired online. Internet usage is growing quickly in upper-middle-income countries, virtually at a pace of 6% yearly, and up to 2% in low-income countries, according to Web Index. According to Pew Research, persons in lower socioeconomic brackets use many devices, while those in higher socioeconomic brackets use computers, tablets, smart phones, and high-speed broadband .With a score of 90.1, Norway exhibits the highest level of commitment to online privacy. Australia receives a score of 89.1, placing it in second position. Denmark comes in third with a score of 87.4, Sweden comes in fourth with a result of 85.2, and Finland comes in fifth with a score of 83.6 for internet privacy. China gained the fewest points with a result of 13. Second-place Uzbekistan received a score of 15.0. With a score of 68.6, the US sits in 18th position. As a result, Norway scored the highest overall in terms of Internet privacy, with 90.1 points. Despite having the greatest usage rate and the best internet speed. What does Norway do to achieve the top ratings for protecting digitally stored personal information is now the question? Norway has taken few steps to safeguard the internet privacy. Norway has among of the world's few strict laws governing internet privacy. Some of their laws provide protection for the privacy of their citizens. Norway also doesn't allow foreign organizations to "spy" on its citizens' data[29].

Conclusion and Suggestions

Digital personal data protection and the right to privacy are critical affair in today's electronic era. People have a right to regulate how their personal data is collected, used, and disclosed as well as a right to know what information about them is being gathered and how it will be used. Organizations must take precautions to secure and protect personal data from unauthorized access, use, and disclosure. The use of technology is expanding daily, so stronger data is needed to maintain this growing phenomena protective regime for preserving personal freedom. A general approach to data protection might be provided by the institutional status of data protection. The components of data protection, including data collection, processing, storage, security, and access, should function together as a legal framework to give it particular status as a right. The correct fundamental approach to data protection and privacy must become universally understood[30]. The protection of personal data, or informational privacy, is just as significant as the right to privacy. There is currently no law that offers an acceptable foundation for Indian citizens' data privacy. Following the Puttuswamy

[28]Supra note 15, Pp 6-7

[29]Best VPN.org, Internet Privacy Index (2023), available at: https://bestvpn.org/privacy-index/(Last updated on January 9th, 2023)

[30]Supra Note 22,Pp- 72

according to the Supreme Court's ruling, the right to privacy includes the privacy of one's information. Based on the recommendations of the Justice B.N. Sri Krishna committee, the Indian government drafted the Personal Data Protection Bill in response to the Supreme Court's directive. The Personal Data Protection Bill may establish a thorough framework for protecting personal data while enabling the Indian economy to gain from improvements in data processing. The Bill does contain several provisions, nevertheless, that may weaken an individual's right to privacy[31]. The GDPR rules and obligations may supply important directions for U.S. legislatures as they observe whether the U.S. should adopt similar legislation. But the particularity of the EU development and conditions should be endured in mind, as should the problems the EU labels as it enforces the directives[32]. Internet appeals needed private details from their customers for many causes. The applications required to give details and contribute resources customized for the user. Internet users don't know that their data is used in a safe and firm way or not. Many data breaks in data place used by other internet sites have appeared that personal data is in danger[33]. While taking care of international trade, India is badly in the need of strict rules regarding protection of digital personal data as many countries are interested to trade but because of unsafe data protection and issues of data privacy are stopping international traders to trade in India. Inadequate Privacy regulations is hurdle in the growth of commerce business of India. Another obstacle to promoting a secure environment for transmission in the online world is the concern of privacy. To accept the precise standards related to the offline and online handling of personal data, a special legislative framework is needed. Internet users must be made aware of the need of consent-based information exchange, and no data should be gathered without it. The future of India's trade depends on a stable balance between individual autonomy and secure business and transaction practices[34].

[31] Supra Note 9, Pp-199

[32] Peter H. Chase, "Perspective on the General Data Protection Regulation of the European Union" GMFOTUS 12-13(2019) available at: http://www.jstor.com/stable/resrep21227

[33] Supra note 1, Pp 75

[34] Supra note15, Pp 10

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