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EDITORIAL

The 16th milestone of our law journal is at your disposal. The current issue coincides with the historic and momentous occasion of celebration of 75th year of adoption of our democratic constitution, an outcome of herculean efforts of the architects of Indian Constitution. We are witnessing paradigm shifts in legal-constitutional parameters with novel and experimental interpretations in the contemporary legal judicial matrix. In this context, it became imperative to assimilate these cross currents of legal thoughts in this issue of our journal.

Contemporary era of globalization has led to the emergence of new civilisational changes which has impacted multiple aspects of human existence. As such, the legal-constitutional matrix is not an exception as it must be responsive, inclusive and assimilative towards the shifting patterns of the society. Dehradun Law Review, Issue - I, Vol-16, a law journal of Law College Dehradun, Uttaranchal University, Dehradun, is an intellectual effort in that direction. Articles dealing with contemporary pressing legal issues with multi-faceted & multi-pronged aspects have been the salient characteristic of our journal which we have constantly endeavored to maintain throughout our academic sojourn.

The current issue covers some complex legal issues like redefining legal paradigms of sustained provocation as a defense in criminal law from the lens of patriarchal assumptions and feminist post-modern jurisprudence, protection to victims of crime and witnesses in new criminal laws, unfolding propositions of judicial process in contemporary universe, services from the lens of consumer protection, understanding the scope of laws in protection of cultural property since colonial times, analysis of provisions of mediation act, 2023, concept of responsible parenting and related issues, growing implications of metaverse in human beings life, sovereignty intransigence in trans-boundary environmental harm cases, social media and its impact on the Indian electoral process, exploration of non-uniform bail jurisprudence concerning organized crimes in India, and legal regime on victim compensation in Britain, U.S. and India have been extensively dealt with and analyzed in detail.

A platonic proposition to become relevant and beneficial always needs an Aristotelian criticism. Readers are the judges and quite often prompt new inducement for further

intellectual inquiries through their constructive criticisms. We always appreciate and welcome the same as these are academic allurements for quality enhancements. We hope this symbiotic relationship to continue in future as well. In addition, we are extremely thankful to the contributors of articles for their invaluable and in-depth analyses and reflections.

God Speed!

Prof. Rajesh Bahuguna
Editor-in-Chief

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REDEFINING LEGAL PARADIGMS OF SUSTAINED PROVOCATION AS A DEFENCE IN CRIMINAL LAW FROM THE LENS OF PATRIARCHAL ASSUMPTIONS AND FEMINIST POSTMODERN JURISPRUDENCE

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Prof. Akhlendra Kumar Pandey**

Abstract

Modernism is an ensemble of a particular cultural norm and uniform practices in the Western civilization, in contrast, postmodernism announces the acknowledgment of a diversity of cultures and the chaotic sensation of accelerating change and uncertainty that permeates modern discourse. These conversations usually touch on the increasing feeling of turmoil and the social problem listed to comprehend the reasons for the rise of postmodernity. Over the last two decades, a growing number of perspectives from marginalized and vulnerable groups including women have impacted social issues in postmodern times. There are diverse understandings of the female dilemma under substantial law, however, almost every legal systemin the history of civilizations accepts certain undisputed principles such as restraining gender injustice, female exploitation, oppression of the marginalised, etc, However, the use of violence has frequently been socially accepted and sometimes officially legalised in some jurisdictions as a legitimate kind of discipline for husbands against their wives if the husbands stayed within the set legal parameters and do not commit an offence. Despite several political upliftment through policies and legislation, there is enough evidence that men have been assaulting women constantly and hiding under the twisted words of the law. A man's "heat of passion" murder is one such illustration viewed as a reasonable or necessary response to an instance of adultery or infidelity that jeopardizes his perception of dignity or authority. Reversely, Suppose the provocation defence is utilized by the other gender. In that case, it implies that the woman lost control after being provoked, acted irrationally, and then killed her attacker, the defence of provocation hardly comes for her escape. The judiciary's task in arriving at an objective standard of justice and achieving reconciliation and synthesis of the needs for stability is by no means an easy fleet, especially where a situation involves the intertwined relationship between law and psychology. The paper begins by describing some of the core ideas of post-modernism before examining how post-modernist conceptions of crime against women have been impacted. This paper investigates the feminist discourse which decides what counts as victimization of an abused battered woman and who defines its meaning and seriousness entailing the series of judicial pronouncements. The paper also evaluates the extent of the masculinist norms and patriarchal hegemony hovering over the Battered Wife Syndrome in India and emphasizing the need for expanding the definition of reasonableness and suddenness when it comes to responses to long-term abuse.

Key Words: *Postmodernism, feminist discourse, criminal justice system, provocation, sustained provocation.*

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I. Introduction

In the contemporary era, it has become a practice to talk about postmodernity, as no discourse is complete without referring to it. To a scholarly understanding, few can contemplate and comprehend the true meaning of postmodernism, and it can be stated that at its best postmodernism allows plurality and at its worst, it is nothing much more than nihilism. However, for an academic interpretation, postmodernism stands for differentiation, subjectivity, multiple points of view, intertextuality, and fragmentation. It entails construction and deconstruction, as postmodernists denied absolute truths and believed in fragmentation and separation of all the ideas with perspectives of no agreement and no absolute answer, the school of social constructionism works in tandem with postmodernism discourse and analysis narratives in both sociological and psychological literature, especially with the affirmative or reconstructive branches of postmodernism, like constitutive theory in criminology with its emphasis on "replacement discourse[1]." To avoid closure and certainty, postmodernism is a process of dismantling other people's statements about the truth that tries to expose their presuppositions and arbitrariness[2]. It undermines all assertions of superior or privileged knowledge-based power and authority. Deconstructive criticism tries to revive and celebrate oppressed voices that have been suppressed to show the existence of other realities, experiences, opinions, and domains as well as a variety of confrontations to the supremacy of other prerogatives to be truthful.

Modernism, on the other hand, laid down the basic groundwork for the recognition of the issues of women and advocated systematic changes, while post-modernism challenged some of the assumptions of modern feminism. The post-modernist feminist philosophy emphasises intersectionality and deconstruction of stringent categories that are built upon the advancements of modernism. Integrating postmodernist ideas into a legal system can be challenging as the system is structured around established rules and procedures and incorporating postmodernist critique may require significant modifications. Postmodernism thus with its focus on deconstruction and skepticism of grand narratives, can offer a critical perspective on legal concepts such as provocation. This could involve examining how the concept of provocation is constructed within legal discourse and how it may reflect underlying biases, specifically gender bias. Provocation has frequently been thought of as a mitigating circumstance. So, unless the offence is murder, it is superfluous to make specific regulations about this defence. Homicide committed in response to provocation requires skillful, self-motivated behaviour. The actor is held accountable for this submission and for not exhibiting a high level of independently motivated resistance. The defence of provocation typically excuses the masculine bursts of assault and violence. The jurisprudence behind this assumed behaviour ranges from acceptance of suppression of women in all public and domestic spheres and to some extent due to the historical baggage grounded in masculine conception and justification of male violence. These settled male-dominated norms have completely ignored an effective understanding of the unfortunate and traumatic experiences of women, their redressal, and protection in the country's criminal administration. The feminist philosophy of law demonstrates oppression and

[1] STUART HENRY & DRAGON MILOVANOVIC, CONSTITUTIVE CRIMINOLOGY: BEYOND POSTMODERNISM (1st ed. Sage 1996).

[2] Id.

masculinist values as having an overwhelming impact on legal systems and their consequences on the material conditions of women in the defence. It also considers gender-related issues arising between law, society, and developmental agencies.

Provocation never exonerates an accused under any given circumstances from complete criminal liability, but only lessens the punishment by changing the nature of an offence. The essential criterion for claiming the defence is stringent in reaction to the provocation as the deceased should not be attracted to provocative circumstances. The ordinary person is managed to be recognised and visualised as an "ordinary male person" who could lose his reason and be ruled by his passions. The ordinary reasonable man has been often described by the English courts in various pronouncements as a hypothetical rational average person, but it has expanded its definition by also including murderers steadfast in retort to the promiscuous and adulterous actions of a wife. This inclusion and acceptance of infidelity works as a qualified trigger for provocation highlighting the stereotype that females after marriage or physical commitment are the inalienable possessions of their male counterparts[3]. Also, the doctrine of coverture, one such doctrine that was prevalent in the common law jurisdiction wherein when a woman used to marry, her entire property and rights associated with it were given to her husband. Therefore, under coverture, all the property came under the husband's control, and while he could not sell or alienate the property without receiving the consent of the wife, he could meanwhile take all the profits and income earned over that property[4]. Under this doctrine, the wife could not enter a contract or make a will[5]. This doctrine in the past is a reminder of realisation about the level of oppression and subordination women had to face since the history of mankind.

The masculinist views and norms have led to stereotypes about how the two genders must react to the provocation offered to them. It has been presumed that owing to the patriarchal setup and dominance men's reactions might be viewed as more justifiable or understandable as compared to women's. Judges and juries influenced by these norms may interpret the emotional or psychological state of the defendant in a way that aligns with traditional masculine behaviours, potentially skewing justice. Therefore, the problem revolves around the modernist idea, which emphasized intellect, holism, universalism, and grand theory, which impacted the rulings of the English courts. The concepts of the relative cultural corpus, particularism, fragmentation, and more specifically tactile perception have not been considered by the courts when determining the seriousness of provocation especially in the case of battered women. This defence, which appears to be comprehensive ignores the slow-burning effect, which occurs when women retaliate after extended periods of abuse. Also, the essentials of sudden and immediate criteriaare insufficient to safeguard the other gender.

[3]Alafair S Burke, Equality, Objectively, and Neutrality, 103 MICH. L. REV. 22(2003).

[4]Rosemary Auchmuty, Review of Married Women and the Law: Coverture in England and the Common Law World, Tim Stretton and Krista J. Kesselring eds. 85 UNIV. TOR. Q. 328-29 (2016).

[5]Id.

II. From universal truth to fragmented narratives: how modernism & postmodernism shaped feminist discourse

The woke contemporary era in the guise of globalisation is passing through various stages of dramatic changes. Traditions, cultures, myths, and belief gradually loosened their roots at the call of modernity. Religious practices and teachings received the flash brunt, followed by the end of monarchy and feudalism. The interaction between exploring the modern movements and the critique of modernist principles in post-modern theories has shaped the feminist discourse. Historically, urbanization and industrialisation initiated the entire process of modernization, and the world first experienced the Renaissance, then Enlightenment, and afterward modernity and postmodernity. Due to Renaissance, modernity is often identified with industrialisation that came in the 18th century in Europe[6]. Therefore, Europe is often attributed as the forerunner of modernity which took multiple stages and forms. Industrialisation changed into an agricultural-traditional society which further transformed into a modern-bureaucratic capitalist society. Modernity has had a long and complex historical evolution. It was thus a culmination of different forces such as political, economic, social, and, cultural, therefore no single process was sufficient to produce modernity. Feminist discourse has been deeply influenced by both modernism and postmodernism. Modernism emerged in the 19th century and supported the theory of universal truth and objectivity. This thought influenced early waves of feminism by pushing them to look forward to universal principles of gender equality, articulating women's identities and experiences challenging the settled stereotype norms. The waves of feminism uncovered the one prominent universal truth which is oppression of the women, and advocated women's rights. Postmodernism on the other hand contributed significantly to the development of intersectionality feminism, examining how various aspects of identity such as sexuality and gender influence individual experiences etc, Postmodernism which gained much prominence in the late 20th century, probed the notion of universal truths and grand narratives. This perpetrated shift started influencing the feminist discourse by encouraging fragmentation and diversity. Since the 1960s, the terms "feminism" and "postmodernism" have gained popularity, emerging concurrently and undoubtedly sharing a substantial amount of convergence. Postmodern feminists argued that there is no single, overarching narrative of women's experiences; instead, experiences are varied and context-dependent. It was stated that the feminist discourse must account for the multiplicity of identities and experiences, moving beyond a one-size-fits-all approach to understanding oppression[7]. Modernism's quest for universal truths gave way to postmodernism's embrace of plurality and diversity. Feminist discourse evolved from seeking a single, unified narrative of women's experiences to recognizing the complexity and variability of these experiences.

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[6] Krishna Kumar, Modernization, Encyclopedia Britannica (Aug. 29. 2024), https://www.britannica.com/topic/modernization.

[7] Kimberle Crenshaw, Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color, 43 (6) STAN. L. REV. 1241-1299 (1991).

i) The birth of Feminist Philosophy permeating Postmodernist Discourse

Western social and political thought has a major issue as per the feminists that it is inclined towards universalism of social happenings attached to men i.e. to represent experiences of men which is often prescribed as common to all human beings[8]. Western thought is men focus on themselves and dilute the marginalised women's appearance in every political thought[9]. The viewpoint regarding women was merely as partial helpmates. They were defined in terms of men's needs concerning pleasure and providing lineage through offspring. Such a viewpoint is specifically recorded in Judaeo-Christian theology and Greek philosophy[10]. The feminist philosophy has been influenced by postmodernism predominantly in the mid-20th century, during the feminism waves in the West. An academic work written by a prominent feminist philosopher is credited for the upheaval it created in the postmodern discourse by criticising the traditional viewpoint of the roles of women and the subordination faced by them for a long period[11]. Feminist philosophy has challenged the male being the centric point of all the assumptions and narratives of the past and claimed that power and social structures since inception have been dominated by masculinist ideas. The stringent rigidity of male dominance and masculinist views were seen in antagonism with the postmodernist theme of gender fluidity, fragmentation, social constructionism, and deconstruction. The intertwined emerging relationship between feminist philosophy and postmodernism has resulted in an emerging field and theory of intersectionality, which illustrates and studies how various kinds of discrimination intersect with individuals and impact them.

ii) The biased nature of law in the quest for Equality

Enlightenment discourses have universalized the experience of white Western middle-class men, as feminists have demonstrated, and have consequently revealed the hidden dominance tactics clear in the concept of impartial knowledge. Both postmodernists and feminists have long acknowledged the necessity of new ethics adaptable to changes in technology and changes in the perception of relationships of strength and wisdom between the two genders[12]. Therefore, liberal feminists contend that the law at times treats men and women differently. The law and specifically criminal law in any jurisdiction do not recognise material differences. The doctrines prevalent in the criminal justice system seem to ignore or sideline the special circumstances that differentiate between men and women. The criminal law in the past did not pay much attention to the women who were subjected to domestic violence and abuse as it was part and parcel of the marital set-up, as women were mostly uneducated and unaware of their human and legal rights. Also, women were married at an early age and were subjected to dominance and discipline by their elder spousal counterparts. The relevance of women's experiences was eliminated by the very objective nature of the

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[8]CHRIS BEASLEY, WHAT IS FEMINISM ANYWAY UNDERSTANDING CONTEMPORARY FEMINIST THOUGHT 8 (Allen & Unvin, Leonards, NSW, Australia 1999).

[9]Id at 9.

[10]Supra at 8.

[11]SIMON D. BEAUVOIR, THE SECOND SEX. (Vintage Classics 2015).

[12]PATRICIA WAUGH, FEMININE FICTIONSREVISITING THE POSTMODERN (1st ed. Routledge 1989).

defences available in the Criminal justice system, and the legal specifications. Consequently, an issue that came up again and again during the challenges was to speculate, "Why doesn't she end the relationship, if it is an abusive one?" The answer to that would be that leaving an abusive relationship after being subjected to abuse and torture is not a possibility, due to the total lack of any psychological and physical safety net for women in such circumstances. This unfortunate dissatisfaction on the part of women is often highlighted in the provocation defence where her closest ally becomes her batterer, and she falls into a state of constant despair.

The common law is what gave rise to provocation defence, because judges and lawyers tend to be mostly men, and that creative process has been male-oriented and dominated. As a result, the conventional standards for these defences are the outcome of legal arguments and considerations based on the experiences and perspectives of men. The fact that the courts nearly exclusively crafted the defence considering circumstances involving male defendants is another explanation for the bias in the law favouring men because men commit the great majority of violent crimes. However, when it is the woman defendant who could have sought the defence for mitigation of the offence, it is established through a series of judicial pronouncements of the common law jurisdictions where instead of claiming the defence provided, she has pleaded the degraded defence of diminished responsibility, admitting the evidence of their mental conditions and has been at the mercy of the courts[13].

III. The overwhelming influence of masculinist norms in the criminal defence of provocation

It is generally known that the provocation defence is sexist. For many years, ardent feminists have argued that the theory condones harsh domestic murderers and reflects and encourages masculine standards of violence. The feminist criticism of provocation makes several assertions regarding the defence's problematically gendered nature, such as that it is rooted in patriarchal history, punishes responsible sexist murders too liberally, discriminates against women, and sends negative messages. Most articles that oppose provocation dwell on its ostensibly sexist roots. Critical observers assert that the voluntary manslaughter theory was developed by old English jurists to defend men who retaliated against insults to their honour, particularly the insult of marital adultery or infidelity. Thus, the idea is based on an outdated belief of the doctrine of coverture as to women being the private property of their husbands and which must be protected from "invasion" using death[14]. The formation of the idea of loss of control being centered on "human weakness" or "human frailty" became known through the writings about provocation at the beginning of the 19th century[15]. In the *R v. Mawgridge*[16] ruling, where Holt CJ described envy as "the anger of a man," including the earliest indication of this transition. The concept created a legal exception for overpowering emotions to override an aggravated person's rational thinking, leading to unlawful killing. A man had to

[13] R v. Ahluwalia (1992) 4 All ER 889.

[14] TIM STRETTON AND KRISTA J. KESSELRING, MARRIED WOMEN AND THE LAW: COVERTURE IN ENGLAND AND THE COMMON LAW WORLD (McGill-Queen's University Press, 2013).

[15] EDWARD H. EAST, A TREATISE OF PLEAS OF THE CROWN 232 (Hawkins, 1803).

[16] [1707] KEL. 119.

retaliate to preserve his honour; he had to act violently and aggressively. The offended man's courage and "spirit" could only be shown through a strong and physical response.

i) The Challenges in the Defence of Provocation due to Patriarchal Hegemony

Going to the historical roots inherent in the broadening of the categories was the idea that the law of provocation had to reflect shared beliefs about what constituted acceptable human weakness. The opposite was also true such as disagreements over whether an illegal arrest, informational words, and injuries to third parties are sufficient bases for mitigation were evidence of community mores regarding what actions should not be used as an exception for losing control and in being provoked. Depending on the circumstances surrounding the offender's loss of self-control, the law of provocation as it existed in the middle of the eighteenth century reflected societal norms or value judgements regarding the relative degrees of moral culpability to be given to the offender. Therefore, the primary objective of the current defence is to accommodate a specific human flaw, the inclination to lose self-control when provoked. If this is extended to circumstances where self-control is lacking due to another factor, it unseals the access to extensive bounds of potential claims, especially for the gender which is presumed to be more aggressive, violent, and dominating[17].

The "gendered" aspect of the doctrine has followed in stereotyping of the other gender as either sympathetic victims or cold and premeditated offenders, without taking into account the intertwined, complicated concerns of gender, equality, and abuse[18]. Given that women are frequently perceived in ways that make them appear guilty, even when they are the victims of heinous crimes, it is not astonishing that often women lose their original identity conforming to the universal truth of being submissive and subservient. This appalling misrepresentation of "natural femineity" serves as concrete evidence against murdering women and validates the harsh conduct that females endure in the current criminal set-up.

Other female critics emphasise the unequal tolerance imbibed in the defence of provocation bestowed on male perpetrators[19]. Many anti-provocation theories follow the civil rights paradigm, which states that laws and policies shouldn't discriminate based on gender, colour, or any other factor. As a result, many feminist experts spread the idea that applying the heat-of-passion concept favours men more than women. Provocation laws, according to feminist opponents, reflect and support a worldview wherein men have been regarded and considered as innate aggressors[20]. According to this perspective, broad interpretations of the concept and even the philosophy itself convey the message that only men have the right to be homicidally enraged when their partners try to leave them or display interest in a different individual[21]. Women are thus

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[17]Angelica Staniloiu & Hans Markowitsch, Gender differences in violence and aggression - a neurobiological perspective 33 PROCEDIA SOC. BEHAV. SCI. 1032 - 1036 (2012).

[18]R EMERSON DOBASH & RUSSELL DOBASH, VIOLENCE AGAINST WIVES: A CASE AGAINST THE PATRIARCHY 48-74 (Free Press New York, 1979).

[19]James J. Sing, Note, Culture as Sameness: Toward a Synthetic View of Provocation and Culture in the Criminal Law,108 YALE L.J.1845,1865 (1999).

[20]SAMUEL H. PILSBURY, JUDGING EVIL: RETHINKING THE LAW OF MURDER AND MANSLAUGHTER (NYU Press 1998).

[21]Tracey L. Meares, Updating the Study of Punishment, 56 STAN. L. REV. 1171,1203 (2004).

encouraged by the law to stay in unhealthy, even violent, relationships[22]. The philosophy at least indicates acceptance of or ambivalence over intimate male-on-female homicides[23].

The phenomenon of murders and assassination is often prescribed as a male phenomenon[24]. Due to this presumption, the defences used as an exception to murders are often criticised to be unfairly favouring male defendants[25]. Broad defences against violent crimes particularly exceptions are typically harmful to women as they often fall at the hands of the male aggressor than to be the actual aggressor in any given relationship. One can be in favour of giving female defendants a break without affecting the applicability of provocation to male defendants when only comparing the probability of success for male and female defendants. Critics of provocation claim that the theory prohibits the administration from effectively enforcing the law against male chauvinist murderers deserving to be punished for their crimes[26]. The criticism contends that the concept does more than just let some flawed people get away with it; it also fosters the circumstances that allow many guilty individuals to escape fair and accurate punishment. Some opponents only presume that the defence partially exonerates this group of murderers in huge numbers because it has the potential to do so. Because of misconceptions, stereotyped thinking, or simple resentment, society generally accepts male-on-female intimate killing. Therefore, broad provocation rules enable state actors and juries to show chauvinistic sympathy for masculine murder suspects. As a result, many feminist experts spread the idea that applying the heat-of-passion concept favours reasonable men more than unreasonable women[27].

ii) Assessing the Reasonable Person Standard in the defence

The law made a difference between acts committed in sheer anger by a provoked man and acts done by an ordinary reasonable man in the same given set of circumstances. In a case[28], Tindal C.J. informed the jury members that the legal doctrine "compassion to human frailty" gave rise to the provocation defence. It was not later than in the 18th century when the reasonable person standard was synonymously used with the "Reasonable Man Standard". This emerged around the same time provocation began to change. During the 19th century, the focal point of the defence moved from the man of honour to the reasonable man. According to Keating J, anything which could plausibly lead an average and properly minded man, to surrender control and execute a violent

[22]Donna K. Coker, Heat of Passion and Wife Killing: Men Who Batter / Men Who Kill, 2 S. CAL. REV. L.& WOMEN'S STUD. 91-94 (1992).

[23]Dan M. Kahan & Martha C. Nussbaum, Two Conceptions of Emotion in Criminal Law, 96 COLUM. L. REV. 269(1996).

[24]Laurie J. Taylor, Comment, Provoked Reason in Men and Women: Heat of Passion Manslaughter and Imperfect Self-Defence, 33 UCLA L. REV 1679 (1986).

[25]Emily L. Miller, Comment, (Wo)manslaughter: Voluntary Manslaughter, Gender, and the Model Penal Code, 50 EMORY L.J. 667 (2001).

[26]Caroline Forell, Homicide, and the Unreasonable Man, 72, GEO. WASH. L. REV. 597 (2004).

[27]Aya Gruber, A Provocative Defence, 103 CAL. L. REV., 273 (2015).

[28]R v. Hayward[1833] 6 C & P 157.

assertive behaviour would qualify as a provocation[29], and this standard should now serve as the basis for provocation. According to the law, there must be enough provocation for a reasonable man to be aroused by the circumstances and for the jury to conclude that the act was motivated by passion. However, the courts did not provide a description or a definition of the above-mentioned hypothetical "ordinary" or "reasonable" man, and it was assumed that juries would simply understand the phrase not attributing the reasonable man to be a pugnacious or irritable one. The reasonable man doctrine was adopted into homicide law in the famous English case and in the century that has gone since the Welsh[30] ruling, American courts have consistently applied the reasonable man threshold. An ordinary man with reasonable control is said to adhere to a set of specific concrete norms of conduct established by the court's application of an objective doctrine permeating through modernism.

With a few new but tight sorts, modern law maintains the same categories of things that offended the ordinary reasonable prudent man of history and still offend the modern and postmodern man. He is provoked into taking human life when he is physically abused when an illegal effort is made to arrest him, when he kills during a mutual fight, or when he witnesses his wife engaging in adultery and murdering her or the paramour[31].

The existence and scope of the defence of provocation necessitate finding a middle ground between two opposing ideologies: first, the knowledge that different people respond to provocation in different ways and that the person who has provoked the accused to cause the death of any person should also be taken care by the law from any given scope of assault or harm or even life taking activity.

Postmodernism encourages the deconstruction of legal narratives and assumptions. It questions the idea of objective standards and universal truths. In the context of provocation, this could lead to a critique of the idea that there is a universal standard for what constitutes sufficient provocation or a reasonable reaction. This perspective might argue that these standards are culturally and historically contingent rather than absolute. Postmodernism emphasizes the importance of individual perspectives and experiences supporting fragmented constructs. This might support a more nuanced view of provocation that considers the defendant's personal background, experiences, and psychological state, challenging the traditional objective standards[32].

IV. THE CONUNDRUM OF SUDDENNESS IN THE LONG-TERM ABUSE CASES

At this juncture, it will be important to draw attention to the points made by Prof. Ved Kumari, who recognised the fundamental restrictions placed on criminal legal defence's[33]. She has maintained that females or the other gender do not need a distinct criminal code or to be exclusively investigated or assessed by females, although

[29] R v. Welsh (1869) 11 Cox C.C. 336, 339.

[30] Id.

[31] R v. Mawgridge [1707] KEL. 119.

[32] K. M. Nanavati v. State of Maharashtra, AIR 1962 SC 605.

[33] VED KUMARI, GENDER ANALYSIS OF THE INDIAN PENAL CODE IN ENGENDERING LAW: ESSAYS IN HONOUR OF LOTIKA SARKAR 15 (Eastern Book Company, 1999).

emphasising the inclusion of women's experiences and concerns in this very existing and sufficient system would be appreciated[34]. Crime is attached to males and conformity is to females, therefore, women are not treated on par with men even if they have done any criminal activity. Ironically, men have had an easier way out of killing women over sexist charges or trivial disagreements as opposed to women's reprisal for offensive behaviour or ongoing abuse. Also, the criminal activities by women are mostly the outcome of difficult circumstances like a broken marriage, a chaotic home, and frequently a relationship that is prone to conflict with their counterpart or preceding victimisation faced by the women.

It is predicated on the notion that people who deprive the other person of their lives after losing self-control in response to a sufficient provocation are less guilty than those who kill intentionally as their passions are higher than their reason[35]. In the defence of provocation, the oppressed gender's initial tolerance and reluctance at the first stance go against the "heat of the moment" norm established by other decisions, including Nanavati[36]. It is believed that a delay between the trigger and the action indicates premeditation[37]. In the battered woman case, it is difficult to identify and determine an isolated act that acted as a last straw on the camel's back. Thus, the provocation is maintained for a longer period[38].

i) The legal perspective on Suddenness and Immediate response intertwined with long-term provocation

Not only must the provocation be sudden, but it must also be grave[39]. The essential elements of the defence of provocation involve graveness and suddenness since the inception of the law[40] which is now replaced by the Bharatiya Nyaya Sanhita, 2023 w.e.f. 01.07.2024[41]. Therefore, the provocation defence will qualify if it is both sudden and grave, and if any one of the elements lacks the involvement, the accused cannot claim the benefit envisaged under the Exception for mitigation of the punishment.

Also, the grave and sudden provocation must render a reasonable person (man) incapable of using his mental faculties. What constitutes grave provocation is a question of fact that has engaged the judicious minds of the Courts in this country as well as the English, American, and Australian courts. The word sudden involves two essential elements, the first being the unexpected provocation and the second being the interval or intermission between the provocation and the commission of crime. Therefore, for reduction of criminal liability, the act of causing death should have been done by the offender under the influence of some feeling depriving him of all self-control endangered

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[34] Id.

[35] George Mousourakis, Reason, Passion, and Self-Control: Understanding the moral basis of the Provocation Defence, 38 R.D.U.S. 215 (2007).

[36] 1962 SCR SUPL. (1) 567 (India).

[37] K.M. Nanavati v. State of Maharashtra, 1962 SCR SUPL. (1) 567 (India).

[38] Katherine O Donovan, Defences for Battered Women Who Kill, 18(2) J.L.& SOC. 224 (1991).

[39] Rajvindeer Singh v. State of Punjab, 1982 Cr. L.J. 975 (P & H) (India).

[40] The Indian Penal Code, 1860 (Act No. 45 of 1860).

[41] The Bharatiya Nyaya Sanhita, 2023 (Act No. 45 of 2023).

by provocation which is both grave and sudden[42]. Therefore, to establish the suddenness criteria, judicial precedents of various jurisdictions become of utmost importance.

In *Hansa Singh v. State of Punjab*[43], the appellant lost his control and reasonable calmness after seeing the deceased performing the act of sodomy on his son. It was ruled in this case[44] that this entire scenario of watching one's offspring going through such a gruesome act was undeniably a grave and sudden provocation that compelled the father i.e. the accused to attempt to murder the deceased. In another landmark case[45] it was emphasised by the court that the word sudden fails to synonymously mean an immediate action or response the word sudden can be contemplated as to some action that can be expected or anticipated.

The question and dilemma of suddenness presents a practical difficulty as it is based on case-to-case circumstances and is a 'question of fact" as per the legislation. The judiciary plays a prominent role based on evidence of whether the person provoked (accused) acted impulsively in the heat of the moment while his passions were high on the deceased or there was a gap of time to calm down and his action of killing the deceased was thoughtful and deliberate. Therefore, provocation and the criminal justice system have a necessary but stormy relationship. Ancient law historically distinguished between crimes performed spontaneously and those committed with premeditation, with crimes committed spontaneously having a ground-lessening punishment. A person who knowingly murders someone in rage sparked by lawfully sufficient provocation is only guilty of unlawful death, not murder, according to the partial defence. Provocation's influence on the common law of homicide dates to the twelfth century, and practically all common law jurisdictions have some form of provocation defence in their legal system. However, despite a long history and widespread implementation, there is still no consensus regarding the doctrine's justification.

ii) The dilemma of Sustained Provocation

The definition of provocation did not account for the potential that victims of domestic violence can even lose control and lash out at their abuser who is the closest ally of the accused. Therefore, judges only recognised the male's wrath and violent outburst as a response to provocation[46]. As these defences started to be used in cases, it was not anticipated that women would kill their husbands out of terror and use these defences. Because of this, it became necessary to create a brand-new criterion for a "battered woman" that went ahead of the definitions of a "reasonable man". Battered Women Syndrome (hereinafter referred to as BWS) was rarely used as a lawful defence in criminal cases involving battered defendants after Dr. Walker started testifying in favour of the existence of such a psychological disease[47].

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[42]Guriya Bacha v. State of Gujarat (1958) Cr LJ 476 (India).

[43]A.I.R. 1977 S.C. 1801(India).

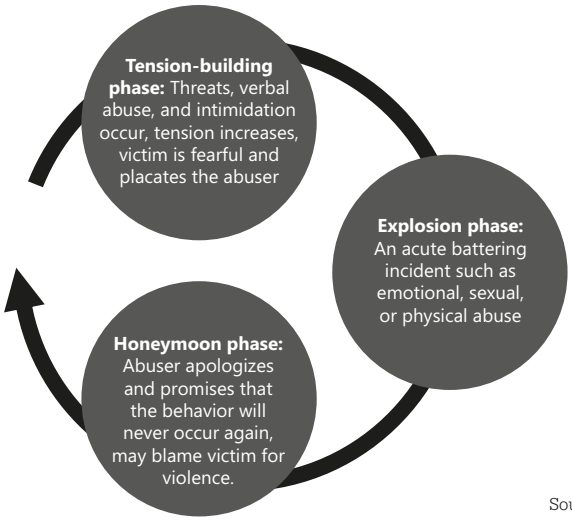
[44]Hansa Singh v. State of Punjab, A.I.R. 1977 S.C. 1801 (India).

[45]Balku v. Emperor,1938 Cr. L. J. 956 (Allahabad) (India).

[46]R. Holton & S. Shute, Self-Control in the Modern Provocation Defence, 27 (1)Oxford J. Leg. Stud. 49 (2007).

[47]Mira Mihajlovich, Does Plight Make Right: The Battered Woman Syndrome, Expert Testimony and the Law of Self- Defence, 62 (4) IND. L. J. 1254- 1282 (1987).

The primary stages/phases of a typical battering relationship are explained by the "Walker Cycle Theory.[48]" The first is known as the "tension buildup phase," and it is when the men and the woman argue verbally[49]. As a result, the batterer has an "acute battering incident," or the second phase, during which they become enraged and unable to control themselves. After these first two phases, there comes a third phase called "loving contrition," in which the abuser generously asks for forgiveness for his violent acts and expresses regret, vowing not to repeat them[50]. As a result, the connection receives "positive reinforcement to continue" However, there is a constant cycle of aggression in this situation, which quickly enters the "tension-building phase.[51]" As a result of this vicious cycle of abuse, battered women have "learned helplessness," a mental state coined by psychologist Martin Seligman in which they feel helpless. They stay with their abusers because they believe they are in a helpless position over which they have no control[52]. The comprehension of the syndrome depends on two fundamental components: "cyclical violence" and "learned helplessness.[53]" The cycle is a predictable pattern of repetitive and frequent domestic violence. However, every time the degree of violent actions increases by the abuser, the gap between the asking for forgiveness phase and the actual battering phase decreases. Unfortunately, many victims of domestic violence are not even close to chasing the "honeymoon" phase as there is constant abuse and battering by the abuser[54].



Source: Promising Futures

[48]LENORE E. A. WALKER, THE BATTERED WOMAN SYNDROME 91 (4th ed. Springer, 2017).

[49]Id at 91.

[50]Id at 92.

[51]Id at 93.

[52]Id at 93.

[53]Lenore Walker, Roberta K. Thyfault & Angela Browne, Beyond the Juror's Ken: Battered Women, 7(1) VT. L. REV. 1-14 (1982).

[54]Promising Futures, The Cycle of Violence: Why It Is No Longer Widely Used to Understand Domestic Violence (Aug. 15, 2022) https://promising.futureswithoutviolence.org/the-cycle-of-domestic-violence/

As the female continues to face abuse despite her efforts to stop it, she loses the will to leave because she believes there is no way out. It gives the victim the impression that the batterer is unbeatable, which limits her options for responding[55]. Because of this, the spectrum of reactions to the battering might be unforeseen, and some of these reactions can be violent. These reactions are now focused on maintaining her survival rather than helping her flee the assault. The woman becomes mentally and physically powerless to escape the coercive grip of her companion because of her psychological state of "learned" helplessness.

Walker asserts that battered women progressively grow passive and think it is impossible to escape, even when doing so is possible because they have little control over their abusive circumstances. The motivation and resolve to leave the circumstance or the relationship fade away. These women are stuck in this vicious cycle of violence because of socioeconomic conditions beyond their control. Furthermore, BWS makes battered women feel helpless because they think that their legal options will fail them. Because of their lack of hope and "learned helplessness," battered women may believe that the abuser's demise will end their cycle of violence once and for all.

iii) Provocation vs. Sustained Provocation

The primitive provocation beliefs, according to Horder[56], was based on partial justification. It was acceptable for a deeply offended man to react violently and furiously. An overwhelming response was only partially justifiable compared to a balanced answer. When viewed through the prism of honour, fury or outrage was a crucial part of the aggrieved man's (completely controlled) honourable response. Both the need for hot blood and the requirement for sufficient provocation had a foundation in partial justification. Importantly, loss of self-control was not mentioned at all at this formative stage of the provocation paradigm.

Over the years, there has been a heap of debate regarding almost every aspect of the partial justification of provocation. Difficulty areas include determining when to refer a case to the jury and the defence's applicability to mistreated women who commit murder. Here, the "reasonable" or "average man" and the qualities ascribed to him considering the accused's character will be the subject of discussion. The idea of provocation started to take on a shape that is recognisable to modern researchers around the Seventeenth Century through the jury and the judgements[57].

In India, the provocation defence views the legitimate actions and responses of the females as the outcome of the ranting or unreasonable reaction that women are often tagged to in society. Contrary to that, a man's "heat of passion" murder is seen as an appropriate or necessary response to adultery, infidelity, and promiscuous relationship that exposes his perception of respect, honour, and status in the male-dominated society. It would be implied if the provocation defence were used that the woman became out of control after being provoked, behaved irrationally, and then killed her

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[55]Lenore Walker, Battered Woman syndrome and Self-Defence, 6 Notre Dame J.L. ETHICS & PUB. POL'Y 321 (1992).

[56]JEREMY HORDER, PROVOCATION ANDRESPONSIBILITY (Clarendon Press, Oxford,1992).

[57]R v. Mawgridge [1707] KEL. 119.

attacker. Females' inability to decide for themselves what to pursue when faced with a provocative circumstance is further promoted by the application of objective reasonable standards based on the experiences of males following a modernist course. Even though it is still way down on the country's legislative agenda, Indian courts are beginning to use BWS testimony and related psychiatric theories when rendering judgments in cases involving traumatised offenders[58]. Notably, instances outside of those involving battered women have recognised the concept of continued provocation[59].

In a case[60], the High Court of Madras, for instance, intellectualized "sustained provocation" as a construction by the judiciary envisioned by the designers of the Criminal law. In the Madras High Court's decision,[61] the term "sustained provocation" was identified as a legal creation intended by the drafters of the criminal legislation. In *Poovammal v. State*[62], the court stated that there might be instances or situations where the offender doesn't immediately become irrational and act out in public. But it might be there for a while, tormenting him nonstop, and then suddenly erupting, causing him to lose control and allow his mind to wander; in other words, it might not be under his control or command and leading to the offence. The accused's mental state of constant provocation and frustration reached a breaking point, leading to the accused's murder of the deceased[63].

In *Manju Lakra v. State of Assam*[64], it was debated whether the grave and unexpected provocation should have occurred right before the murder or whether the time gap may have been extended to a much earlier period. Domestic violence was committed against the accused woman in this case without provocation, but on one occasion the violent husband was consumed. She was being beaten by him at the time of the occurrence, and as a result, she also suffered head and eye injuries. Unable to take the brutality any longer, she stole "lathi" from the hands if the deceased and killed him. The accused ended up entering a "not guilty" plea throughout the trial and no evidence on her behalf was put forth. While hearing the appeal the High Court of Guwahati cited the Ahluwalia[65] ruling coming from the English law jurisdiction, which emphasised the idea of "cumulative provocation," and said that if the instantaneous and prompt behaviour is taken into consideration without giving due regard to preceding actions or series of actions that were intertwined with the last provocative action that lead to the killing of the deceased, then it may not be sufficient to be a proper application of the defence of provocation. The Court further related the activities carried out by the accused in this instance to the urgency requirement under Section 304B[66], which talks about the unnatural death of a woman. The court concluded that if a set of circumstances was identified as having the

[58]Manju Lakra v. State of Assam, (2013) 6 Gau LR 222, 251 (India).

[59]Lakhwinder Kaur v. State of Punjab Appeal (Cri) no. 385 DB of 2004 (India).

[60]Suyambukkani v. State of Tamil Nadu (1989) LW (Cr) 86 (para 21) (India).

[61]Id.

[62](2012) 2 MWN (Cri) 276, 278 (India).

[63]Poovammal v. State of Tamil Nadu (2012) 2 MWN (Cri) 276, 278 (India).

[64](2013) 6 Gau. LR 222, 251 (India).

[65][1992] 4 All ER 889.

[66]The Indian Penal Code,1860, s 304 B.

ability to lead to a woman's suicide, it should also be identified as having the same potential to make that woman become an aggressor who kills her abuser. Due to these factors, the Court determined that her case would be a good fit for Exception 1 and thereby decreased her sentence.

This ruling means that a series of actions that combined establish "grave" and "sudden" provocation should be such that the defendant was never truly able to cool down, and the action that was taken right before the abuser was killed was the result of the earlier provocative recurring episodes. The Courts have broadened the definition of "cooling time," which typically prevents the use of the defence, by recognising "cumulative provocation."

But there are a few noteworthy elements that should be emphasised. The unfortunate and unaware female defendants in Poovammal[67] and Lakra[68], unlike Suyambukkani[69], did not raise any defences during the trial; but, on appeal, their advocates argued that the sentence's severity should be reduced. Such actions support the initial claim that women rarely argued the defence of provocation. The courts only consider a sentence-mitigation issue during an appeal case, and they then, if applicable, consider the instigating circumstances to reduce the offence to a culpable homicide that does not constitute murder. The notion that the mental state caused by the deceased's preceding act could be taken into consideration for the evaluation of whether there was an acceptable reason for provocation is applied in the court's recognition of "sustained" provocation[70]. By extending the period between the conduct and the provocation, the court went beyond this English common law concept[71]. This justification is drawn from another Madras High Court case,[72] in this case, it was stated that because the provocation that sets off the loss of self-control, cannot be separated from the actions and circumstances that preceded it, the court allowed the sustained provocation defence. Thus, even though the deceased batterer's most recent actions may not have been particularly provocative when considered in the context of the earlier violence, they may have been enough to make the battered woman lose control. This demonstrates that there is preliminary legal precedence for the incorporation of BWS into Indian law. However, given the current system's dependence on judge discretion, it is possible to convict abused women, as has happened in numerous cases in lower courts and other jurisdictions. The above case laws highlight the need for the BWS to be expressly included in the Bharatiya Nyaya Sanhita to make it gender-just legislation for courts to assist battered women without violating the Code's statutory framework of fulfilling criteria of suddenness and relying heavily on the courts to act in their favour.

Additionally, *Suyambukkani*[73] and *Poovammal*[74] have handled the idea of "sustained" or

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[67](2012) 2 MWN (Cri) 276, 278 (India).

[68](2013) 6 Gau LR 222, 251 (India).

[69](1989) LW (Cr) 86 (India).

[70]Boya Munigadu v. The Queen, ILR 3 MAD 33,34.

[71]Id.

[72]Rajendran v. Tamil Nadu (1997) 2 MWN (Cri) 237, 246 (India).

[73](1989) LW (Cr) 86 (India).

[74](2012) 2 MWN (Cri) 276, 278 (India).

"cumulative" provocation a little differently from Lakra. The idea of "sustained provocation" was applied in the earlier trials primarily because there was no instantaneous occurrence that caused the accused to lose control. However, the Guwahati High Court in Lakra[75] considered the prior acts of violence while relying on "cumulative provocation". Not to mention that any law sinking in the system should also not become unfavourable to the justice dispensation mechanism and ethos. Therefore, the murder conviction of a lady who had slain her husband was modified by the Apex Court in *Nawaz v. State*[76] wherein the court gave the benefit of Exception 1 because the occurrence occurred in a split second and the accused was devoid of self-control because of her spouse calling her names[77]. The accused use their right to free will in situations where they are under coercion. The label "prostitute" applied to his wife and daughter may, at most, be taken into consideration for the wife's sentencing mitigation because she had a valid reason for her involvement in the murder; however, this does not qualify for a reduction in the charge itself. This woman's plight has become a mockery of justice.

Regarding the need to accept the exemption under the IPC, the Allahabad High Court, in addition to the Madras High Court, has just recently argued in favour of its recognition and provided excellent justifications for it, wherein it was stated that the idea of "sustained provocation" has also increasingly seeped into Indian criminal law over time. The needs of the times and their problems must be met with adaptability. Under no circumstances can justice be the slave to rigid rules. Legal jurisprudence aims to provide justice in all contexts[78].

Ironically, men have had an easier way out of killing women over sexist charges or trivial disagreements as opposed to women's reprisal for offensive behaviour or ongoing abuse, even though violence seems to dominate the factual matrix of both male and female killer cases. The behaviours of the batterer are provocative, especially for women who kill their abusive partners, and they cause a variety of feelings in the victim's head, including dread, despair, and the urge to survive in addition to rage.

V. Conclusion & Suggestions

In addressing the defence of provocation through the lens of feminist discourse permeating modernism and postmodernism, the article highlights the predominant impact of patriarchal theoretical frameworks and societal constructions over the defence of provocations and the male chauvinism involved and deeply rooted in the history of this defence. By deconstructing dominant narratives and questioning the universality of legal norms, feminist postmodern approaches reveal the limitations and exclusions inherent in traditional legal concepts. Reforming the legal paradigms for incorporating an analysis based on gendered violence and the psychological and emotional dimensions of the defence can be crucial for reaffirming the elimination of bias from the defence. The defence of sustained provocation which contemplates long-term abuse necessitates a transformation in the jurisprudence of the system that is

[75] 2013) 6 Gau LR 222, 251 (India).

[76] (2019) 3 SCC 517 (India).

[77] Id.

[78] Jag Prasad v. State of U.P., MANU/UP/1293/2018: 2018 (104) ACC 186 (India).

primarily recognising male-oriented offences and punishments. The deep-rooted masculinist system can be reformed if the legal practitioners and judicial officers are aware of the consequences of long-term abuse and sustained provocation. The practical implementation of sustained provocation in the defence of provocation can be established through the addition of an Explanation into the existing legislation providing a clear and precise application of law and for a more equitable and just legal system. There is no doubt that even men face violence and even they are responsible for activities that are specifically termed to be women-centric. However, the neutrality that these social groups mention is beyond the social realities of the patriarchal social environment. Men often occupy powerful positions in social strata, employment opportunities, and unfortunately even while claiming a defence in the criminal justice system. The present status of defence of provocation unravels that the female's acts are the result of a psychological reaction to having been abused by her perpetrator, rather than a deliberate act on her own. Since, the modernist idea, which emphasised intellect, holism, universalism, and grand theory, has had an impact on the rulings of the English courts, the concept of the relative cultural corpus, particularism, fragmentation, and more specifically tactile perception have not been considered by the courts when determining the seriousness of provocation. It is crucial to note at this point that the objective standards used in criminal law have historically been very consistent. If we desire to maintain the standards of provocation, we must be more explicit about them. I believe that the current trend toward personalising the concept of reasonableness conflicts with the fundamental legal requirements of a varied community. Integrating postmodernist ideas into the concept of provocation in criminal law offers a critical lens through which to examine and potentially reform traditional legal practices. While it presents challenges related to consistency and practical application, it also provides opportunities for a more nuanced understanding of the factors influencing provocation and self-control.

PROTECTION TO VICTIMS OF CRIME AND WITNESSES IN NEW CRIMINAL LAWS: A COMPARATIVE STUDY

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Abstract

Victim of crime has got significant place in new criminal laws which the Parliament has recently enacted. Not only victim of crime but witnesses are also entitled to get certain safeguards under new criminal laws, which was missing in earlier criminal laws. So, considering the plight of victims and their dependents, Parliament has enacted three important laws namely The Bharatiya Nyaya Sanhita2023, The Bharatiya Nagarik Suraksha Sanhita 2023 and Bharatiya Sakhsya Adhiniyam 2023. These new legislations have changed the traditional approach of Indian Criminal Justice System and have given more emphasis on rights of victim of crime and witnesses rather than rights of accused. So, this initiative will definitely be helpful in disposing of cases expeditiously which is a mandate of Article 21 of the Indian Constitution.

Keywords- *Victim, Witness, Criminal Justice System and Plight of victim, etc.*

Introduction

Generally, the victim of crime has never been a concern of the criminal justice system because it was considered that since the state is representing the victim, the state will provide all safety and is responsible for protection of life and limb of its citizen. But due to the rise of crime rate and considering the gravity of the issue, the Indian Supreme Court and Parliament both started focusing on rights of victims of crime and protection to witness. Earlier the criminal justice system was accused centric and the entire focus was on protection of rights of accused who himself has breached the law because of one presumption that is presumption of innocence, so unless his guilt is proved before court of law the accused must be presumed innocent.

But with the passage of time, Victimology got recognition as a separate branch of criminal law and it was felt by victimologists that victim of crime should be placed in focal point of criminal justice system so that victim particularly who are unable to pay court fee and advocate fee on account of poverty. On the other hand, accused is entitled to get free legal aid if he is poor as per mandate of Section 304 of The Code of Criminal Procedure[1].

Considering the plight of victims of crime, recently Indian Parliament has enacted three special legislations namely The Bharatiya Nyaya Sanhita 2023, The Bharatiya Nagarik

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[1]The Code of Criminal Procedure, 1973.

Suraksha Sanhita 2023 and Bharatiya Sakhsya Adhiniyam 2023. These three special legislations are dedicated to provide justice to the victim of crime and protection to witnesses.

1. Right to be heard at the time of withdrawal of criminal cases against the accused.

As per Section 360 of the Bharatiya Nagarik Suraksha Sanhita, 2023 victims of crime shall be heard before withdrawal of criminal cases against the accused. This is the most significant provision of this new criminal law which gives an opportunity to victim of crime to file protest petition at the time of withdrawal of criminal cases particularly when victim succeeds in establishing the fact before the court that there was threat call from the accused side and his release would hamper the justice or endanger life or limb of the victim. Earlier victim had no say in criminal justice system at this point of time and government was at liberty to withdraw criminal cases against accused whenever government wanted to do this which actually happened in *Abdul Karim v. State of Karnataka*[2] (popularly known as the Raj Kumar abduction case). This is a very leading case on withdrawal of criminal cases against the offender and the Supreme Court heard the victim (Father of deceased Sub-Inspector who lost his life when he raided Veerappan and his team). In this case, popular actor of Karnataka, Raj Kumar was abducted by sandal smuggler Veerappan and he put an illegal demand before the State government to release guilty associates of Veerappan who were in jail and pressured the government to withdraw the case against Veerappan. Since actor Raj Kumar was so popular, people of the state went on agitation and started agitating against the government to bring back their popular actor Raj Kumar. Considering the seriousness of the issue, the Chief Minister of Karnataka through his cabinet decided to withdraw all cases against Veerappan and to release all guilty partners from jail. Meanwhile Mr. Abdul Karim, father of deceased son (S.I.) who was killed by Veerappan when he had gone to arrest Veerappan, filed a petition before the Supreme Court stating the entire facts that if Veerappan would be released, his son who had sacrificed his life in apprehending Veerappan and his guilty partners would be futile. Accepting the plea, the Supreme Court intervened into the matter and held that withdrawal of criminal cases in this manner would discourage the police and people will lose their confidence in the government also. The Apex Court directed the state to adopt other method to release the actor Raj Kumar. The point is that victims of crime like Abdul Karim had to file a petition in the Supreme Court just to prohibit the state from withdrawing criminal cases.

Definitely, this new Bharatiya Nagarik Suraksha Sanhita, 2023 would be helpful to the victims of crime in raising their voice at the time of withdrawal of criminal cases and no government would be able to take disadvantage of statutory provision.

2. Right to Appeal

Under criminal justice system, one of the precious right available to the accused is to prefer an appeal against order of conviction or more sentence, but Parliament by Criminal Law Amendment Act 2008 inserted specific provision in Section[3] 372 that victims of crime can also make an appeal against order of acquittal or lesser sentence

[2] A.I.R 2001 S.C.116

[3] The Criminal Procedure Code, Section 372

and this amendment was in tune with recommendation made by Malimath Committee constituted on criminal law reform.

Recently, the Parliament has enacted new criminal law that is the Bhartiya Nagrik Suraksha Sanhita 2023 and Section[4] 413 gives liberty to the victim of crime to prefer an appeal against acquittal order or lesser sentence or lesser compensation. It is also obvious that if the victim is not satisfied with compensation which is to be paid to the victim must have the right to challenge the inadequacy of the compensation amount. Further where the accused is acquitted or awarded a lesser sentence, the victim should be at liberty to prefer an appeal to the appellate court.

Undoubtedly this provision will boost the confidence of the victim of crime in the justice delivery system which was missing in previous statute and victims had to knock on the door of the High Court or Supreme Court.

3. Right to compensation

The basic purpose of the criminal justice system is not only to convict the offender but to compensate for irreparable loss which the victim has suffered due to wrong caused by the offender as well as the victim of crime is also rehabilitated. These are the part of justice delivery system restitution, rehabilitation and restoration (Three 'R') so that the victim can be put in that position if he/she would have been if his/her rights would have not been violated. This is well known as *Status Quo Ante*. For the loss or injury suffered by the victim of crime, Section 396 directs every state government to prepare a scheme for compensation in coordination with the central government[5].

Where a recommendation is made by the court for compensation, the District Legal Services Authority or the State Legal Services Authority as the case may be shall decide the quantum of compensation to be awarded under the scheme whereas section 396(3) says that if the trial court at the conclusion of trial is satisfied that the compensation awarded under section 395 is not adequate for such rehabilitation or where the accused is acquitted or discharged and victim has to be rehabilitated, the trial court can make a recommendation to District Legal Services Authority or State Legal Services Authority. On the other hand, where offender is not traced or identified and where no trial takes place, the victim or its dependents may make an application to the State Legal Services Authority or District Legal Services Authority. For award of compensation on receipt of such application, District Legal Services Authority or State Legal Services Authority as the case may be shall make a due enquiry within two months and award compensation. Here, District Legal Service Authority or State Legal Service Authority as the case may be, after receipt of application made by S.H.O. or area magistrate may provide first aid facility or medical facility free of cost. After making thorough analysis between two provisions of section 357 of the code of criminal procedure, 1973 and section 396 of the Bharatiya Nagarik Suraksha Sanhita, 2023, the substantive difference is that, in earlier statute, trial court itself was competent to award compensation irrespective of application or in criminal cases under section 357 of the code of criminal procedure, 1973. Apart from this, the Supreme Court has covered all human rights violation cases under Article 21 of the Indian Constitution.

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[4]The BharatiyaNagarik Suraksha Sanhita, 2023, Section 413

[5]Id, Section 396

The Apex Court in *Rudal Shah v. State of Bihar*[6] held that where accused was to be released in 1968 but he had to remain in jail for more than fourteen years and was released in 1982, he must be provided compensation for his rehabilitation and the Apex Court considered it violation of his fundamental right guaranteed under Article 21 of the Constitution. Again, in a leading case *Nilabati Behera v. State of Orissa*[7] ,the Supreme Court held that in case of custodial death, victims of crime (dependent of deceased) must be compensated by the state government because ultimately it's the state responsibility to protect life and limb of its citizens. So, it can be said that the apex court in India had already opened the door for the victims of crime in 1982 and since then the Supreme Court has been in favor of giving more access to victims under the criminal justice system. In addition to this, Indian Supreme Court has made a landmark judgment in *Vishakha v. State of Rajasthan*[8] . In this case, where the apex court provided not only protection to the victim of gang rape but also issued various guidelines for protection of women from sexual offences at workplace which played important role in making special legislation for women i.e. Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013.

4. Treatment of Victims

There is another significant provision in the new Bharatiya Nagarik Suraksha Sanhita, 2023 that is Section 397 which talks about treatment of victims in hospitals. By this provision, liability has been imposed upon all the government as well as private hospitals to provide medical treatment free of cost to the victims of any offence covered under section 66, section 65, section 66, section 67 of the Bhartiya Nyaya Sanhita, 2023 and child victims under POCSO Act, 2012 and they (hospitals) shall immediately inform the police about such incident. It has been observed that many hospitals whether they are government or private refused to provide medical treatment without completing medico-legal formalities in this regard the Supreme Court itself has observed in *Parmanand Katara v. Union of India*[9] that right to medical aid is a fundamental right and is an essential component of Article 21 of the Constitution and in the welfare state, the state is under obligation to preserve and protect life of its citizens and people cannot be allowed to die in the absence of medico-legal formalities. So, this judicial pronouncement is in the background of this provision.

4.1 Right to be examined by Medical Practitioner

This new BNSS, 2023 has imposed an obligation on registered medical practitioner to submit medical report of victim of rape within seven days. This obligatory provision will speed up the process of Criminal Justice System because there will be less possibility of fabricating the document. In addition to this disclosure of name of victim of rape is an offence. No person is allowed to disclose the name of victim of crime. This provision would be helpful in maintaining dignity of victim and prevent mental trauma. Along with these safeguards to victim of crime it is also mandatory for Trial Court to conduct in camera proceedings as per section 366 of BNSS 2023 for victim of rape or an offence

[6] A.I.R 1982 S.C. 79

[7] A.I.R 1993 S.C. 82

[8] A.I.R 1997 S.C. 85

[9] A.I.R 1989 S.C 2039

under Protection of Children from Sexual Offences Act (POCSO). By inserting these provisions, Parliament has made an attempt to provide speedy justice and also privacy of victim of crime.

4.2 Legal aid to accused, not to victim of crime, at state expenses in certain cases

In a leading case, *M. H. Hoskot v. State of Maharashtra*[10] , the Supreme Court for the first time held that where a poor person is unable to engage his advocate on account of poverty and is deprived from justice, it would be violation of his fundamental right provided under Article 21 i.e., right to life or personal liberty. This precious right would be meaningless for those poor people who do not have sufficient means to engage their counsel in Court of Law.it is constitutional obligation of state to provide free legal aid to its poor people. Hence right to free legal aid is essential component of Article 21 of Indian Constitution. On the other hand in civil cases free legal aid is available to poor litigants under Order 33[11] and in criminal cases free legal aid is available to an accused under Section 341 of the BNSS 2023.

Contrary to this where victim is not satisfied with the proceedings of Prosecution and willing to file either protest petition against closure report submitted by investigating officer or willing to make an appeal against inadequate sentence or acquittal order and victim is poor unable to engage his/her advocate in the court, then this new BNSS 2023 is silent on this point. So therefore, it is suggested that Parliament by slight modification may insert a clause under Section 341 of BNSS 2023 that victim who are poor and unable to engage an advocate in court and also not satisfied with the order of court, he or she would be entitled to get free legal aid from the state.

This amendment would also be helpful to provide justice to victim of crime where he/she has requested to the Supreme Court u/s 446[12] to transfer a criminal case from one High Court to another High Court for fair trial and to ensure fair justice which can be seen in *Madhumita Shukla Murder case*[13] wherein deceased's sister had filed a case in Supreme Court requesting that accused was MLA and would influence the trial. Accepting the plea matter was transferred from U.P. to Uttarakhand and ultimately trial court in Uttarakhand held him guilty which was upheld by the High Court. In such cases Supreme Court has played significant role so if slight modification is made for poor victim of crime, it would be a great help for them to attain justice.

5. Witness Protection Scheme

Witness Protection Scheme is another significant provision of new criminal laws which was missing in earlier statutes and the necessity of Witness Protection Scheme cannot be ignored for fair trial under the criminal justice system. From *Zahira Sheikh Case*[14] to *Aarushi murder case*[15] either the trial court had to acquit the accused or the investigating agency had to file a closure report in the court of law. Considering the

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[10]AIR 1978 S.C. 198

[11]The Code of Civil Procedure, 1908 (Act no. 5 of 1908)

[12]The Bhartiya Nyaya Sanhita, 2023 (Act No. 45 of 2023)

[13]State through C.B.I. v. Amarmani Tripathi, AIR 2005 S.C. 538

[14]Zahira Sheikh v. State of Gujarat (2004) 4 SCC 158

[15]Dr. Mrs. Nupur Talwar v. State of Uttar Pradesh & Anr. 2012 (11) SCC 465.

seriousness of the issue, the Parliament has inserted a specific provision under section 397 of the BNSS, 2023 for the protection of witnesses. Apart from this, Section 195A of the IPC, 1860 (Amendment) 2006 had made a threat to witness a cognizable offence and is punishable with 7 years of imprisonment.

Though before the enactment of this new Sanhita, the Ministry of Home Affairs, Government of India prepared a scheme for protection of witness i.e. Witness Protection Scheme 2018. This scheme is more effective in that sense because it has segregated offenses on the ground of its severity and a threat report shall be prepared by Deputy Commissioner of Police/Assistant Commissioner of Police in order to provide protection to the witness. There are some salient features of this scheme which needs to be discussed in brief:

- There are three categories of threat firstly, which are related to life. Secondly, where the threat extends to safety, reputation or property of the witness or his family members during investigation/ trial or thereafter and thirdly, where the threat is moderate and extends to harassment to the victim or his family members.
- The report shall be prepared by competent authority within 5 days from the date of receipt of application.
- All the hearings on witness protection application shall be held in-camera by the competent authority.
- Government shall make provision for the Witness Protection Fund.
- Competent authority will ensure that witness and accused do not come face to face during investigation or trial.
- Monitoring of mail or telephone calls.
- Installation of CCTV camera or security devices fencing etc.
- Concealment of identity of witness.
- Regular patrolling of police around the witness's house.

6. Power of Supreme Court to transfer criminal case from one state to another state

There was a provision in the Code of Criminal Procedure, 1973, that on the basis of an application made by a victim of crime, the Supreme Court shall have the power to transfer a criminal case from one state to another state. The intended purpose behind incorporating this provision in the code was to ensure impartial and fair justice. Acting under the purview of this invested power, the Supreme Court had transferred a criminal case from the state of Uttar Pradesh to Uttarakhand to ensure impartial justice in a leading case *State through CBI v. Amarmani Tripathi* . This case is popularly known as Madhumita Shukla murder case, wherein the sister of the deceased, Nidhi Shukla, had filed an application to transfer the case from the state of Uttar Pradesh to Uttarakhand for the conduct of fair trial because the accused was a political leader and had influence over the matter. So, she raised this objection before the court because in the same case, police had filed a closure report stating that the accused was not involved in the incident. When Matter was reopened by CBI, on the basis of the postmortem report and DNA report of the victim, Nidhi Shukla had an apprehension that the accused being MLA could have influence over the trial, so the matter was transferred from UP to Uttarakhand and their trial Court convicted the accused and his wife for committing murder of deceased Madhumita Shukla and in appeal, Uttrakhand High Court repealed the judgement of trial court.

Now under this new BNSS section 446, the transfer of the criminal case from one state to another can be made by the Supreme Court when an application is made by the Attorney General of India or the victim of crime and it appears to the Supreme Court that such an order is expedient for the ends of justice. The significance of section 406 of the code of criminal procedure can also be seen in the best bakery case, where an unruly mob hit and looted the 'World best bakery' shop, which was being run by the father of Jahira Shaikh. As a result of that, her father was killed and a few workers were also killed in the incident. She was an eye witness in that incident and lodged FIR against offenders. Her statement was also recorded by the investigating officer as a prosecution witness but the trial Court released all the offenders involved in the incident due to lack of evidence. Again, in this case, the National Human Rights Commission intervened in the issue and the matter was transferred from the Gujarat High Court to the Bombay High Court and a fresh trial was conducted in Maharashtra. Under New BNSS, a criminal case may also be transferred by the High Court from one district to another district to ensure fair and impartial justice in criminal cases.

7. Role of Malimath Committee in shaping new criminal laws

These new criminal laws have been enacted by the Parliament in the light of recommendations made by Malimath Committee[16] constituted by the Government of India on Criminal Law Reforms. This committee has made significant recommendations particularly for victims of crime, which are as follows:

- The Victim, if she or he is dead, her or his legal representative, shall have the right to be impleaded as a party in every criminal proceeding where the offence is punishable with seven years of imprisonment or more.
- The Victim has a right to be represented by an advocate free of cost if she or he is unable to engage counsel.
- The Victim's right to participate in criminal proceedings shall include the right to produce evidence, to ask questions from witnesses, to be informed of the status of investigation and to move to the court to issue directions for further investigation.
- The Victim shall have the right to file a protest petition at the time of withdrawal of prosecution and grant of bail.
- The Right to prefer an appeal against order of acquittal or lessor sentence or inadequate sentence or grant of inadequate sentence.
- Victims should be provided medical help, psychiatric help, and interim compensation.
- Victim compensation is a state's obligation in all serious crimes. This should be legislated by the parliament.
- Victim compensation fund should be regulated by the Legal Services Authority Act, 1987.

8. Right against closure report

According to Section 169 of the Code of Criminal Procedure 1973 investigating officer was empowered to file closure report where evidence was not found sufficient against accused. Knowingly or unknowingly instigating officer can close the investigation.

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[16](29/09/24) https://www.mha.gov.in/sites/default/files/criminal_justice_system.pdf

Similar provision has been incorporated in section 189 of the BNSS which empowers the investigating officer to close the report if evidences are not sufficient but closure report does not affect the rights of victim of crime. Victim crime shall have right to file a protest petition in that very court where closure report is filed by investigating officer. In *State of UP v. Dr. Rajesh Talwar* and others, this case is popularly known as Aarushi murder case where in closer report was filed by UP Police but when protest petition was filed then Matter was referred to CBI and CBI filed Charge sheet in this case. This is an effective remedy in the hands of victim of crime being dissatisfied from the investigation he or she can file with protest petition. under section 482 of the CrPC 1973 High Court has inherent jurisdiction in criminal cases had power to knock the Door high court under section 482 of the CrPC 1973 in new BNSS 2023 inherent power of High Court in criminal cases is provided under section 528 according to this section High Court shall have power to take any appropriate step in order to do justice with the case. So victim can seek remedy under section 528 of this BNSS either for reinvestigation or to rectify faulty charge sheet.

9. Protection of rights of Victim of Crime through Plea Bargaining

The concept of plea bargaining was adopted in India after the recommendation of Malimath Committee report 2003 on Criminal law reform. The basic purpose of plea bargaining is to decide criminal cases expeditiously and reduce pendency of cases before Trial Court. Though this method is very effective for accused because he may request the court for bargaining of sentence if court is satisfied then accused may be awarded one fourth sentence of the offence which accused has committed but plea bargaining is also beneficial for the victim of crime in that sense because this method also empowers to the victim either to raise objection before trial court at the time of hearing of plea bargaining or he or she can give his/her consent that accused may be allowed by court for plea bargaining. Victim's right is protected by this method either by providing compensation to the victim or awarding one fourth sentence prescribed for the said offence. This method is efficacious because it provides speedy justice to the victim otherwise victim has to wait for final order of the court and it takes time to decide a criminal case by the court which is evident from data of pendency of criminal cases before the Indian Court.

Since we have adopted the concept of sentence bargaining not charge bargaining knowing the fact that this method could have been misused by the accused. Though this method is adopted in those criminal cases which are punishable with less than seven years imprisonment and plea bargaining is also not applicable to offences against women and children even though this method is very efficacious in providing justice to the victims of crime.

In BNSS 2023 provision regarding plea bargaining is provided under section 290 and guidelines for mutually satisfactory disposition of cases is provided in section 291 of the BNSS. Definitely this method would be very effective in protecting the rights of victim of crime.

10. Right to File Complaint

The most significant right which a victim of crime can file a complaint against the offender. Under section 154 of the CrPC 1973 provides that information regarding cognizable offence can be given to the officer in charge of the police station and police officer shall register the case against the offender. The word

'shall' used in that section imposes obligation upon authority to register the case. The similar provision is given in new BNSS 2023 under section 173 and victim can also file complaint to the magistrate without going to police station under section 200 of the CrPC 1973. So victim has both the option either he/she can lodge F.I.R or can file compliant to the magistrate. On the other hand, remedy is also provided under section 154 of the Cr.P.C that if F.I.R is not lodged then being aggrieved informant can send that information to Superintendent of Police. If he is also not entertaining that issues, then victim of crime has right to take shelter of section 156(3) of the Code of Criminal Procedure and this same procedure is provided in section 175 of the BNSS.

Another significant provision of new BNSS is about 'Zero F.I.R' and electronic F.I.R which can be lodged by the victim under section 173(1) and section 173 (4), where information discloses sexual offence that shall be recorded by a women police officer.

By providing e F.I.R under this BNSS would enable victim to register this information without going to police station. It will not only save time but also inexpensive and speedy provision and definitely 'Zero F.I.R' would be helpful for those victim who are unable to go to police station either due to financial constraints or social constraint. Earlier Police used to refuse from registering F.I.R due to Jurisdictional error now this lacuna has been removed by this BNSS.

Though section 154 was very clear about mandatory registration of F.I.R but ultimately the Supreme Court has cleared that doubt in *Lalit Kumari & others v. State of U.P* held that once information disclose cognizable offence police officers are bound to register that case as F.I.R and may further proceeds for investigation.

In addition to this victim has right to ask the magistrate for recording of statement under section 183 of the BNSS. This statement is recorded by magistrate after complying all set procedure that is why it is considered as substance piece of evidence in Court of Law.

11. Conclusion and suggestion

After making thorough analysis of these new criminal laws it can be seen that the victim's right to file an appeal against the accused was inserted in the year 2008 under Section 372 of the Code of Criminal Procedure. Victim's right to file a protest petition at the time of withdrawal of prosecution has got recognition in the BNSS, 2023 meaning to say that most of the recommendations have been accepted by the government and have got statutory recognition. But in spite of all these merits inherent in new criminal laws there are certain issues which must be addressed by the Parliament in order to make these laws more victim centric. To strengthen these new criminal laws following suggestions would enhance public confidence in justice delivery system which are as follows:

- By making slight modification in BNSS victim should be given liberty to ask question and produce relevant evidence in trial court.
- Victim should be empowered to get information about day to day investigation so that he/she may become aware about status of case.
- Victim should have right to request the court to transfer his/her case where victim reside instead of trial case at place of crime to avoid any kind of inconvenience to the victim.

- To protect witnesses in criminal cases there should be provision for recording of their statement through videoconferencing from his/her residence, it shall also reduce unnecessary expenses of the witness and court.
- Soon after commission of crime victim must be provided security and other necessary protection by the concerned police station.
- There must be a designated police officer at every police station which shall maintain record of victim of crime and witness and keep supervision on them.
- Every District should have District victim and witness protection officer (DVWPO) who shall supervise victim and witnesses as well as his police officer who has been designated at police station for protection of victims and witness.
- If above mentioned suggestions are incorporated in new Criminal law definitely it would be very useful in protection of rights of victims of crime and witness.

UNFOLDING PROPOSITIONS OF JUDICIAL PROCESS IN CONTEMPORARY UNIVERSE

Dr. Vishal Mahalwar*

Abstract

Since inception, when we turn to a civilized society, state emphasizes on the free and fair judicial process. In the absence of adequate and appropriate judicial process, we may not be able to achieve the goal of social welfare in the society. It is functionality of the organs of that state which reflects and enumerates about the nature and structure of the nation. In this Article, author has reflected upon unfolding propositions of judicial process in the nation like India. Numerous factors are responsible for judicial process or judiciary as it seems today. Either it is doctrine of separation of power or liberalization of judicial process these factors play a key role in molding the different stakeholder of judiciary, legislation, and executive. Some influential elements of judicial process like judicial review, judicial activism, precedents and many more have taken the judiciary to higher flight. In order to regulate, govern and shape the society, judicial process has left indelible mark in the history of judiciary.

Keywords- *Law, Dynamism, Independent Judiciary*

Introduction to Judicial Process

In the first place, initially getting justice has always been matter of discomfort among the masses. Judicial delay system is generally impacted by socio, economic and political elements at various phases. In order to provide justice, for its convenience, Authorities who were responsible to deliver the same, made codification of principles, norms and conduct which lead to discipline in the society in a uniform way. But priorly, there was no sense of codification of the norms and principle that's why everything was determined and adjudicated on the ground of equity and good conscience. If we talk about prior to Independence era, Britishers were responsible to create the judicial structure in the country but as far as laws are concerned which are the base of justice delivery system had never been introduced in a liberated way. At that point of time, only adversarial judicial process was in prevalent rather than inquisitorial judicial process. Reason behind this was to have a common law which was judge made law. All the disputes were entertained and adjudicated based on natural justice, equity and good conscience. In the common law judicial process, judges had nothing before them while adjudicating a matter. No inclination towards the rules, norms and statutes was one of the advantageous things in the history of judicial process and hence judge's role was like a neutral referee. Judges used to decide the cases on the basis of principles adopted in priorly decided cases. In brief, precedents were the key factors for illuminating the light of justice. Now, after independence, the frequency of enactments of statutes have

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remarkably been expended just for the reason of dynamic changes within the society. We are now moving towards the civil law judicial process which talk about the substantive and procedural law made by legislators. The advantageous part of civil law judicial process is codification of the law. Now, whenever judges adjudicate the matter, they need to look into the applicable, relevant law as per the fact and issues of the case. The basic idea behind the civil law is to figure out the truth apart from fairly adjudication. Concrete presence of the substantive and procedural law compels the judicial process to being strict to the law. In the present and modern judicial process, idea is to achieve the goal of social justice either we get this social justice through codified law or through the verdict of court based on equity and good conscience i.e. judge made law. This recognizes that main goal of judicial process is to achieve the goal of welfare of the society.

Concept of "Law"

We have widened the horizon of understanding the concept of "law". Numerous eminent jurists have elaborated the term law in diversified ways. Austin says that law is a command of sovereign[1]. Bentham talks about the law as a tool of public utility. According to him, the basic goal of law is to provide the maximum happiness to maximum people[2]. Similarly, Roscoe Pound talk about the social engineering[3]. The ultimate purpose of law is to serve the people of country. Law and society are considered as interdependent. We can't separate these two from each other. Those who study society say that law is for the society and society is not meant for law. Laws have to be changed, amended and modified as per the convenience of the society, not vice versa. One thing has to be acknowledged that it is not necessary that every time, law is to be molded, changed, amended or modified at convenience of the society. Some time, we have seen that stringent laws were introduced in the past to regulate the conduct and shaping the society. In the past, we have observed that judiciary has played a role to adjudicate the matter through referring enactments and statutes. Apart from it judges made law has also been recognized in due process of justice. Eventually, we have widened the scope of source of law which includes law made by parliament. Secondly, law made by judges through precedents. In this contemporary world, more specifically in India, Judiciary's role has become more widened. Judiciary has stated performing the role of legislators apart from normal role of adjudication. Now, many things rely on the discretionary power of courts. Initially, role of legislators was to create law for the betterment and upliftment of the society. Society is also responsible to dictate the legislature in order to get the laws which are in the interest of the society.

Judicial Dynamism

Role of judiciary in the contemporary world is dynamic that's why whole system of judicial process is also known as judicial dynamism which is in contravention of judicial restraint. Judicial dynamism not merely provides liberty to address the concern of the society which are not limited to the redressal and judicial pronouncement. In fact,

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[1] JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED, (Law & Justice Publishing co. pvt. Ltd.2022)

[2] J. BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION, (Clarendon Press, Oxford 1789).

[3] POUND, ROSCOE, "AN INTRODUCTION TO THE PHILOSOPHY OF LAW, (Revised Edition, Yale University Press 1982),

present judicial process encourages the system to act beyond the designated power and jurisdictions which is generally reflected through social ordering, judicial review and judicial activism. Doctrine of separation of power encourages the system to act within the designated limits and periphery. If any of the organs go beyond the designated function and jurisdictions it leads to imbalance and grave repercussion. Judiciary is one of the organs of the state which exceptionally encroaches in to the periphery of the other organ unlike executive and legislation. Interference and intervention by judiciary in the executive and legislative is indispensable in order to have a check and balance. Comparatively, executive and legislature have less interference in the functioning of judiciary which may be considered a healthy sign of democratic country. In due course of judicial process, judiciary has evolved with new dimension of functionality of judges as a stakeholder of judiciary. Judges have more function than usual. In fact, we can say that not only aggrieved party is the subject matter to the court. Those persons who are not directly aggrieved from the wrong committed by third party may also institute the legal proceedings. In brief, locus standi relaxation has widened the functionality of judicial process. Public interest litigation has become more accepted and more welcomed subject matter of the judiciary, more specifically by apex court. In Indian judiciary, Justice P. N. Bhagwati has played a prominent role in encouraging the Public Interest Litigation which serves the purpose of social justice and social welfare since we have observed that within our society[4]. There are lot of diversifications due to which in lack of resources, some people may not have an access to judicial system. In order to overcome this problem, public interest litigation serves the goal of equal access to justice. There are numerous instances where a single letter has also been taken in to account[5]. Generally, an aggrieved person has a right to institute the legal proceeding against the culprit however in the present scenario regarding judicial process has drastically changed. Subordinate courts are dedicated and directed by the judicial pronouncement of apex court. Either Supreme Court or High Court' s decision has a power to dictate the inferior or subordinate courts. Precedents are most prominent component of judicial process which encourages high court to come up with new principles, norms, doctrines and guidelines and through which they may address the diversified issues of the society. Generally, precedent is based on *stare decisis* which means that like cases should be treated alike. In those cases where matter has similar facts and issues have already been decided by the apex court, then in such situation, subordinate courts are not required to take exertion and spent much time to decide the legal issues which are already addressed by the apex court.

Filling of Legislative Vacuums by Precedents

Now, administration of justice has more crucial role apart from adjudication. Judicial process has taken responsibility of filling the gaps where issues have never been entertained or addressed through legislation. Judiciary is now acting like a legislator by providing new principle, guidelines with a purpose to address the issues prevalent in the society. In new evolving judicial process, the study of judicial pronouncements has been

[4]S.P. Gupta v. President of India and Ors.AIR 1982 SC149; M.C. Mehta And Anr v. Union of India & Ors AIR 1987 SC 1086; Bandhua Mukti Morcha v. Union of India & Others AIR 1984 SC 802; Maneka Gandhi v. Union of India AIR 1978 SC 597

[5]Bandhua Mukti Morcha v. Union of India & Others AIR 1984 SC 802

divided into two components, one is ratio decidendi and second is obiter dictum. Both of these judicial pronouncement components play a very significant role in better understanding of decisions taken by competent court. Any decision taken by court must be accompanied by the ratio, reason or logic. In the absence of ratio decidendi it leads to arbitrariness. For free and fair decision, ratio decidendi principle needs to be followed by the apex court or by subordinate courts religiously. This is one of the ways to satisfy the client as a stakeholder of judicial process. Another component of judicial pronouncement is obiter dictum which is the weak part of decision. It doesn't have an authoritative value. It is nothing but just a suggestion or opinion of judges regarding the matter decided by the judges. It may not be authoritatively applied since it is very personal comment or opinion of the judges. Obiter dictum may not be questioned since it has persuasive value in itself. If public prosecutor gives the reference of obiter dictum, it plays an influential role over the judge since it influences the choice of the judges while delivering any kind of judicial pronouncement. On the basis of authoritativeness, we may determine the judicial pronouncement as a precedent. Precedent is such a tool through which we may save the energy and time of the court.

Independence of Judiciary

In India, judiciary is overburdened due to backlog of pending cases. Despite of all adversities, the merits of judicial process have never been compromised. In order to strengthen the judiciary, we have to have an independence of judiciary without which we may not be able to address the concerns of different stakeholder of the society. As far as Independence of judiciary is concerned, it is not yet defined in the constitution of India but different provisions of constitution encourage the judiciary to be independent. Sometimes, question arises whether we want to provide independence either to the judiciary or to the judges. In the absence of independence of judges, the repercussion may be reflected in the judicial process, that's why either judiciary as an institution or judges as individuals must have independence. The supreme law of the land i.e. Constitution of India talk about the fix tenure of the judges[6]. Further, parliament is under obligation not to discuss the conduct of the judges who are holding the office[7]. Another example of independence of judiciary is enunciation of clear-cut power and jurisdiction of supreme court in the constitution[8]. If we take the reference of part IV of the Constitution, it talks about the obligation of state to have separation of judiciary from executive[9]. Fix salaries[10] and allowances of judges are the indication that they are not going to be deviated from the obligation imposed on them by the virtue of holding their offices. Either we talk about supreme court or high court, both of them shall be considered the court of record as per the constitution of India[11]. It has further articulated that being an independent judiciary, the court has the power to punish accused for contempt of court[12]. All such provisions mentioned in the constitution give a sense of

[6] Art. 124 & 217 of the Constitution of India

[7] Art. 211 of the Constitution of India

[8] Art. 32 of the Constitution of India

[9] Art. 50 of the Constitution of India

[10] Art. 125 & 221 of the Constitution of India

[11] Art. 129 & 215 of the Constitution of India

[12] Ibid.

independence to the judiciary. Though not in a straight way but other way round, India judiciary is the one which is responsible to strengthen the democratic nature of the country. This is one of the institutions which play a role of guardian of the supreme law of the land i.e. the Constitution. Judiciary is also responsible to safeguard the fundamental rights of citizens. The principle of Independence of judiciary has been laid down in various international Human Right instruments like Universal Declaration of Human Right[13], International Covenant on Civil and Political Rights[14] and many more. Indian judiciary may not have a clean chit that it is free from political influences. Despite of separation of execution and judiciary, there are still some instances where there is encroachment of executive in the periphery of judiciary. History has observed and witnessed that during 1973 to 1983, there were some conflicts between political parties and judiciary. In 1973, some senior judges of supreme court were superseded. Reason being, those judges did not sacrifice the independence of judiciary and upheld the decision against the will of ruling power. Resultantly, there was an appointment of chief justice of Supreme court as he delivered the judgement in the favor of government in three important constitutional cases. The Senior judges paid heavy price asthey delivered the judgement against government during emergency that's why they were superseded by junior judges. Furthermore, the appointment of judges or transfer of

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[13]According to Art. 10, "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him."

[14]According to Article 14

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(c) To be tried without undue delay;

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(g) Not to be compelled to testify against himself or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

judges has also been a burning topic of discussion. During 1975, around 16 judges of High Court were transferred from one to other High Court[15]. In the history of judiciary, three prominent judicial pronouncements emerged with reference to appointment and transfer of judges. These three cases were also known as Judges transfer cases. In *S.P. Gupta v. Union Of India*[16], court unanimously agreed with the meaning of the word "consultation" as determined in *Union of India v. Sakalchand Himatlal Sheth*[17], by doing so, judiciary substantially narrowed down and reduced its own power in appointing judges and gave the control to executive. In this case Art. 217 (1), Constitution of India was interpreted and held that consultation doesn't mean "concurrence". Then subsequently, in another case Judge named as Second Judge Transfer Case[18], In 1993, Nine Judge Bench overruled the decision given in S.P. Gupta's case and judiciary took back the power which they rendered in the previous judgement to President. It was held that President is bound to act in accordance with the opinion of CJI. Furthermore, it was stated that chief justice of India should have primacy and appointment of chief justice should be based on seniority. It was decided that CJI must consult two seniors most judges and then any recommendation can be given, if only there is consensus among them. Interpretation of the word "consultation" was done in such a way that meant "concurrence". Due to such judgement, the role of President in appointment of judges in higher judiciary was restricted. After all, In the year of 1998, the third Judges Case[19] was entertained by 9 judges' bench of supreme court. Supreme Court held that if any decision has been given by CJI without proper consultation then it is not binding. It was emphasized that at least 4 seniors most judges should be consulted at the time of appointment of judges in higher judiciary. Due to the decision of second judges Transfer Case, appointment of judges in Supreme Court and high court is fairly free from executive control. In the context of independence of judiciary, both decision of Second judges' case and third judges' case are praiseworthy. After rigorous exercise, by judiciary, one more case come in the picture which is known as "Fourth Judges Case"[20]. By the virtue of National Judicial Appointment Commission Act, 2014, NAJC was established. The idea behind the commission was to form and facilitate the collegium through which the name of candidate for appointment of judges in the supreme court and High Court

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5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

[15]Srinjoy Das, "48 Yrs After Emergency, Transfer Of 24 HC Judges in One Go Marks Power Shift from Executive to Judiciary: Justice Bibek Chaudhuri on Transfer to Patna" available at https://www.livelaw.in

[16]AIR1982 SC 149

[17]AIR 1977 SC 2328

[18]Supreme Court Advocates-on-Record Association v. Union of India AIR 1994 SC 268

[19]In re Special Reference 1 of 1998

[20]Supreme Court Advocates-on-record Association & Anr. v. Union of India (2016) 5 SCC 1

may be recommended to the president. In this case, five judges bench held that establishment of commission is unconstitutional. Composition of the commission was such that by ratio of 4:1, the majority of judges held that the Act was violative of basic structure of independence of judiciary. The court held that NJAC Act goes in to the contravention of precedent set in *Keshvanandan Bharti*[21] and *Minerva Mill*[22] case. Justice Chelameswar who dissented said that "NJAC could have acted as check on wholesome trade off within the collegium and incestuous accommodations between Judicial & Executive branches."

Activism in Judicial Process

In nutshell, we can say that separation of power is needed to have an independency of judiciary but still we must require to have check and balance over different organs. In the past decade, there has been some dynamic changes in judicial process. Present judicial process is such that it gives more opportunity to be at the door of the court irrespective of socio, economic and political constraint. In fact, judiciary is now more inclined towards shaping the structure of the society as an institution. Past judicial pronouncement reflects the dynamic change in the society. For instance, in the Islamic Law, talaq-e-biddat remained prevalent for immemorable time but just because of sensitivity or awareness in people towards their rights have compelled them to force the court to held it as unconstitutional, as it violate the basic right of equality under Art 14 of the constitution[23]. There are numerous instances where the cost has initiated to safeguard the right of citizens of the country. With the emergence of information technology & globalization, many rights have evolved by the judiciary. Judiciary has done an interpretation of the constitution to safeguard the interest of the society. Since inception, there were not many rights to be evolved. It is just a matter of thinking of betterment and upliftment of each and every member of the society. Every judgement of higher judiciary is a fine example of step taken towards the betterment of the society. Judiciary is evolving with the time. For instance, the provision of reservation of SC/ST was encouraged but over the period, this requirement of the society become graver by simple reservation, they were unable to reach the last person. In order to address the people, who are still deprived from their rights and need upliftment, In the year of 2024, new policy of sub classification of SC/ST with reserved category has also been considered by the apex court[24]. 7 judges bench overruled the previous decision[25] which came in the year of 2005. Such kind of judgement reflects judiciary's dynamism. Not only the society, in fact judicial process has also been influenced by different factors prevalent in the domain. The independence of judiciary is that much extended that judiciary has the right to review any matter pertaining to executive, legislative and judiciary. Judiciary may have a review of any action taken by executive, seem to be questionable, with regard to constitutionality. Similarly, legislature may also be the subject matter of review by judiciary if there is question on constitutionality and questions on the process

[21] Keshvanandan Bharti v. State of Kerala AIR 1973 SC 1461

[22] Minerva Mills Ltd. & Ors v. Union of India AIR 1980 SC 1789

[23] Shayara Bano v Union of India (2017) 9 SCC 1

[24] State of Punjab v Davinder Singh 2024 INSC 562

[25] E.V. Chinnaiah v. State Of Andhra Pradesh (2005) 1 SCC 394

followed by the legislature in due course of making a law. Lastly, any matter decided by the judicial process may also be considered as a matter of judicial Review. This much independence of judiciary or in judicial process can hardly be seen anywhere in the world. Another perspective of judiciary is social control that's why we use to say that judicial process is an instrument to social ordering. Through judicial process, shaping of the society may be done in an authoritative manner. Since inception, either it is law or judiciary playing a tremendous role of guiding and shaping the society. "Law" is in itself a very wider term. Anything framed or drafted by legislature would be considered as a law but now we have more wider perspective towards the law which includes interpretation of statutes by the judiciary and precedents including obiter dicta. In the present scenario, sometime directions and guidelines are being delivered by the judiciary by taking suo moto cognizance on any matter like environment, sustainable development etc. In the history of judiciary, this institution has served the society by dealing with different matter of social concern like Bigamy[26], Bonded labour[27], child labour[28], dowry death[29], female feticide[30], Harassment of woman at working place[31], Immoral trafficking[32], Rape[33], Maintenance[34] and many more. Judicial Activism is one of the terminologies appropriated in judicial process. As we know that the basic function of judiciary is to adjudicate the matter, but as much independence has been given to judiciary, judiciary has become more proactive. Higher judiciary has more to do other than adjudication. In fact, Judicial Activism has become necessary for progressive society. This is one way through which we are protecting and expending individual rights. Every organ of the state has its own duties and obligation to perform however check and balances over the organs are highly needed. That's why judiciary is one of the organs which is encroaching and intervene in the function of executive and legislature. For instance, executive is bound to provide best of facilities to the citizens but many a times in due process of execution and implementation, they infringe and violate the fundamental rights of the people. For instance, we need express high ways, in order to execute the plans, many rights are get violated. Executors acquire a land and don't provide sufficient and appropriate sum of amount as a compensation. In order to safeguard the rights of people or farmers from whom land has been taken, judiciary is responsible one who has to take some steps in order to provide and protect the fundamental rights of specific section of society. In the nutshell, we can say that judiciary has changed its face drastically and performed admirably. In the upcoming time, judiciary shall play a prominent role in shaping and regulating the society. Apart from it, judiciary is a one of the organs who is responsible to keep other different organs in the order. There is dire need to provide and facilitate the judiciary with more

[26]Lily Thomas v. Union of India AIR 2000 SC 1650

[27]Bandhua Mukti Morcha v. Union of India & Others AIR 1984 SC 802

[28]M.C.Mehta v. State of T.N. AIR 1997 SC 699

[29]Raja Lal Singh v. State of Jharkhand AIR 2007 SC 2154

[30]Centre For Enquiry into Health and Allied Themes (CEHAT) v. Union of India AIR 2003 SC 3309

[31]Vishaka & Ors v. State of Rajasthan & Ors AIR 1997 SC 3011

[32]State of Maharashtra v. Mohd. Sajid Husain Mohd. S. Husain AIR 2008 SC 155

[33]State of M.P. v. Babulal AIR 2008 SC 582

[34]Mohd. Ahmed Khan v. Shah Bano AIR 1985 SC 945

independence. Even in the past, it has evidently shown that judiciary has played a tremendous role in providing socio, economic and political justice to the masses. Eventually, no state may have the harmony in the society till the time we don't get successful in achieving the goal of social welfare.

Epilogue

In order to maintain the stability, consistency & legitimacy, Larger Bench Rule plays a very significant role. There are numerous instances of breach of larger bench rule through which we may get a reflection of indiscipline in the judiciary. Despite of all adversities, there is a prevalence of Larger Bench Rule. It is such a rule which encourages the non-arbitrariness; however, problem arises where the small bench gives a verdict in contravention to the well settled precedent set out by the larger bench. Overruling of *Romesh Thapper's*[35] judgement in *Kanubhai*[36] & *P.N. Kumar*[37] by smaller bench illustrates ignorance of constitutional principles and values. As per the judgement in *Kanubai*, two Judges held that Supreme Court is under obligation to send the petition to the High court first. Such kind of indiscipline or breach of Larger Bench Rule in the judiciary has also disturbed the principle of stare decisis. Indian judiciary has seen many developments over the period. Gradually, judiciary has emerged with new thought, principles and norms. Even in United State of America, in one of the pronouncements, court held that "negro" is the property of his master[38]. Later on, that slavery was pronounced and considered as de- humanizing by sharing the concern of human dignity[39]. This is one of the examples of evolution of human rights through judicial dynamism. Modern Indian judiciary is facing many more challenges in due course of judicial process. Rendering the speedy, free, fair and effective justice is one of the challenges which we are facing. Reason behind justice delay is very clear. The infrastructure of judiciary has not been strengthened in the past years. Alternative dispute resolution has not been accepted by the society due to orthodox approach towards this. The way, there is an increase in the number of populations, it is not in right proposition to number of judges deputed for addressing to judicial works. Despite of all efforts by judiciary, access to justice to needy and downtrodden is still outside the ambit of judicial system. Even though, in the past many years, there is boom in instituting the legal proceedings in civil cases that indicates the faith, belief, trust & integrity in the institution of judicial system. Finally, in order to strengthen the judicial system, there is a need of collective efforts from executive, legislature and judiciary irrespective of presence and functionality of separation of power.

[35]Romesh Thappar v. The State of Madras AIR1950 SC 124

[36]Kanubhai Brahmbhatt v. State of Gujarat 1989 Supp (2) SCC 310

[37]PN Kumar v. Municipal Corporation of Delhi(1987) 4 SCC 609

[38]Dred Scott v. Sandford 15 L Ed 691 (1857)

[39]Brown v. Board of Education 347 US 483: 98 L Ed 873 (1954)

SERVICES FROM THE LENS OF CONSUMER PROTECTION WITH SPECIAL REFERENCE TO EDUCATION AS SERVICE

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Abstract

The new Consumer Protection Act 2019 has brought a ray of hope for those huge number of students who are paying hefty amount of fees to those large corporate educational institutions for the courses. The quality of educational services that are rendered suffers from deficiencies and therefore the availability of remedy under the Consumer Protection Act 2019 has been in debate. The paper explores the possibility and extent of relief under the consumer protection laws to the students for the quality of educational services.

Key words
Services, Deficiency, Consumer, Relief, Student as consumer,

Introduction

Consumer issues and concerns have undergone paradigm shift leading to enactment of Consumer Protection Act 2019. The Consumer Protection Act, 2019 came into force on 20th July, 2020. This statute was made to make the Indian consumer laws in conformity with the global standards of legislation that provided for more power to the executive officers under the consumer protection laws and also provisions relating to e-commerce. *In Neena Aneja & Anr. v. Jai Prakash Associates Ltd*,[1] *the Apex Court analyzed and remarked on consequences of Consumer Protection Act, 2019 on the maters that have been brought under Consumer Protection Act, 1986. The court interpreted numerous verdicts as far as the impact of amendments brought under consumer protection laws on the current proceedings. They also deliberated on the intention of parliament in bringing Consumer Protection Act, 2019 and the monetary jurisdiction of various forums under Consumer laws such as National state and District commission*.

Certain weaknesses were met under the old consumer protection Act due to which the said Act had to be revised to provide certain benefits to the consumer which includes an alternative approach or solution to the concern under law, the 1986 Act prohibited them from approaching the Consumer Forum. It was sad that a consumer could only come to the Forum if he had suffered a loss or harm as a result of an unfair commercial conducts or a service defect. The Act dealt with dangerous or hazardous commodities, but it did

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[1]AIR 2021 SC 1441.

not hold the seller of such goods liable. It also never went into detail on product safety requirements or permissible amounts of hazardous compounds[2].

The 2019 Act, which was notified on July 15, 2020 and went into force on July 20, 2020, instituted consumer councils to resolve consumer grievances and related issues. This Act was enacted primarily to address an accumulation of consumer complaints that had been pending in Consumer Forums and Courts around the country. The Consumer Disputes Redress Commission's jurisdiction was outlined by the Act.

Now National Consumer Disputes Redress Commission has the jurisdiction to decide claim up to 10 crores and state Consumer Disputes Redress Commission takes up the matters involving amount less than 10 crores. The matter worth value up-to 1 crores are decided by district Consumer Disputes Redress Commission.

Services under Consumer Protection Act, 2019

The concept of services as defined under Consumer Protection Act, 2019 has tried to offer as comprehensive definition of services as possible including e commerce services.

By virtue of section 1 (4) all goods and services are covered apart from those that are specifically excluded through notification of central govt. The phrase hire service refers to providing customer with service in exchange for payment of some sort. A service cannot be considered as a "service" if money has not been paid. Services covered under the Act are: Professional services, Services of Advocate, Accepting deposit from public, Share broker services, Telecom sector, Electricity sector, Transport service, Medical services etcetera. The various manifestation of how services have been interpreted under consumer laws is interesting to see and highlights the approach of the courts.

In case of *Lucknow Development Authority v. M K Gupta*[3], court concluded that if consideration is paid for services and is not a contract of personal service would be called service within the purview of the Act. It was held in this case that construction of house is service, even though this is connected to real estate."

In *Shaila Construction v. Nainital Lake Development III*[4] , the court held that if the sale of the immovable property is complete, there is no question of hire for services. Though deficiency in services is possible and there is no denial to complaint in such cases. Thus, the definition given in the Consumer Protection Act, 2019 has an exclusionary part that contracts of free services and personal service cannot be questioned under the Act." The amount of tax submitted by tax payers to government is not a payment as it is used by the government. In such a case if after paying house tax a complaint of inadequate water supply by the corporation is filed then such a case cannot be filed as the corporation is discharging its statutory duty which is not covered by Consumer Protection Act. As the state provides services without any charges therefore a government officer is not allowed to complain against state as consumers. Similarly the medical facility that are offered in Government hospitals is rendered without any charge therefore the same is outside the purview of the Act and patients do not qualify to be called as consumer and

[2]Ankur Saha & Ram Khanna Sr., "Evolution of Consumer Courts in India: The Consumers Protection Act 2019 and Emerging Themes of Consumer Jurisprudence" 9 IJCLP 115(2021).

[3]1994 SCC (1) 243

[4](1996) CPJ 11 (NCDRC),

whatever nominal charges are paid it will not be called for services hired. Here the charges paid are considered as for universal purposes of the state and not any services rendered. Thus, there is no question of services being hired by the patients. But the consumer is not rendered remedies in case there is patent negligence. The remedy through civil suit is always available[5].

Further, Contract of personal services are excluded from definition of service. National Consumer Disputes Redress Commission in *Cosmopolitan Hospitals v. Vasantha P Nair*[6] concluded that medical services are including under Consumer Protection Act. The rationale lies in the fact that contract of service is different from contract for service. As far as contract of service is concerned servant can be dictated by the master as to what is to be done and the manner in which it is to be done. This is termed as contract of service and hence not covered under Consumer Protection Act because the services of servant can always be terminated and thus, he can't complain about his services being deficient. On the contrary contract for service indicates that no order can be given as regards what and how is to be done. For eg attorney client relationship falls in this category. Many professional services are covered in this category. For instance, cloth for stitching given to tailoring shop, services of doctor is also under category of contract for service. Further the distinction was made more clear in *Indian Medical Association v. V P Shantha*[7], here court explained that contract for service can be understood as any professional or technical services in whose performance no detailed direction is given nor any control is exercised rather technical expertise and knowledge is used with his personal discretion. On the other hand contract of service is more like a master servant relation where the servant is duty bound to obey the orders regarding what is to be done and methods of its performance[8].

Education as services and students as consumer under the Consumer Protection Act

Imparting education has been considered as a noble profession and its very nature has been contested as being considered as services in commercial sense and thereby objection still holds good for students being considered as consumer to get relief. There is conflicting opinion expressed by courts as well as consumer forums regarding education being treated as services under Consumer Protection Act. This paper tries to understand the judicial approach towards the same as well as implications of education being treated as services as under Consumer Protection Act. The necessity to determine the nature of education as Consumer Protection Act, consumer is essential to allow relief to students under Consumer Protection Act for any deficiency of any services from the educational institutions. To determine the applicability, the student who has paid fees and taken admission in the educational institution has to be equated with consumers under the consumer protection laws. As a legal corollary, educational activities rendered in the institutions has to be equated with services as mentioned in

[5]Unity Trust Society v. State of Rajasthan, (1992) 1 CPJ 259 (NC)).

[6](1992) CPJ 302 (NCDRC)

[7]1995 SCC (6) 651

[8]Ibid.

the consumer protection laws. If these criteria are fulfilled, then in any case of complaint against the educational institutions, the student can directly approach the consumer forum, qua the presence of territorial and pecuniary jurisdiction, for reliefs under the relevant laws.

Section 2(a) (d) of the Consumer Protection Act, 1986 defined "consumer". Consumer is defined as a person who-

(I) "buys any goods for consideration that has been either paid, or partly paid and partly promised or bought under a system of deferred payment and includes the user of such goods when such use is made with the approval of first mentioned person. It is provided that the definition does not include the person who has obtained the goods for resale or for any commercial purpose".

(ii) "hires or avails of any services for a consideration which has been paid, promised, partly paid and partly promised or under any system of deferred payment. The beneficiaries of the services are also included within the definition of consumer when the beneficiaries use the services with the approval of the first mentioned person. The definition excludes any person who makes use of such services for any commercial purpose".

The explanation provides that the definition would not include any person who has bought the goods or which is used by him/her exclusively for the purpose of attaining self-employment[9]. This means that if the goods or services is used by the consumer for any commercial purpose then it will remove the person from the ambit of the consumer under the provision. The 2019 Act that repealed the earlier Act, the definition of consumer is the same except for the fact that the explanation has been amended in respect of the e-commerce transactions. The amended explanation now includes offline or online transaction through electronic means or by teleshopping or multi-level marketing[10].

In the case of *International Airports Authority of India v. Solidaire India Ltd*[11]., the National Commission was of the view that a person is a consumer who hires or avails of any service rendered by the opposite party for consideration.

In the case of *Punjab University v. Unit Trust of India*[12], the Supreme Court of India was of the view that "so as to be a consumer, a person has to hire or avail service for consideration but such hiring or availing shall not be for the purpose of commercial purpose unless the commercial purpose is for the earning of livelihood". The meaning of service has been provided in a Supreme Court Judgment as, "The term service may mean any benefit or any act resulting in promoting interest or happiness[13]." It may be either contractual, professional, public or statutory. The definition of service is very wide. The inclusion of service depends on the context in which it is used in an enactment.

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[9]Consumer Protection Act, 1986 expl. to s.2(a) (d).

[10]Consumer Protection Act, 2019 expl. b to s. 2(a) (d).

[11]2015 SCC OnLine NCDRC 2715.

[12]AIR 2014 SC 3670.

[13]AIR 1994 SC 787.

In *Bihar School Examination Board v. Suresh Prasad Sinha*[14], "the son of the complainant was losing a year of his academic career because of deficiency of services on the part of BSEB (Bihar School Examination Board). The question before the court was can a student be considered a consumer under Consumer Protection Act? The Supreme Court was of the view that conduction of the examination, evaluation of answer scripts, declaring results and issuing certificates etc. do not come under the purview of the consumer protection laws because these are the sovereign functions of the educational institutions. Thus, when a statutory body conducts an examination, it does not offer any services for consideration. It provides that this is the statutory function of the statutory body. The court was of the firm opinion that even if consideration is taken for such activities, they do not come under the purview of the consumer protection laws and the beneficiaries of the activities are not consumers. The Court in this case was dealing with a categorical issue whether a statutory body conducting examination comes under purview of the Consumer Protection Act, 1986 or not? The Court further held that fees paid by the student are not a consideration for availing the services of the conduction of examination and the publication of results."

Again in *Buddhist Dental Mission v. Bhuprsh Khurana*[15] "the Supreme Court of India dealt with the issue that the appellant educational institution did not have the requisite affiliation and was not recognized by the Dental Council of India and it admitted the respondent into the course. The issue before the Court was whether the appellant was liable for deficiency of services. The preliminary issue in this case was, whether the appellant was liable under the consumer protection laws for the deficiency of service. The Court was of the view that without any proper affiliation or the requisite sanctions by the Board, the appellant has started the educational institution and had included the students in the course. This amounted to deficiency of service."

Under the provisions of the Consumer Protection Act, 2019, a person has the right to file a complaint against deficient services provided by the service providers. In order to prove deficiency in service, the first essential is that the person alleging deficiency should prove that the person comes under the definition of consumer of the service that is provided by the service provider.

In the case of *Bhaskar Golla v. Ramakrishna Vidyashrama*[16], the National Commission was of the view that "As regards the deficiency in providing services of boarding and lodging in the hostel is concerned, the deficiencies are writ large on the face of it. The evidences on record clearly show that no warden was appointed in the hostel. These all point to the facts that there was deficiency of service in relation to the boarding and lodging in the hostel."

The wider ambit of protection under Consumer Protection Act covers unfair trade practices as well. In the case of *HCMI Education v. Narendra Pal Singh*[17], the National Commission was of the view, in a case where an educational institution which was based in Phillipines, had made misleading statement that they had the requisite

[14](2009) 8 SCC 483.

[15]2009 (2) Scale 685.

[16]2019 SCC OnLine NCDRC 1181.

[17](2013) 3 CPJ 121.

permission for the course they were offering and they were made liable for the unfair trade practice in this regards. In the further case of *Shaheed Bhagat Singh Public School v. Anoop Singh*[18] , the National Commission was of the view that the false and misleading advertisement as regards the affiliation would bring home the allegation of unfair trade practices.

DEFICIENCY IN SERVICES

Consumer protection laws also provide the penalty for the purpose of punishing any deficiency of service or any unfair trade practice practiced in terms of the educational institutions. "'The Consumer Protection Act aims to protect the consumer interests"[19] The element of profit is pertinent to draw the commercial aspect of goods and services. But there has to be different removal and compensation of the defects and deficiencies. The former requires replacement and repair whereas the later requires compensation for loss.

Deficiency has been defined under Section 2(11) of the Consumer Protection Act, 2019. It says,

Deficiency has been defined as "any fault, imperfection, shortcoming or inadequacy in the quality, nature and manner of performance which is required to be maintained by or under any law for the time being in force or has been undertaken to be performed by a person in pursuance of a contract or otherwise in relation to any service and includes:

(i) any act of negligence or omission or commission by such person which causes loss or injury to the consumer; and

(ii) deliberate withholding of relevant information by such person to the consumer."

This provision deals with the definition of deficiency in comprehensive way. It says that there may be any fault, imperfection, shortcoming or inadequacy in the quality, nature and manner of the performance which is to be maintained by the person who provides goods or services and any negligent act or omission or any deliberate concealment of information shall be excluded.

There are certain tests that must be adhered to determine if there is an issue of the deficiency in service on the part of the service provider. The tests are as follows-

1. Test of reasonable care and precaution- This test was devised by the courts in reference to the subject of medical negligence in the case of *Dr. Laxman Balakrishna Joshi v. Dr. Trimbak Bapu Godbol*[20], "in which the Court was of the view that the medical practitioner shall exercise reasonable degree of care, skill and knowledge in his/her medical practice. In the context of the educational institutions, the institution should also be liable to maintain this amount of reasonable care and protection so that the student who is studying under the educational institution is not prejudiced by the conduct of the educational institution."

[18]2012 SCC OnLine NCDRC 519.

[19]Ibid.

[20]AIR 1968 SC 128.

2. Test of substantial commercial hardship- This test seems plausible in the context of the deficiency of service which was coined by the Court in the case of the *Sailesh Munjal v. AIIMS*[21], "wherein the Court held that if at all the actions of the service provider has caused substantial monetary loss for the consumer, it will drag the case within the ambit of the deficiency of service and make the service provider liable for the same."

Under the provisions of the Consumer Protection Act, 2019, a person has the right to file a complaint against deficient services provided by the service providers. To prove deficiency in service, the first crucial aspect required is that the person alleging deficiency should prove that he is a consumer of the service that is provided by the service provider. A combined reading of the definition in the Act and taking the context of the educational institution, if there is any fault, imperfection, shortcoming or inadequacy in the quality, nature and manner of performance of the education or the related activities that are provided by the educational institution, it may be regarded that the educational institute is liable for the deficiency of services. If services as defined under the Consumer Protection Act, 1986[22] is analyzed and it is shown that there is a failure to provide any service which is mandated for the discharge of his duties or function, it will amount to deficiency. Thereby, any deficiency or defect in the services provided by the educational institutions may be covered under this definition, hence any complaints, inter alia, regarding wrong allotment of roll numbers, delay in declaration of results, and admission in excess of the allotted quota can be filed before the consumer forum if the essential condition of jurisdiction is satisfied. Since educational institutions are being commercialized, there are complaints in the consumer forums regarding the misleading advertisements by such institutions[23].

It is equally important to see some of the rulings of National Commission which are on many occasions in sharp contrast with the Supreme Court decisions.

There was a case of failure to refund the fees. In the case of *Frankfinn Institute of Air Hostess Training and another v. Aashima Jarial*[24] the National Commission ordered a refund of fees and cost of litigation to the opposite parties. Because the order of the district forum was based on equity therefore complainant was held to be eligible for fee refund and litigation cost. As unwarranted delay was already caused by lower consumer forums, prompt compliance was ordered by the commission.

Manu Solanki v. Vinayak Mission University[25] ,"this was the case which dealt with the core issue regarding inclusion of education as services under C.P.A. Here the SC judgment of P.T. *Koshy v. Ellen Charitable Trust and ors*[26] was also referred which stated

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[21](2004) 3 CPR 27 (NC).

[22]Deficiency, as defined under Section 2(11) of the Consumer Protection Act, 1986, "means any fault, imperfection, shortcoming or inadequacy in the quality, nature and manner of performance which is required to be maintained by or under any law for the time being in force or has been undertaken to be performed by a person in pursuance of a contract or otherwise in relation to any service."

[23]S. Mehta, 'Consumer Protection and Educational Services' (2010) 4 MLJ 19.

[24]2019 SCC OnLine NCDRC 380.

[25]I (2020) CPJ 210 (NC).

[26]2012(3) CPC 615

that the education is not a commodity or a good and the educational institutions are not rendering any services when they provide education." The Commission considered the case of *Bihar Examination Board v. Suresh Prasad Sinha*[27] and tried to exclude conducting examination and the related activities from the purview of the consumer protection laws. It was asserted that the board is a statutory authority and statutory functions of the board amounted to the conduction of examination and any related services. It was negated that the consideration that was paid for the purpose of examination converted the statutory function into that of the commercial function. The commission in this case had held that mere payment of the examination fees would not take the functions into that of the commercial functions. Thus, they are not rendering any services and any deficiency of services would not be amenable to the jurisdiction of the consumer courts.

Another interesting case was of *Rajendra Kumar Gupta v. Virendra Swarup Public School*[28] here the father was the complainant whose son had dies during summer camp of the school with drowning in swimming pool. School claimed there was no negligence and deficiency in service. The national forum refused to treat school as covered under Consumer Protection Act. The initial objection was raised by the opposite party that complaint is not maintainable it was argued that complainant cannot be called as consumer as Consumer Protection Act does not applies to educational institutions.

In *M.P. Singh Rathore v. Little Flowers Public School and others*[29] the question was regarding deficiency of service by the school who failed the student deliberately in class IX and then in board exams and tempered with the records. The Commission in its judgment has analyzed all the other judgments in this regard and was of the view that ,"the Hon'ble Supreme Court in a series of its judgments has taken a view that the education is not a commodity and student is not a consumer as well as the educational institutions are not service provider".

In *University Of Karnataka v. Poonam G. Bhandari*[30], the National Commission in this case was of the view that when a person is appearing for any examination, evaluation of answer scripts, publication of the results of the university is not services provided to the candidate for which, in case of any discrepancies they cannot approach the consumer courts. Even if consideration is provided, then also such activities will not be considered as services. In this and many more such cases the court has made distinction between examination and other statutory work of educational institution which cannot be considered as services for the purpose of Consumer Protection Act.

In *Himachal Pradesh University v. Sanjay Kumar*[31] here the candidate applied to appear for supplementary exams but the university failed to provide him roll number in due time and thereby the candidate failed to appear in exam. The loss of year was suffered by the

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[27](2009) 8 SCC 483

[28]First Appeal No. 852 OF 2016 (Against the Order dated 03/06/2016 in Complaint No. 29/2006 of the State Commission Uttar Pradesh) (17 April 2024) https://www.livelaw.in/pdf_upload/rajendra-kumar-gupta-vs-dr-virendra-swarup-public-schoolncdrc-389719.pdf.

[29](2020) CPJ 110 (NC).

[30]FA No. 245 of 1992, decided on 16-9-1993.

[31](2003) 1 CPJ 273 (NC).

student and it was held to be deficiency of service on the part of the University. This was one of such cases, where the Commission started discriminating between the conduct of the examination as such and the administrative activities that were connected thereto.

FIITJEE Ltd. v. S. Balavignesh[32], in this case respondent joined the coaching and after paying all dues left the course. A clause in admission form provided no refund in such case as there was loss of the seat to the institution. But the commission agreed that coaching institutes are well covered under the Consumer Protection Act.

Conclusion

In the light of the contrast found in the decisions of the apex court and the highest body delivering consumer judgments National Consumer Disputes Redress Commission, it can be concluded that there are some factors which are required to be satisfied before an education could be considered a service in strict sense of the term specially under consumer laws. A same educational institution may render many kinds of services which sometimes may be amenable to jurisdiction of the National consumer forum and the same institution when conducting examination related activities will not be held liable for deficiency of services. Still there is a gap which need to be fulfilled by a more accurate and purposeful verdict from the authority of honorable Supreme court. We cannot be unsighted to the fact that these days mushrooming of educational institution and the faulty services they are providing to the students should be subject to effective and expeditious remedy at the disposal of consumer laws so that a more responsible behavior is ensured on the part of educational Institutions.

[32] (2015) 3 CPJ 112 (NC).

WHOSE HERITAGE IS IT? UNDERSTANDING THE SCOPE OF LAWS IN PROTECTION OF CULTURAL PROPERTY SINCE COLONIAL TIMES

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Dr. Aditi Mann**

Abstract

India, as a nation, has a rich cultural history spanning for thousands of years. Since ancient times, there have been several dynasties which have carved out their empire in various parts of the country. Besides gaining political influence, there have also been large scale construction activities which occurred primarily in last thousand years. This has included construction and beautification of temples, thereby, giving boost to art and craft. As reminiscence of this rich cultural heritage, many antiquities have been, and continue to be, discovered from various parts of the country. Largely, however, these antiquities are undocumented, making them easy target for anti-social elements. With the focus on case-studies, this paper intends to understand the legislations which have been formulated for protection of the antiquities.

Introduction

Since India's independence, there have seen many instances where valuable antiquities were smuggled out of the country. Recently, there has been a trend where the transaction of these antiquities symbolises the 'Memorandum of Understanding', an extension of friendly alliance between the two countries. There are several organisations which have dedicatedly worked for the recovery of the stolen and lost antiquities. India Pride Project, for example, is one such association[1]. It was only because of their timely documentation that many images / sculptures were recovered.

However, not every transaction of the antiquities is as peaceful. Davis, in his paper[2], mentions how the Hindu god Shiva himself had to appear as plaintiff before the Queen's Bench in London and file a suit for return of his stolen property. Quoting the newspaper Sunday Times of London, February 21, 1988 with headline "Suing Shiva Dismays Dealers", Davis emphasized on how it was reported.

The case was a bizarre enough event in itself. It was brought by the Lord Shiva against the Metropolitan Police and the Bumper Development Corporation of Albert, Canada, for the return of an eleventh century bronze dancing figure of the god. Since he could not

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[1]In August 2018, a12th century bronze sculpture of Buddha was recovered by the same organization from UK which was stolen from the Archaeological Museum in Nalanda in 1961.

[2]Richard H. Davis, Temples, Deities, and the Law, in Hinduism and Law, ed. by TIMOTHY LUBIN, DONALD R. DAVIS, JR., AND JAYANTH K. KRISHNAN 195-206 (Cambridge University Press, Delhi, 2010).

actually appear, Shiva was represented by the Indian government and, on paper, by the Shiva Lingam, a cylindrical stone phallus, the deity's main physical manifestation in any Shiva temple-although the phallus was not produced in court.

Davis argued that ?iva's actions here provided an opportunity "for exploring the intricate and conflictual interrelations of medieval South Indian temple practices, the classical Indian legal discourse of the Dharma??stra tradition, and the efforts of British and Indian jurists of the Colonial period to articulate appropriate legal principles to govern Hindu religious institutions". Interestingly, Davis points out how in medieval South India, the inscriptions mention that the central images or icons of Hindu temples are living deities and owner of the property. These inscriptions thus, become legal documents as piece of evidence[3].

In another similar case mentioned by Arlt and Folan[4], the authors provided documentary evidence on a sculpture titled "Worshippers of the Buddha" which was excavated from the stupa near the Buddhist site in Andhra Pradesh, Chandavaram and was stolen from the site museum in 2001 which was, later, illegally exported from India. This case brought to light the role of an art dealer in relation to temple robberies and illicit trade in cultural property. Apparently, the dealer sold twenty-two works to National Gallery of Australia between years 2002-2011 for a huge amount of money. This specific piece was bought by the same museum in 2005 and was displayed in the Indian art gallery in 2006[5]. The author mentioned how the entanglement in the controversy tarnished the Gallery's reputation and strained the relationship of the two countries. Later, a smooth voluntary repatriation of the sculpture was approved by the Australian authorities even prior to a request from Government of India. The image was then sent to the National Museum of India, Delhi.

It is pertinent to note that many sculptures are still under danger because of either ignorance of laws or rather lack of it. The evolution of law in India regarding the conservation of historical heritage can be traced back to colonial period. In the early nineteenth century, during the time of East India Company's rule, Bengal Regulation and the Madras Regulation were introduced[6]. Throughout the early phase of British rule, up to 1860s, the trend was to carry off the antiquities to England where they would be housed in either British Museum or India Museum, both located in London. Sir Alexander Cunningham, the first Director-General of Archaeological Survey of India in

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[3]Cited from R. Davis, Temples, Deities, and the Law, 195. For an extended account of the case see, Davis, Lives of India Images, 59.

[4]Arlt and Folan, Research and Restitution: The National Gallery of Australia's repatriation of a sculpture from the Buddhist site of Chanavaram, JOURNAL OF ART MARKET STUDIES,2 (2018). (8th May, 2019) http://www.fokum-jams.org; DOI 10.23690/jams.v2i2.43.

[5]During this time National Gallery of Australia considered that there is sufficient evidence to point out that the sculpture was legally exported as the historical objects were allowed to be sent out of India with a license before the Antiquities and Art Treasures Act of 1972 was formulated. It accepted that the documents presented revealed that the sculpture was exported from India in 1969 before the act was passed. Later, in her address the Susan Cennan after reviewing the process concluded that "The NGA was the victim of well-planned fraud by Art of the Past. These events illustrate the need to rely on sources of information other than a dealer, even if ostensibly reputable..." Cited from Arlt and Folan, "Research and Restitution,"14, 2 J ART MKT, STDS (2018).

[6]For more details, read, Aditi Mann, Conservation Through Legislation, 47 (1)INDIAN HISTORICAL REVIEW, 115-129 (2020).

1861,also had no qualms in shifting the sculptures to London, which were found from Yusufzai district. He opined that good casts could be made for the Calcutta and Lahore museums. Large number of items displayed in British Museum came from Cunningham's private collection. He believed in the ability of private collection by a knowledgeable collector as a means of preservation and conservation[7].

The Department of Archaeology also took legislative measures in this regard and passed an act in 1863 giving the Government of India the sanction to protect and preserve buildings noteworthy for their historical and architectural value. Similarly, 'The Treasure Trove Act' of 1878 gave authority to the government to claim any treasure exceeding ten rupees value. The term "treasure" meant 'anything of any value hidden in the soil, or anything affixed thereto[8]". This Act was definitely the most important of all legislative enactments, it endowed the government of India and the provincial governments with "indefeasible rights" to acquire all objects of archaeological interest, providing a detailed definition of what was classified as "treasure" and "what constituted its value[9]". The Act further stated that a stern punitive action in the form of imprisonment for a term of a year or fine or both will be undertaken if: the finder failed to give notice of any treasure; modifies or attempts to alter such treasure by concealing the identity. However, the definition of the treasure could not be applied to those individual sculptures and fragments which were discovered by the natives and later established either at a religious shrine or in their houses.

A new era in the conservation process of heritage began with the promulgation of 'The Ancient Monuments Preservation Act, 1904'. Lord Curzon (1899-1905) who was the viceroy during this time gave priority to restoration of buildings. Lord Curzon, in his address on the Ancient Monuments Bill, suggested that he believed it was the duty of the Imperial Government to restore the heritage[10]. The main objective of this Act was: to safeguard the proper upkeep and repair of ancient buildings in private ownership except those which were used for sacred purposes; to prevent the excavation of sites of historic interest by ignorant and unauthorized persons; 'to secure control over traffic in antiquities and to acquire ownership, where necessary and possible, of monuments and objects of archaeological and historical interest'.

Curzon had a very clear approach about the antiquities lying scattered around the monuments and nearby areas. He believed it is better to set the antiquities in site-museums (museums to be set on site itself) rather than shifting them to cities. Going back to the Ancient Monuments Preservation Act of 1904, it had certain flaws. It has been pointed out that the origins of the Act could be traced to a campaign which was going on in Europe for a uniform code for preservation of monuments in England and in Western Europe by the Society for the Protection of Ancient Buildings (SPAB) established in 1877[11]. It has also been argued that this Society had been pressurizing

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[7]U.SINGH,THE DISCOVERY OF ANCIENT INDIA, 353 (Permanent Black, Delhi, 2004).

[8]'Indian Treasure Trove Act, 1878' online at www.asi.nic.in/pdf_data/9.pdf, accessed on 21-11-2018.

[9]TAPATI GUHA THAKURTA, MONUMENTS, OBJECTS AND HISTORIES, 56 (Permanent Black, Delhi, 2004).

[10]Nayanjot Lahiri, 'Coming to Grips with India's Ancient Past: John Marshall's Early Years as Lord Curzon's Director General of Archaeology in India: Part I,' SOUTH ASIAN STUDIES Vol. 14, No. 1, 1998.

[11]It was an initiative of William Morris who formed the society also known as Anti-Scrape Society. The SPAB was rooted in the Arts and Crafts movement, and came to a stand for a particular notion of aesthetics which held

ASI for framing similar codes and laws for the conservation and preservation of Indian sites[12]. Thus, the aim of the society to focus on specific cultural concerns of nineteenth-century Europe, was conveyed to India and the Archaeological Survey of India was made responsible for its implementation[13]. John Marshall, who was the then Director-General of ASI, following the state-driven policies of monument preservation, came up with a code, "The Conservation Manual" published in 1924[14]. He, among other issues, had difficulty in framing a single, coherent set of rules and practices for the conservation of ancient structures in India as the "political, religious and traditional considerations and a variety of local conditions render it impossible to lay down any general rule which shall be applicable to all cases". His conservation guidelines revealed the "tension implicit in combining, on one hand, a specific notion of preserving ancient buildings in their state of decay in order to preserve their 'historic' character, and on the other, an energetic, state-driven policy that only a colonial state could apply to ensure that this was done properly." Interestingly, his manual made a clear distinction between "dead" and "living" monuments and laid the guidelines for handling each category.

Lahiri, in her work argues that during British times, Indians were not incorporated as active collaborators in heritage preservation. The preservation of monuments, as a formal policy, was controlled by the government. Initially, the work was distributed between the central government and provincial governments, but after the Act of 1935 was passed, it was almost entirely controlled by the central government[15].

The next legislation in this direction was known as the 'Antiquities Export Control Act'. This Act was promulgated in 1947, and supplemented the Act of 1904. The Act of 1947 was significant as it clearly defined what all objects fall under the category of 'Antiquity'[16]. It laid down general rules and regulations provided for the regulation of the export of antiquities. Under this Act, the Director-General was the license issuing

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that the value of historic buildings lay in their age, in the continuity of material over time, and that the aesthetics of old structures was to be found in their age. For details on the founding of this society see, Chris Miele, "Conservation and the Enemies of Progress?" in ed. CHRIS MIELE, FROM WILLIAM MORRIS: BUILDING CONSERVATION AND THE ARTS AND CRAFTS CULT OF AUTHENTICITY 1877-1939,1-29 (Yale University Press, New Haven, 2005).

[12]HP Ray, Legislation and the Study of the Past: The Archaeological Survey of India and Challenges of the Present.' Paper presented at the symposium on "Masters" and "Indigenous": Digging the Others' Past, (Lausanne University, 2016).

[13]For the conflicting ideas emerging between SPAB and Marshall, and a discussion on Marshall' s manual see, Indra Sengupta, A Conservation Code for the Colony: John Marshall's Conservation Manual and Monument Preservation Between India and Europe: in ed. MICHAEL FALSER AND MONICA JUNEJA ARCHAEOLOGIZING' HERITAGE?(21-37) (Springer Heidelberg University 2010).

[14]Prior to the publication of this manual, Marshall wrote a pamphlet called "Conservation of Ancient Monuments: General Principles for the Guidance of those Entrusted with the Custody of an Execution and Repairs to Ancient Monuments". In this pamphlet Marshall stressed that priority should be given to preservation over restoration. See. John Marshall, with the same title, (GOVERNMENT PRESS SHIMLA1906).

[15]Nayanjot Lahiri. Monumental Follies INDIA INTERNATIONAL CENTRE QUARTERLY, 33,(2007).

[16]"Antiquity" includes -i) any coin, sculpture, manuscripts, epigraph, or other work of art or craftsmanship, ii) any article, object or thing detached from a building or cave, iii) any article, object or thing illustrative of science, art, era literature, religion, customs, morals or politics in bygone ages, iv) any article, object or thing declared by the Central Government by notification in the official Gazette to be an antiquity for the purposes of this act.

authority and was empowered to decide whether any object, article, or thing is or is not an antiquity and his decision was final.

In 1951, 'The Ancient and Historical Monuments and Archeological Sites and Remains (Declaration of National Importance) Act' was enacted. Under this Act, all the ancient and historical monuments and archaeological sites and remains which earlier were protected under "The Ancient Monuments Preservation Act", 1904 were re-announced as monuments and archaeological sites of national importance. Another four hundred and fifty monuments and sites of Part 'B' States were also added[17]. Later, some more archaeological sites and monuments were declared as of national importance under Section 126 of the States Reorganization Act, 1956. In 1958, 'The Ancient Monuments and Archaeological Sites and Remains Act' was enacted, for providing better and effective preservation of the archaeological remains and monuments. This Act provided for the protection and preservation of ancient and historical monuments and archaeological excavations and for the protection of sculptures, carvings, and other similar objects. Later, this Act repealed the Act of 1951.

In 1970, the United Nations Educational, Scientific and Cultural Organization (UNESCO) held a Convention which emphasized on the means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property. It was a vital international agreement that stimulated tightening of legal and ethical collecting standards. Article 7 of this Convention stated that its purpose was to prohibit the import of cultural property stolen from a museum or a religious or secular public monument or similar institution in another State Party to this Convention after the entry into force of this Convention for the States concerned, provided that such property is documented as appearing in the inventory of that institution[18].

This clause narrowed the scope of the convention since it mentioned that the antiquity needs to be documented in the inventory. There were many images across the country which have never been catalogued or reported, especially the ones which were under worship and, thus, easily became prey to thieves who sold them to international smugglers and dealers.

In India, next came the 'Antiquities and Art Treasures Act, 1972', which was enacted for effective control over the moveable cultural property consisting of antiquities and art treasures[19]. This Act, eventually, repealed the Act of 1947. It clearly stated that the reason for its introduction was that the provisions contained in the previous Act were not sufficient. In order to preserve the art treasures and antiquities, there was a dire need to make a comprehensive law to regulate the patterns of exports in order to prevent smuggling and fraudulent dealings. The Act provided for the appointment of registering and licensing officers by the Central Government who would grant authorization to any person who wishes to possess or deal in antiquities. However, the licensees were required to maintain registers, records and photographs for periodic inspection by the

[17]The Indian Constitution of 1950 classified at that time three main types of states and territories. Part B states were former princely states or a group of princely states that includes Assam, Bihar, Bombay, Madhya Pradesh, Bihar, Orissa, Punjab, Uttar Pradesh and West Bengal.

[18](11-11- 2018) https://eca.state.gov/files/bureau/unesco01.

[19](28-11- 2018) http//:www.indiaculture.nic.in.

licensing or any gazette officer of the government. Nevertheless, the absolute power was still in the hands of the Central government to withdraw the permission and then, to solely deal in the business of antiquities.

Even though this Act was introduced nearly fifty years ago to curb the illegal activities, there have been incidents where trafficking of antiquities is still rampant. Recently, a case of 1981 was heard by the Delhi High Court when an appeal was made by Central Bureau of Investigation (CBI) after the defendant was acquitted by the lower Court (Tis Hazari Court, Delhi). The case, in brief, was that Dr. D. Mitra, Director-General of Archaeological Survey of India, New Delhi informed CBI about the alleged theft and an attempt to smuggle out eighteen antique stone objects and terracotta figurines. On the basis of this information, a case was registered in August1981,u/s 411 of IPC25(1)r/w3&25(2)r/w14(3)of the Antiquities & Art Treasure Act, 1972 against the accused Shreekant Jain. The case involved theft of idol of Goddess Durga from an old temple of Takashakeshwar Mahadeva in Allahabad by few people who then smuggled the objects to Delhi. The idol was then sold to Kashi Nath who was an antique broker of Delhi and, finally, was acquired by Shreekant Jain who was supposed to smuggled it to New York. Before, he could board the flight, he was questioned by airport authorities and later, Customs Department got involved. After the recovery of the stolen items of the antiquities was made at the Delhi Airport, a case was filed against the accused. However, due to a botched investigation, the accused was acquitted in 2017. The judgement shows how the judiciary was lamenting on its own decision: -

But to say the least, if investigations are conducted in such a manner by CBI as highlighted in this judgement, time is not far away when people will lose faith in the system and government will be forced to constitute another agency. All senior officers of CBI kept sitting with their eyes closed during an investigation in this case which was very unfortunate. Need is felt that CBI should sensitize its officers for making them more responsive and effective towards investigation and they required to awake long slumber…

Later, a writ petition was filed in 2018 by the CBI in Delhi High Court, and after due deliberations, the court disposed of the writ and kept the order of the Lower Court aside. Such incidents highlight the fact that when it comes to protection of antiquities, our legal system still has a long way to go.

There have been many incidents where cases were filed over not only those antiquities which were stolen but also the ones which were under active worship in different parts of the country. Such a case was recently taken up by the Madras High Court in 2022.The Buddha Trust in Salem had prayed for a direction to the ASI to conduct an inspection of a statue at Thalaivetti Muniyappan temple in Periyari village, which was believed to be of Hindu deity. At an earlier hearing, the judge had directed the Commissioner of the State's Archaeological Department to inspect the temple and the statue and submit a report. The court also halted Hindu rituals at the temple. The archaeological department, led by the Commissioner, carried out inspections at the temple and concluded that the idol's structure is a depiction of the mahalakshanas(attributes or great traits and refer to the discourses that inspired physical depictions of the Buddha, through statues and illustrations). Justice Anand Venkatesh remarked that allowing the Hindu Religious and Charitable Endowment department to "continue treating the sculpture as that of Thalaivetti Muniappan would be against the tenets of Buddhism."

The judge observed that after having received such a report, the mistaken identity can no longer be allowed to prevail. In view of the categorical report submitted by the Commissioner, the assumption of the department that it is a temple is no longer sustainable and the control must go into the hands of some other authority," the court said. "In view of the same, the original status must be restored and permitting the HR&CE department to continue to treat the sculpture as Thalaivetti Muniappan will not be appropriate". The judge observed and directed the Commissioner of Archaeological Department to take control of the property and maintain it.

International Efforts to Protect Cultural Property

Looted antiquities have been posing a concern for culture-rich nations since times immemorial. Antiquities have traversed a long arduous journey in international history. From the ancient archaeological sites to known public museums such as Paul Getty Museum and Metropolitan Museum of Art in the US to the British Museum in the UK, antiquities often find a way from archaeological sites and private collections to government buildings. While these museums may symbolise the long roads through which civilisations have travelled and serve as important reminders of humankind's achievements, they are also representative of conquests and acquisitions[20].

The principles regarding preservation and return of cultural property were initially a part of the Laws of War in the form of Hague Convention of 1899 and 1907[21]. Article 27 of the fourth Geneva Convention recognised that state parties must undertake all necessary steps in sieges and bombardments to ensure that buildings dedicated to religion, art, science or charitable purpose, historical monuments and hospitals are protected as long as they are not used for military purpose[22]. The laws, however, failed to prevent the utter destruction witnessed during World War I and World War II.

The regulations were put to test in the ensuing war in 1914 where deliberate and widespread destruction of property took place[23]. Cultural property and its preservation started getting more attention after the experience of World War-I. The first international conference for the protection and conservation of Artistic and Historical Monuments was held in Athens in 1931. It was drafted by Le Corbusier at the fourth Assembly of the International Congresses on Modern Architecture (1933)[24]. The Conference attempted to rationalise the possession of art by establishing procedures for preservation and protection of arts and communities. The Conference aimed to spark a debate regarding the universality of preservation values and cities grappling with preserving endangered

[20]Matthew R Hoffman, Cultural Pragmatism: A new approach to International movement of Antiquities. IOWA LAW. REV 665 (2010).

[21]Convention Respecting the Laws and Customs of War on Land , October 18, 1907, Art 27, 36

[22]International Humanitarian Law Databases, (September 21, 2024) https://ihl-databases.icrc.org/en/ihl-treaties/hague-conv-iv-1907/regulations-art-27.

[23]Vrdoljak, Ana Filipa, The Criminalisation of the Intentional Destruction of Cultural Heritage (October 19, 2015). FORGING A SOCIO-LEGAL APPROACH TO ENVIRONMENTAL HARM: GLOBAL PERSPECTIVES. Ed. M. ORLANDO AND T. BERGIN (London: Routledge, 2016).

[24]From the Emergence of the Concept of World Heritage to the creation of ICOMOS (September 12, 20124) https://www.icomos.org/en/about-icomos/mission-and-vision/history?showall=1.

properties. Most of the principles agreed upon by parties found their way into the Athens Charter[25]. The resolutions passed at Athens were made into 'Carta del Restauro.' The Charter was a brave step to create an international framework to protect historic sites and represented a growing consciousness amongst the leaders of the world regarding the importance of protecting antiquities and international heritage. The charter defined the basic principles of restoration and tasked each signatory to work towards the restoration and preservation plan keeping their cultures and traditions in mind. The Charter, thus, contributed towards internationalising efforts towards conservation and restoration of historic documents.

The Second World War and its resultant destruction, however, was at a scale far more than the world had experienced before. Cultural sights were destroyed and large-scale displacement of cultural objects took place. Most of the art works of western Europe were plundered by Germany. This led to inclusion of plunder of public and private property as a War crime in the Nuremberg Charter and the Control Council Law No 10. The Nuremberg Tribunal convicted Mr. Rosenberg, who headed 'Einsatzstab Rosenberg' the organisation that carried out confiscations of art work and cultural objects. He was found guilty for systematically removing to Reich those treasures which were considered an important part of the heritage by all and sentenced to death[26]. There have been other instances of awarding punishment to private individuals found guilty of destroying monuments commemorating the dead of the first world war by the French Permanent Military tribunal.

The judgment of the Nuremberg Tribunal paved the way for future codification efforts. In the wake of World WarII, efforts began internationally to strengthen the laws protecting cultural property resulting in modern protections for the cultural objects. The result was the 1954 Hague Convention for the Protection of Cultural Property in the event of Armed Conflict[27]. The Convention was adopted under the aegis of UNESCO, the agency at the forefront in initiating efforts to protect tangible and intangible cultural property.

The Convention was one of the first and most comprehensive multilateral treaties directed towards protection of cultural heritage in times of war and peace. The Convention provided for protection of monuments, art, archaeological sites, works of art as well as other scientific collections irrespective of their authorship or ownership. Article 1 of the convention covers cultural property irrespective of origin or ownership and includes moveable, immoveable property such as monuments, art, history, buildings, works of art and objects of artistic, archaeological interest. It even covered buildings where moveable cultural property was kept. Articles 3 and 4 press upon the high contracting parties to safeguard and respect cultural property situated within their territory and not to use it for purposes which are likely to expose it to danger. Article 5 enjoins upon the contracting parties who are occupying a territory in whole or in part to support the national authorities to safeguard the cultural property. Articles 10 and 16

[25]David A Scott, Modern Antiquities: The Looted and the Faked, INT'AL JOURNAL OF CUL'AL PROPERTY (2013) 20:49-75. doi:10.1017/S0940739112000471

[26]VRDOLJAK Supra Note 23

[27]Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954 (2 September 2024) https://www.unesco.org/en/legal-affairs/convention-protection-cultural-property-event-armed-conflict-regulations-execution-convention

mandate putting the cultural property under protection during armed conflict by marking them with distinct emblems. However, the convention confined itself only to destruction that took place in the times of armed conflict. Plundering and looting in times of peace was not addressed. A protocol was adopted to regulate the protection of cultural property during occupation and provide for restitution of illegally exported objects[28]. A second protocol to the convention was added in the year 1999 which created a new category of enhanced protections for cultural property of great importance and defined sanctions for violations of the protocol[29].

An increase in the market of cultural property and its illegal smuggling lead to UNESCO's General Conference adopting 'The Convention on the Means of Prohibiting and Preventing the illicit Import, Export, and Transfer of Ownership of Cultural Property' also known as the World Heritage Convention in 1972[30]. The Convention intended to protect outstanding cultural heritage which is unique and important to the present and future generations and common heritage of mankind. It is considered as the first international endeavour to address the concerns regarding proliferation of illegal trade and market of cultural objects[31]. The Convention aimed to regulate the international antiquities market by requiring importing nations to prohibit importation of goods that were exported from foreign countries in violation of export restrictions[32]. It charges all the signatories to create rules to assist in the recovery of looted and stolen property.

The Preamble to the Convention states, "the interchange of cultural property among nations for scientific, cultural and educational purposes increases the knowledge of the civilization of Man, enriches the cultural life of all peoples and inspires mutual respect and appreciation among nations."

Article 1 of the Convention contains first detailed definition of the term 'Cultural Property' which, on religious or secular grounds, is specifically designated by each state being of importance for archaeology, prehistory, history, literature, art or science and which belongs to rare collections of fauna, flora, literature, art and science. Article 2 recognises that illicit import, export and transfer of ownership of cultural property is one of the main causes of impoverishment of the cultural heritage of the countries of origins of such property. Article 3 illegalises export, import and transfer of ownership of the property contrary to the provisions of the Act. Article 5 urges state parties to set up national services for the protection of cultural heritage and maintain an inventory of protected properties within their territory. Article 6 puts in place a system of mutually enforceable certifications by each state party which would specify that the export of the

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[28]Protocol for the Protection of Cultural Property in the Event of Armed Conflict. The Hague, 14 May 1954. (2 September 2024) https://ihl-databases.icrc.org/en/ihl-treaties/hague-prot-1954

[29]Second Protocol to the Hague Convention of 1954for the protection of Cultural Property in the Event of Armed Conflict, 1999.

[30]Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, 1970 (September 12, 2024 1:10 pm), https://www.unesco.org/en/legal-affairs/convention-means-prohibiting-and-preventing-illicit-import-export-and-transfer-ownership-cultural

[31]Patty Gerstenblith, Controlling the International Market in Antiquities: Reducing the Harm, Preserving the Past, CHIC JRNL OF INT'AL LAW: Vol. 8: No. 1, Article 10. (2007) (September 2, 2024 17:05 pm), https://chicagounbound.uchicago.edu/cjil/vol8/iss1/10

[32]Supra Note 11 (Gerstenblith, Patty,2007)

property in question is authorized. Article 7 urges the state parties to take measures through national laws to prevent museums within its territory from acquiring cultural property originating in another state that has been illegally exported after the coming into force of this convention. Article 8 asks the states to put in place penalties and administrative sanctions on persons found guilty of violating the provisions of the treaty. Article 9 makes a case for international cooperation amongst state parties in identifying cultural property and take measures to prevent irremediable damage to cultural heritage of the requesting state. The Convention, thus, reconciles the interests of art importing and art exporting states[33]. The World Heritage Convention also established the World Heritage Committee and World Heritage List that designates list of protected properties[34]

However, there was a difference in systems that protected property acquired in good faith and those who held that stolen property could not transfer a good title. This difference in legal systems came to be easily exploited by traffickers to their advantage prompting UNESCO to commission a study on ways and means to improve national legal control of illicit trafficked cultural property. The study recommended that UNESCO should address this issue through a treaty that will address the difficult questions of private Law. UNESCO asked The International Institute for the Unification of Private Law (UNIDROIT) to work on rules of private law that would be applicable to illicit traffic in cultural objects[35].

This resulted in the UNIDROIT Convention on Stolen and Illegally Exported Cultural Objects, 1995. The Convention purported to create an individual cause of action for the return of stolen cultural property. It adopts the same definition of cultural objects but differs significantly from the UNESCO convention by allowing private owners to claim back any kind of cultural objects not designated or registered by the state which was a mandatory requirement under the UNESCO Convention. The Convention also introduces a limitation period of three years for restitution from the date of location of the cultural object and the knowledge of the identity of the possessor and all other cases within a period of 50 years from the date of the theft[36].

The Heritage Convention and UNIDROIT Convention are the two most influential multilateral treaties today that give right to all signatory states to restrict the import of items of cultural significance even if owned by private entities[37].

Further, in 1999, UNESCO promulgated an International Code of Ethics for Dealers in Cultural Property, the code calls on dealers not to facilitate trade in stolen, illegally alienated, clandestinely excavated and illegally exported cultural property and accept

[33]James A.R. Nafzige, Trading and Returning Cultural Objects under International Law, (2) SANT ART AND CULTURE L REV 179-194 (2016).

[34]Joseph P. Fishman, Locating the Int'l Interest in Intranational Cultural Prop. Disputes, 35 YALE J. INT'L L. 347, 389 (2010).

[35]Lyndel V. Prott, UNESCO and UNIDROIT: A Partnership against Trafficking in Cultural Objects, [1] [UNI L REV], Volume 1, Issue 1, January 1996, Pages 59-71, (1996). https://doi.org/10.1093/ulr/1.1.59

[36]UNIDROIT CONVENTION ON STOLEN OR ILLEGALLY EXPORTED CULTURAL OBJECTS art. 3(3) and 10(2), June 24, 1995

[37]FISHMAN Supra Note 34

as binding the principles of professional practice intended to distinguish cultural property being illicitly traded from that illicit trade and they will seek to eliminate the former from their professional activities[38].

Since the early 1980s, the United Nations has also been playing an active role in highlighting the need for protecting cultural property. The General Assembly has adopted a series of resolutions addressing return of stolen cultural objects. It adopted a resolution on Restitution of Works of Art to Countries Victim of Expropriation, 1973[39]. The Resolution recognized the obligation of countries which had access to cultural objects as a result of colonial or foreign occupation to promptly restitute those objects without charge as a measure of just reparation. In the wake of widespread destruction of cultural property by ISIL(Da'esh), The Security Council adopted a resolution in 2017 condemning the destruction of historical sites and artefacts and urged member states to adopt legal measures to counter trafficking in cultural property.

Conclusion

A look at the historical developments and international efforts to address looting, destruction of cultural property proves a widespread acceptance and broad consensus among countries regarding the importance of protecting cultural heritage. Throughout the world, governments are becoming sensitive towards the antiquities and 'native treasures', and are cordially returning the heritage to their original places. Not only governments, but even international organizations are lending support to various nations so that they may protect their cultural legacy[40]. However, what is crucial here is how we respond to questions like: Will the upcoming generations be able to witness the wondrous monuments and images that speak volumes about our historic legacy? Whether what has been done till now in terms of the projects for protection of heritage, awareness programs or the laws enacted, is sufficient to safeguard them from the harm, both natural and human? The answers to these have been attempted by Lahiri as:

Heritage conservation should be separated from the scope of work of the Archaeological Survey. The deplorable deterioration of both the principles and standards despite increasing amounts of government money being spent on structural and chemical conservation underlines that it is not the lack of resources, but of accountability that is responsible for the present state of affairs. Conservation weighs like a mill-stone of the Archaeological aspects of monuments and sites, but the Survey must no longer be primarily responsible for conservation. The regulatory framework that a National Heritage Commission puts in place ought to be more decentralized.

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[38]UNIDROIT CONVENTION Supra Note 36

[39]UNITED NATIONS SECURITY COUNCIL RESOLUTION 3187 (XXVIII)

[40]Aga Khan Trust of Culture, established in 1988 is a private philanthropic foundation which aims to revitalize culture and improving the overall quality of life in societies where Muslims have a significant presence. Under it, is a programme called The Aga Khan Historic Cities Programme which undertakes the restoration and rehabilitation of historic structures and public spaces in ways that spur social, economic and cultural development. Aga Khan Trust of Culture along with Archaeological Survey of India has done restoration work in Humayun's Tomb and Sunder Nursery near Nizamuddin in Delhi.

Although remarkable strides have been made in this direction, nevertheless there is still scope for stringent application of the Laws and Conventions for safeguarding the Cultural treasures. Institutional mechanisms and implementing agencies need to be brought up in tune with the growing discourse and widespread acceptance of general principles regarding preservation of antiquities.

A CRITICAL ANALYSIS OF PROVISIONS OF THE MEDIATION ACT, 2023

Dr. Manoj Kumar*

Abstract

Mediation is a procedure in which a neutral third person helps and negotiates with the parties to a dispute to reach at an amicable settlement. Recently, the Parliament has passed the Mediation Act, 2013. This paper gives an overview of the various provisions of this Act. Further, it also makes critical analyses of the provisions of this Act.

Key words

Alternative Dispute Resolution Mechanism, Mediation, Evolution of Mediation, Need for Mediation, the Mediation Act, 2023, Critical Analysis

"At first people refuse to believe that a strange new thing can be done, then they begin to hope that it can be done- then it is done and all the world wonders why it was not done centuries ego."

-France Burnett, The Secret Garden

I. INTRODUCTION

India is a colossal country having huge population. There has been high growth in socio-economic activities of its citizens in the last some decades. Citizen's grievances and disputes in the society are also growing while dealing with various social, economic, and routine affairs leading to huge litigation. There has been huge burden on the Judiciary because of pendency of cases in the courts. It is rightly said that 'justice delayed is justice denied.' This distressing situation has resulted in the growth of various Alternative Dispute Resolution (ADR) mechanisms like Lok Adalats, mediation, arbitration and conciliation to resolve these problems and disputes.

Mediation is one of the most frequently adopted Alternative Dispute Resolution Mechanism[1]. It is a non-binding process in which a neutral third person, the mediatoror conciliator, helps the parties to a dispute in reaching a mutually agreed and acceptable settlement of dispute. The Mediator acts as impartial third person who felicitates and makes use of various techniques, procedures and skills to assist the parties in resolving their disputes by negotiating agreements without adjudication. He has no authority to

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[1]AVTAR SINGH, LAW OF ARBITRATION AND CONCILIATION AND ALTERNATIVE DISPUTE RESOLUTION SYSTEMS 583 (Eastern Book Company, Lucknow, 11th edn., 2018).

make any binding decision[2]. He has no power to adjudicate a dispute or to pass and enforce an award. The mediation procedure is followed on a private basis and without detriment to the lawful rights and remedies of the parties. The mediation processes may involve many stages like preparation, joint sessions, private meetings and final result[3].

The mediators apply their own methods and techniques. Their steps and strategies may be different. Everything rests on the nature of the dispute. Whenever a dispute is highly complicated, than it may require more private meetings with the parties. The technique of evaluative or facilitative approach may be adopted by a mediator. A mediator will try to shun judgments or opinions. Rather, they encourage and felicitate parties to start their interactions and uncover their priorities and interests. In mediation procedure, the Mediator will make efforts to identify the main issue of differences or disputes and try to assist the parties to bridge the gaps among them[4].

The term "mediation" is very well used and recognized in international law. "It is the technical term in International Law which signifies the interposition by a neutral and friendly state between two states at war or on the eve of war with each other, of its good offices to restore or to preserve peace. The term is sometimes as a synonym for intervention, but mediation differs from it in being purely a friendly act[5]."

II. EVOLUTION OF MEDIATION IN INDIA

The idea of mediation is not novel for justice delivery system in India. Mediation has always been practiced in India in the shape of the Panchayati system for centuries. In Panchayat system, esteemed elders of the rural community used to work as mediators between the village parties and facilitated to resolve their disputes. This type of traditional mediation is still taken in to use in rural areas even today[6]. Moreover, in pre-British era in India, mediation was admired and practiced amongst the businessman. The members of business associations used to resolve their disputes through some respected and impartial businessmen called as Mahajans and by making use of informal procedure which combined arbitration and mediation[7]. Afterwards, the Britishers set up an alternative dispute resolution (ADR) system to resolve disputes in India between government agencies and undertakings, intra-governmental entities, in public utility service disputes and in labour disputes[8]. In contemporary India, mediation is acknowledged but slightest practiced technique of alternative disputes resolution because of lack of awareness[9].

Before the enactment of the Mediation Act in the year 2023, there was no specific and dedicated legislation on mediation in India. There were only three methods to commence mediation procedures in India. The first one was to provide a clause in the

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[2] Id. at 582.

[3] Id. at 583.

[4] Ibid.

[5] P. RAMANATHA AIYAR (ED.), ENCYCLOPEDIA OF LAWS OF ENGLAND (Law Lexicon, 1997).

[6] See, the Mediation Bill, 2021, evolution of Mediation.

[7] Consumer handbook on Mediation (FAQ), Ministry of Consumer Affairs, Government of India, New Delhi, 2021.

[8] Supra note 6.

[9] Supra note 7.

contract for resolving disputes between the parties. This process is called as 'private mediation.' Second method is by 'reference through courts under Section 89 of the Code of Civil Procedure 1908',which is called as 'court-referred mediation.' And third and last method is to lay down provisions under various laws for mediation as a technique for resolution of disputes[10].

Section 89 under the Code of Civil Procedure, 1908 presents provision for the resolution of clash outside the courts[11]. The constitutionality of this provision was contested before the Supreme Court inthe case of *Salem Advocate Bar Association v. Union*[12] of India. The Supreme Court upheld the constitutionality of section 89 and set up a committee to prepare rules for the smooth implementation of section 89. The Committee submitted its report to the Supreme Court in the year 2005. The Supreme Court accepted this report and directed all the High Courts to apply the rules created by the Committee[13]. In the case of *Afcons Infrastructure Ltd. v. Cherian Varkey Construction Co. (P) Ltd*.[14], the Supreme Court pointed out certain drafting errors and vagueness under Section 89. The Court observed that there has been lack of clarity on the use of phrases like 'mediation' and 'judicial settlement.' It does not offer for the suitable stage for referring the case to mediation. Further, there has been lack of uniform rules of procedure regulating mediation; consequently, proceedings take place as per the rules approved by each High Court. All these issues have caused hurdles in reaping its full benefits[15].

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[10]Ibid.

[11]The Code of Civil Procedure, 1908, s. 89. It reads:- "Settlement of disputes outisde the Court.--(1) Where it appears to the Court that there exist elements of a settlement which may be acceptable to the parties, the Court shall formulate the terms of settlement and give them to the parties for their observations and after receiving the observations of the parties, the Court may reformulate the terms of a possible settlement and refer the same for:--

(a) arbitration;

(b) conciliation;

(c) judicial settlement including settlement through Lok Adalat: or

(d) mediation;

(2) Where a dispute has been referred–

(a) for arbitration or conciliation, the provisions of the Arbitration and Conciliation Act, 1996 (26 of 1996) shall apply as if the proceedings for arbitration or conciliation were referred for settlement under the provisions of that Act;

(b) to Lok Adalat, the Court shall refer the same to the Lok Adalat in accordance with the provisions of sub-section (1) of section 20 of the Legal Services Authority Act, 1987 (39 of 1987) and all other provisions of that Act shall .apply in respect of the dispute so referred to the Lok Adalat;

(c) for judicial settlement, the Court shall refer the same to a suitable institution or person and such institution or person shall be deemed to be a Lok Adalat and all the provisions of the Legal Services Authority Act, 1987 (39 of 1987) shall apply as if the dispute were referred to a Lok Adalat under the provisions of that Act;

(d) for mediation, the Court shall effect a compromise between the parties and shall follow such procedure as may be prescribed."

[12](2005) 6 SCC 344.

[13]Sonali Negi and Arpita Chauhan, "Need for Mediation Laws in India" Vol. 5 Issue- 2 INTERNATIONAL JOURNAL OF LAW, MANAGEMENT AND HUMANITIES 397 (2022).

[14](2010) 8 SCC 24.

[15]Supra note 6.

Further, before the passing of the Mediation Act, 2023, there had been a small number of specific sectors and laws including the Industrial Disputes Act, 1947, the Companies Mediation Rules, 2016 and Pre- Institution Mediation Rules under the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts (Amendment) Act, 2018, the Consumer Protection Act, 2019 which included provisions on mediation within the Act providing it is as one of the modes of amicable resolution of disputes[16].

III. THE MEDIATION ACT, 2023: SALIENT FEATURES

The urgent need for a separate legislation on mediation had been widely felt by all stakeholders including the Supreme Court in order to give sanctity to the mediation method and to eradicate the discrepancies in various prevailing laws such as the Industrial Disputes Act 1947; the Code of Civil Procedure 1908; the Commercial Courts Act 2015, etc. Moreover, it was necessary to pass a legislation to address the issues of international and domestic mediation and to implement the Singapore Convention on Mediation[17].

Since there was no specific legislation in India on mediation, therefore, the Supreme Court constituted a committee in January, 2020 to be chaired by Shri Niranjan Bhat to make the draft of law on Mediation. Later, the Supreme Court recommended to the Central Government to pass a law on mediation. Relying on the recommendations from the Supreme Court, the Central Government prepared the draft of the Mediation Bill on November 5, 2021 on their website for receiving responses from public on it. After considering public opinions and suggestions on the draft Bill, 'the Mediation Bill, 2021' was presented in the Rajya Sabha by the Central Government on December 20, 2021. This Bill was sent to the Standing Committee of Parliament for examination on December 22, 2021 which submitted its report on July 21, 2022 to the Parliament[18]. Finally in the year 2023, this Bill was passed in Lok Sabha and Rajya Sabha on August 7, 2023 and August 1, 2023 respectively. The Mediation Act, 2023 (hereinafter to be called as the Act) received the approval of the President of India and notified in the Gazette of India on September 14, 2023[19].

The Act consists of 11 chapters comprising 65 sections and 10 schedules. It comprehensively covers several areas of mediation. This Act recognizes dispute settlement through mediation process and gives it the same validity as of decree of the Court of law. It provides for resolution of disputes through mediation by the mediation service providers, institutional mediation or otherwise like community mediation. It provides for setting up of Mediation Council of India for promotion and facilitation of International and domestic mediation, conduct of mediation proceedings, registration or renewal, lay down standards of professional and ethical conduct of mediators etc. It also provides provisions on how mediation settlement agreement can be enforced. Further, it also gives recognition to community mediation and online mediation and

[16]Nisith Desai, "Mediation: The Go-TO Dispute Resolution Mechanism in India" (December 2020). (3 August 2023) https:/www.nishitdesai.com

[17]Supra note 6.

[18]Ibid.

[19]The Mediation Act, 2023.

makes consequential amendments in various laws to give effect to mediation processes[20]. The salient features of the Act may be discussed as under:

III.I OBJECTICES, POLICY AND APPLICABILITY OF THE ACT

The Act has been passed to accept mediation process as an effective alternative to dispute resolution mechanism. The policy of the Act is:

"to promote and facilitate mediation, especially institutional mediation, for resolution of disputes, commercial or otherwise, enforce mediated settlement agreements, provide for a body for registration of mediators, to encourage community mediation and to make online mediation as acceptable and cost effective process and for matters connected therewith or incidental thereto.[21]"

Therefore, the objectives and policy of the Act is to recognize institutional mediation for settlement of commercial or other disputes, promotion and facilitation of mediation, enforcement of mediated settlement agreements, to recognize and facilitate community mediation and online mediation, establishment of a body for registration of mediators and to make consequential amendments in existing laws to give effect to the policy of the Act.

Chapter I deals with the short title, extent and commencement of the Act. This Act has been made applicable to the whole of Indian territories[22]. The provisions of the Act will be made implemented by the Central Government from such date as may be deemed fit. Nevertheless, different dates may also be fixed for the applicability of diverse provisions of the Act[23].

Chapter II provides for application and definitions under the Act. Section 2 provides that the Act will be applicable whenever a provision has been provided in mediation agreement or both the party to a dispute resides in India or personally works for gain or where one of the parties to a clash is government or its instrumentality or in international mediation. Further, a dispute may also be referred for mediation by the Central or state government[24].

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[20]Ibid.

[21]The Mediation Act, 2023, the Preamble.

[22]Id., s. 1(2).

[23]Id., s. 1(3).

[24]Id., s. 2. It reads: - "Applicability- This Act shall apply where mediation is conducted in India, and-

(i) all or both parties habitually reside in or are incorporated in or have their place of business in India; or

(ii) the mediation agreement provides that any dispute shall be resolved in accordance with the provisions of this Act; or

(iii) there is an international mediation; or

(iv) wherein one of the parties to the dispute is the Central Government or a State Government or agencies, public bodies, corporations and local bodies, including entities controlled or owned by such Government and where the matter pertains to a commercial dispute; or

(v) to any other kind of dispute if deemed appropriate and notified by the Central Government or a State Government from time to time, for resolution through mediation under this Act, wherein such Governments, or agencies, public bodies, corporations and local bodies including entities controlled or owned by them, is a party."

The Act provides an inclusive and vast definition of mediation. The word 'mediation' means and includes a procedure under which a neutral third person helps the parties to reach an amicable settlement of a dispute. It also includes online mediation, pre-litigation mediation or conciliation[25]. A 'mediator' may be appointed by the parties to a dispute or by a mediation service provider[26].

III.II MEDIATION AGRREMENT AND PRE-LITIGATION MEDIATION

Chapter- III deals with mediation, mediation agreement and pre litigation mediation. A mediation agreement must be between two parties or their representatives which shall be reduced in to writing agreeing to submit all or any disputes to mediation. The mediation agreement can be created through inserting a clause in a contract or by making separate agreement. It may arise by exchange of communications like letters, emails etc. or by signed documents by parties or a suit in which mediation agreement is claimed by one party and not denied by the other party[27].

The most important feature of the Act is that it provides for pre- litigation mediation. It provides that both the parties to any civil or commercial nature of dispute before filing a suit can make appropriate steps for settlement of their disputes through mediation with mutual consent and voluntarily even if there is no mediation agreement between them[28]. The law regarding pre litigation mediation will be applicable on various tribunals established by the Central Government or State Government. A mediator in all such cases may be either a mediator enrolled with the Mediation Council or empaneled by the Court Mediation Centre or any Legal Services Authority or empaneled under this Act.

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[25]Id., s. 3(h). It reads: -"Mediation includes a process, whether referred to by the expression mediation, pre-litigation mediation, online mediation, community mediation, conciliation or an expression of similar import, whereby parties attempt to reach an amicable settlement of their dispute with the assistance of a third person referred to as mediator, who does not have the authority to impose a settlement upon the parties to the dispute."

[26]Id., s. 3(i). It reads: -"Mediator means a person who is appointed to be a mediator, by the parties or by a mediation service provider, to undertake mediation, and includes a person registered as mediator with the Council."

[27]Id., s. 4. (1) It reads: - "Mediation Agreement- A mediation agreement shall be in writing, by or between parties and anyone claiming through them, to submit to mediation all or certain disputes which have arisen or which may arise between the parties;

(2) A mediation agreement may be in the form of a mediation clause in a contract or in the form of a separate agreement;

(3) A mediation agreement is in writing, if it is contained in or recorded as-

(a) any document signed by the parties;

(b) an exchange of communications or letters including through electronic form as provided under the Information Technology Act, 2000;

(c) any pleadings in a suit or any other proceedings in which existence of mediation agreement is alleged by one party and not denied by the other;

(4) A reference in any agreement containing a mediation clause shall constitute a mediation agreement if the agreement is in writing and the reference is such as to make the mediation clause as part of the agreement;

(5) The parties may agree to submit to mediation any dispute arising between them under an agreement, whether entered prior to arising of the dispute or subsequent thereto;

(6) A mediation agreement in case of international mediation shall refer to an agreement for resolution in matters of commercial disputes referred to in clause (a) of section 3."

[28]Id., s. 5.

However, both parties may agree for any other mediator for settlement of their dispute. An application can be made by any party of a dispute to an authorized person for pre litigation mediation services. The mediation centers at different High Courts and Legal Services Authorities established under the Legal Services Authorities Act, 1987 will prepare and preserve a penal of mediators for pre litigation mediation. In case of non-settlement of compensation under the Motor Vehicles Act, 1988, the Claims Tribunal shall refer all such cases for mediation. The Claims tribunal will adjudicate motor accident compensation cases in consideration of settlement agreement if it is agreed by both the parties to a dispute. If there can be no settlement of dispute through mediation than the mediator will prepare and submit a report to the Claims Tribunal for non-settlement of dispute[29]. This Act lays down a suggestive list under First Schedule of matters or disputes which cannot be referred to mediation apart from a few matrimonial crimes or compoundable crimes linked with or arising out of civil proceedings which can be referred to mediation by Court, if deemed fit. However, the outcome of such mediation will not have effect of decree or judgment of Court. The Central Government may alter this list by notification[30]. Although, a dispute could not be settled through pre litigation mediation due to lack of agreement, the court or tribunal can refer at any stage of proceedings any dispute for mediation. While referring a matter for mediation, it may also make interim orders to safeguard any party from damages or harm. Both the parties in such a mediation process shall be free to reach to any settlement[31].

III.III MEDIATORS: WHO MAY BE APPOINTED AS MEDIATOR

Chapter- IV of the Act deals with mediators and who may become mediator in a dispute. The Act unambiguously and categorically says that a citizen of any country can be appointed as a mediator[32]. However, a mediator who is of foreign nationality must have essential qualifications, experience and accreditation from recognized authority. Both the parties to a dispute can decide the name of mediator and method of their appointment voluntarily. In case no consensus is made out than the party who wish to avail mediation services will have to file a written request to a mediation service provider

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[29]Ibid.

[30]Id., s. 6.

[31]Id., s. 7.

[32]Id., s. 8(1) It reads- "Unless otherwise agreed upon by the parties, a person of any nationality may be appointed as a mediator: Provided that mediator of any foreign nationality shall possess such qualification, experience and accreditation as may be specified.

(2) The parties shall be free to agree upon the name of mediator and the procedure for their appointment.

(3) If the parties do not reach any agreement on a matter referred to in sub-section (2), then the party seeking initiation of mediation shall make an application to a mediation service provider for the appointment of a mediator.

(4) Upon receiving an application under sub-section (3), the mediation service provider shall, within a period of seven days, appoint,-

(i) the mediator as agreed by the parties; or

(ii) in case the parties are unable to reach agreement as to the appointment of mediator or mediator agreed by them refuses to act as mediator, a mediator from the panel maintained by it, with his consent.

(5) The person appointed under clause (i) of sub-section (4) shall communicate his willingness or otherwise within a period of seven days from the date of receipt of communication of such appointment."

for the purpose of nomination of a mediator. The mediation service provider will have to assign a mediator within time limit of seven days from the date of receipt of application. Such mediator will be appointed either as per the agreement of both parties to a dispute or where no such agreement can be reached or refusal of mediator to serve as mediator than from a panel of mediators maintained by mediation service provider with his consent. The newly appointed mediator must convey his acceptance to serve as mediator within a period of seven days to the concerned persons[33]. The considerations of preference of the parties and suitability of mediator shall be kept in mind whenever a mediator has to be appointed by the mediation service provider from the penal of mediators maintained by them[34].

The Act also provides process to be observed by the mediator which must be just and fair procedure. A person who is appointed as mediator must disclose to both the parties to a dispute before or after the conduct of mediation proceedings any conflict of interest raising doubts of his impartiality or independence due to his professional, personal, financial or other circumstances. After such disclosure, any party to a dispute may either waive any objection in writing or may request to change the mediator and termination of his assignment as mediator from such dispute[35]. The mediation service provider upon receipt of such written objection can terminate services of a mediator after affording him reasonable opportunity of being heard[36]. The mediation service provider has to appoint a new mediator within 07 days from end of services of earlier mediator[37].

III.IV PROCEDURE OF MEDIATION PROCEEDINGS

Chapter- V provides the procedure for mediation proceedings. The settlement of disputes through mediation will be done within the territorial jurisdiction of the court or tribunal having jurisdiction to resolve such dispute. Nevertheless, the parties to a dispute may mutually agree that mediation may be conducted at any place outside the jurisdiction of court or tribunal. The mediation may be conducted in online mode also. When mediation is conducted online or outside the jurisdiction of the court or tribunal with the consent of both parties to a dispute, then it will be considered to be done within the territorial jurisdiction[38]. Where there has been an existing agreement among the parties to a dispute and one of party sends notice for settlement of dispute through mediation than the mediation process will be considered to have started from the date of receiving of notice by the another party. However, where there is no such agreement and both parties agree on settlement of their dispute through mediation than the mediation process will start from the date of receipt of consent of mediator. Further, if a party to dispute seeks services of mediation through mediation service provider than the mediation process will start from the date of appointment of mediator by such mediation service provider[39]. The procedure of mediation proceedings has to be just and fair and it will not be obliged to follow provisions of the Code of Civil Procedure, 1908 or the Indian

[33]Ibid.

[34]Id., s. 9.

[35]Id., s. 10.

[36]Id., s. 11.

[37]Id., s. 12.

[38]Id., s. 13.

[39]Id., s. 14.

Evidence Act, 1872. The rules of procedure may be laid down in this regard. The parties to a dispute will be assisted by a mediator in an impartial, independent and neutral manner to reach to amicable resolution of their disputes. Every mediator has to observe and follow the standards of professional and ethical conduct and principles of fairness and objectivity. He must protect confidentiality, voluntariness and self-determination of the parties. A mediator may apply several techniques of mediation like meetings with both the parties separately or jointly as per requirements and circumstances of a case. The language of mediation proceedings can be decided as per the choices of both the parties to a dispute by the mediator[40].

The role and function of mediator is to help the parties to a dispute in resolution of their disputes through exchange of communication of view or opinion of both parties, identification of main issues of disputes, to clear priorities and making better understanding and discovering areas of settlement. The mediators will emphasis that both the parties to a dispute should reach to a resolution by putting claims. The mediator must inform both the parties expressly that it is the choice of parties to arrive at a settlement mutually and he will not give any guarantee that the mediation may lead in a settlement or he will force any settlement[41]. The mediator shall be debarred to perform as a representative or counsel of a party or act as an arbitrator in any arbitration or judicial proceeding in reverence of a clash which is the subject matter of the mediation process. He will also not to be represented by the parties as a witness in any judicial or arbitral proceeding[42]. Every mediation proceeding must be concluded within a period of 120 days from the first date of hearing before the mediator. This period may be extended with the consent of both parties to a dispute to a maximum period of sixty days[43].

The parties to a dispute may enter in to writing to a mediated settlement agreement on all or any of the issues in a dispute. Such mediated settlement agreement must confirm to essential requirements of a valid contract and may cover issues which are outside of original disputes of the parties. The mediated settlement agreement has to be in writing and duly signed by both parties to a dispute and countersigned by the mediator[44]. The mediated settlement agreement may be registered with an authority duly notified by the Central Government for the purpose of record within a period of one hundred and eighty

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[40]Id., s. 15.

[41]Id., s. 16.

[42]Id., s. 17.

[43]Id., s. 18.

[44]Id., s. 19(1) It reads:- "A mediated settlement agreement includes an agreement in writing between some or all of the parties resulting from mediation, settling some or all of the disputes between such parties, and authenticated by the mediator: Provided that the terms of the mediated settlement agreement may extend beyond the disputes referred to mediation.

Explanation.-A mediated settlement agreement which is void under the Indian Contract Act, 1872, shall not be deemed to be lawful settlement agreement within the meaning of mediated settlement agreement.

(2) Where a mediated settlement agreement is reached between the parties with regard to all or some of the disputes, the same shall be reduced in to writing and signed by the parties.

(3) Subject to the provisions of section 26, the mediated settlement agreement signed,-

(i) in case of institutional mediation, shall be submitted to the mediator, who shall, after authenticating the same, forward it with a covering letter signed by him, to the mediation service provider and also provide a copy to the parties;

days from the date of receiving of true copy of mediated settlement agreement[45]. Where parties to a dispute cannot reach to an amicable settlement of their dispute than the mediator shall prepare and submit a duly signed non-settlement report to the mediation service provider or to all the parties to such dispute. The mediator does not require providing any reasons for non-settlement[46].

The mediator, all parties to a dispute and participants are required to maintain privacy and confidentiality to the mediation proceedings like suggestions, opinions, acknowledgements, promises, apologies, admissions and proposals made during the mediation; willingness to or acceptance of proposals made or exchanged in the mediation; papers prepared solely to carry out of mediation. Further, video or audio recording of mediation proceedings are also not permissible, and all such documents are not admissible as evidence before any court or tribunal[47]. However, such privilege from disclosure will not be applicable in cases of child abuse, domestic violence, imminent threat to public health and safety etc[48].

The mediation proceedings shall be terminated on the date of award of mediated settlement agreement or on the expiry of time limit of mediation process or written declaration by the mediator to put an end to mediation proceedings or where any party

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(ii) in all other cases, shall be submitted to the mediator who shall, after authenticating the mediated settlement agreement, provide a copy to all the parties.

(4) The parties, may, at any time during the mediation process, make an agreement with respect to any of the disputes which is the subject matter of mediation.

(5) Any mediated settlement agreement under this section includes a settlement agreement resulting from online mediation."

[45]Id., s. 20(1). It reads:- "For the purposes of record, mediated settlement agreement arrived at between the parties, other than those arrived in a court or tribunal referred mediation or award of Lok Adalat or final award of the Permanent Lok Adalat under section 21 or section 22E of the Legal Services Authorities Act, 1987, may, at the option of parties, be registered with an Authority constituted under the said Act, or any other body as may be notified by the Central Government, in such manner as may be specified and such Authority or body shall issue a unique registration number to such settlement agreements: Provided that the mediated settlement agreement under this section may be registered with such Authority or the body situated within the territorial jurisdiction of the court or tribunal of competent jurisdiction to decide the subject matter of dispute.

Explanation.-For the removal of doubts, it is clarified that nothing contained in this sub-section shall affect the rights of parties to enforce the mediated settlement agreement under section 27 or challenge the same under section 28.

(2) The registration referred to in sub-section (1) may be made by the parties or mediation service provider within a period of one hundred and eighty days from the date of receipt of authenticated copy of mediated settlement agreement: Provided that mediated settlement agreement may be allowed to be registered after the expiry of period of one hundred and eighty days on payment of such fee as may be specified in consultation with the Authority or any other body referred to in sub-section (1)."

[46]Id., s. 21.

[47]Id., ss. 22, 23.

[48]Ibid.

opts out from mediation proceedings[49]. The overall cost of mediation process shall be borne by both the parities equally[50].

III.V ENFORCEMENT OF MEDIATED SETTLEMENT AGREEMENT AND ONLINE MEDIATION

Chapter- VI & VII lays down the provisions relating to enforcement of mediated settlement agreement and online mediation. A mediated settlement agreement which has been duly signed and authenticated and verified by the mediator shall be binding on all the parties or their representatives to a dispute and it will be imposed in the similar manner as if it is a decree or order of the court as per the provisions of the Code of Civil Procedure, 1908. Both the parties can make use of such mediated settlement agreement in their defense, set-off or other legal proceedings[51]. Where a party is not satisfied with the mediated settlement agreement and is willing to challenge it than such party can file an application in this regard to the Court or Tribunal of capable jurisdiction. A mediated settlement agreement can be challenged within a period of 90 days from the date of receipt of an authenticated copy of such settlement on the grounds of corruption, fraud, impersonation or lack of jurisdiction. However, the Court or Tribunal can relax the limitation period of ninety days if the applicant is able to prove sufficient cause for non-filing of application within the limitation period[52].

Chapter- VII provides for online mediation which can be conducted at any stage of mediation proceedings under the Act. Online mediation can also be conducted in pre

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[49]Id., s. 24. It reads:- "The mediation proceedings under this Act shall be deemed to terminate-

(a) on the date of signing and authentication of the mediated settlement agreement; or

(b) on the date of the written declaration of the mediator, after consultation with the parties or otherwise, to the effect that further efforts at mediation are no longer justified; or

(c) on the date of the communication by a party or parties in writing, addressed to the mediator and the other parties to the effect that the party wishes to opt out of mediation;

(d) on the expiry of time limit under section 18."

[50]Id., s. 25.

[51]Id., s. 27.

[52]Id., s. 28.(1). It reads:- "Notwithstanding anything contained in any other law for the time being in force,

in any case in which the mediated settlement agreement is arrived at between the parties and is sought to be challenged by either of the parties, such party may file an application before the court or tribunal of competent jurisdiction.

(2) A mediated settlement agreement may be challenged only on all or any of the following grounds, namely:-

(I) fraud;

(ii) corruption;

(iii) impersonation;

(iv) where the mediation was conducted in disputes or matters not fit for mediation under section 6.

(3) An application for challenging the mediated settlement agreement shall not be made after ninety days have elapsed from the date on which the party making that application has received the copy of mediated settlement agreement under sub-section (3) of section 19: Provided that if the court or tribunal, as the case may be, is satisfied that the applicant was prevented by sufficient cause from making the application within the said period of ninety days, it may entertain the application within a further period of ninety days." ninety days, it may entertain the application within a further period of ninety days.

litigation mediation. However, online mediation can be done only with the prior consent of both parties to a dispute and necessary elements of confidentiality and integrity of proceedings has to be maintained[53].

III.VI MEDIATION COUNCIL OF INDIA: COMPOSITION, TERMS AND CONDITIONS, POWERS AND FUNCTIONS

The Act under Chapter- VIII lays down for the establishment and incorporation, terms and conditions, powers and functions of Mediation Council of India. The Central Government shall through notification set up a Council by the name of the Mediation Council of India to perform functions and duties under the Act. The Council is a legal person or body corporate having head office at New Delhi[54]. The Council consist a Chairperson, two members, three *ex-officio* members and one part time member who are to be appointed by the Central Government[55]. The Chairperson must be a person of capacity, integrity and standing who have sufficient knowledge and professional experience or who have shown capability in tackling with problems relating to law, mediation or alternative dispute resolution, public affairs or administration. One member has to be appointed by the Central Government who have knowledge and experience in mediation law or alternative dispute resolution mechanisms. Another member must have experience in teaching and research in alternative dispute resolution mechanisms or mediation law. The *ex officio* members must be one member from Department of Legal Affairs, Ministry of Law and Justice and one member from

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[53]Id., s. 30(1). It reads:-"Online mediation including pre-litigation mediation may be conducted at any stage of mediation under this Act, with the written consent of the parties including by the use of electronic form or computer networks but not limited to an encrypted electronic mail service, secure chat rooms or conferencing by video or audio mode or both.

(2) The process of online mediation shall be in such manner as may be specified.

(3) The conduct of online mediation shall be in the circumstances, which ensure that the essential elements of integrity of proceedings and confidentiality are maintained at all times and the mediator may take such appropriate steps in this regard as he deems fit.

(4) Subject to the other provisions of this Act, the mediation communications in the case of online mediation shall, ensure confidentiality of mediation."

[54]Id., s. 31. (1). It reads:-"The Central Government shall, by notification, establish for the purposes of this Act, a Council to be known as the Mediation Council of India to perform the duties and discharge the functions under this Act.

(2) The Council shall be a body corporate by the name aforesaid, having perpetual succession and a common seal, with power, subject to the provisions of this Act, to acquire, hold and dispose of property, both movable and immovable, and to enter into contract, and shall, by the said name, sue or be sued.

(3) The head office of the Council shall be at Delhi or at such other place as may be notified by the Central Government.

(4) The Council may, in consultation with the Central Government, establish offices at other places in India and abroad."

[55]Id., s. 32(1). It reads:-"The Council shall consist of the following members, namely:-

(a) a person of ability, integrity and standing having adequate knowledge and professional experience or shown capacity in dealing with problems relating to law, alternative dispute resolution preferably mediation, public affairs or administration to be appointed by the Central Government-Chairperson;

(b) a person having knowledge and experience in law related to mediation or alternative dispute resolution mechanisms, to be appointed by the Central Government-Member;

Department of Expenditure, Ministry of Finance and one member Secretary who will be the Chief Executive Officer. There will be one part time member who will represent a body belonging to commerce and industry[56]. The tenure of the Chairperson will be four years from the date of joining the office or seventy years whichever is earlier. The other member will hold office for four years or sixty seven years whichever will be earlier and they are eligible for reappointment. The member's terms and conditions of service, salaries and allowances will be such as may be decided by the Central Government. The members will be getting travelling and other allowances[57]. The proceedings of the Council will not become invalid merely due to any vacancy or any defect in the composition of the Council or any irregularity in the procedure not affecting merits of the case[58].

A member of Council may tender his resignation from office addressed to the Central Government. However, he will not be relinquished from his office until three months from notice or a new member joins in[59]. Any member can be removed by the Central government from his office if he has become physically or medically unfit in performance of his duties or undischarged insolvent or engaged in paid employment or convicted for offence of moral turpitude or acquired pecuniary or other interest likely to affect prejudicially his functions as member or abused his position detrimental to public interest. However, where a member has to be removed from his office on any of these grounds than, he shall be notified about his charges and given reasonable opportunity of being heard before his removal[60]. The Council can constitute expert committees to smoothly discharge its functions[61]. The office of the Council will comprise a Chief Executive Officer and Secretariat. The Secretariat will consist of such number of officers

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(c) an eminent person having experience in research or teaching in the field of mediation and alternative dispute resolution laws, to be appointed by the Central Government-Member;

(d) Secretary to the Government of India in the Department of Legal Affairs, Ministry of Law and Justice or his representative not below the rank of Joint Secretary- Member, *ex officio*;

(e) Secretary to the Government of India in the Department of Expenditure, Ministry of Finance or his representative not below the rank of Joint Secretary- Member, *ex officio*;

(f) Chief Executive Officer-Member-Secretary, *ex officio*; and

(g) one representative of a recognised body of commerce and industry, chosen by the Central Government-Part-Time Member.

(2) The Members of the Council, other than *ex officio* members, shall hold office as such, for a term of four years from the date on which they enter upon their office and shall be eligible for re-appointment: Provided that no Member other than *ex officio* Member shall hold office after he has attained the age of seventy years, in the case of Chairperson, and sixty-seven years, in the case of other Members: Provided further that if the Chairperson is appointed on Part-Time basis, then, at least one of the Members appointed under clauses (b) or (c) shall be a Full-Time Member.

(3) The salaries, allowances and other terms and conditions of Members other than *ex officio* Members shall be such as may be prescribed.

(4) The Member shall be entitled to such travelling and other allowances as may be prescribed."

[56]Ibid.

[57]Ibid.

[58]Id., s. 33.

[59]Id., s. 34.

[60]Id., s. 35.

[61]Id., s. 36.

and employees as required. The qualifications, appointment and other terms and conditions of service may be laid down by the rules[62].

The Council has to perform various the duties and functions[63]. These functions include promotion and development of international and domestic mediation and create a set up for it, to lay down rules and guidelines for the conduct of mediation, continuous education, grant of certificate and assessment of mediators, registration, renew, suspend or cancel registration, to lay down standards of conduct and etiquettes, to organize conference or workshops on mediation, to recognize mediation institutions and mediation service providers etc[64]. The Council has to prepare and present annual report on enforcement of the provisions of the Act to the Central Government[65].

III.VII MEDIATION SERVICE PROVIDERS, MEDIATION INSTITUTES AND COMMUNITY MEDIATION

Chapter- IX deals with mediation service providers and mediation institutes. Mediation service provider means an organization or a body that assists for the conduct of mediation. This body or organization may be recognized by the Council or it may be an authority which has been established under the Legal Services Authorities Act, 1987 or

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[62]Id., s. 37.

[63]Id., s. 38. It reads:- "The Council shall-

(a) endeavour to promote domestic and international mediation in India through appropriate guidelines;

(b) endeavour to develop India to be a robust centre for domestic and international mediation;

(c) lay down the guidelines for the continuous education, certification and assessment of mediators by the recognised mediation institutes;

(d) provide for the manner of conduct of mediation proceedings, under sub-section (1) of section 15;

(e) provide for manner of registration of mediators and renew, withdraw, suspend or cancel registration on the basis of conditions as may be specified;

(f) lay down standards for professional and ethical conduct of mediators under sub-section (3) of section 15;

(g) hold trainings, workshops and courses in the area of mediation in collaboration with mediation service providers, law firms and universities and other stakeholders, both Indian and international, and any other mediation institutes;

(h) enter into memoranda of understanding or agreements with domestic and international bodies or organisations or institutions;

(i) recognise mediation institutes and mediation service providers and renew, withdraw, suspend or cancel such recognition;

(j) specify the criteria for recognition of mediation institutes and mediation service providers;

(k) call for any information or record of mediation institutes and mediation service providers;

(l) lay down standards for professional and ethical conduct of the mediation institutes and mediation service providers;

(m) publish such information, data, research studies and such other information as may be required;

(n) maintain an electronic depository of the mediated settlement agreements made in India and for such other records related thereto in such manner as may be specified; and

(o) perform any other function as may be assigned to it by the Central Government."

[64]Ibid.

[65]Id., s. 39.

it may be a court- annexed mediation Centre or such body may be recognized by the Central Government[66]. The mediation service providers will perform several functions namely certification of mediators and maintenance of penal of mediators, to provide services of mediators to parties to a dispute, to give infrastructural, logistic and other assistance in the smooth conduct of mediation, promotion of professional and ethical conduct among mediators and to help in registration of mediated settlement agreement etc[67]. The Council will give recognition to mediation institutes to perform such functions and carry out such duties and as may be identified[68].

Chapter- X provides provisions for community mediation. This is a very important and novel concept for settlement of disputes at community level. A dispute at community level which may disturb mutual harmony, peace and tranquility of a locality or area can be amicably settled by community mediation. However, the permission of all the parties to a dispute should be taken before going for community mediation. Community mediation can be availed by any of the parties to a dispute at community level by making an application before the District Magistrate or Sub-Divisional Magistrate or any competent authority. The concerned authority or District Magistrate after receiving such an application for settlement of dispute through mediation will set up a penal of three community mediators. The District Magistrate or Sub-Divisional Magistrate will establish a permanent penal of community mediators which can be changed from time to time keeping in mind representation of women or class or group of persons. The permanent penal of mediators may be set up from amongst the persons who are of standing, honesty and integrity or a local person who has significantly contributed to society or representative of a place or resident welfare association or any person who have experience in mediation etc[69]. A penal of three mediators will conduct community mediation and formulate appropriate procedure for resolution of dispute. The mediators will try to settle disputes amicably with the consent of all disputing parties.

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[66]Id., s. 40.(1). "It reads: -"mediation service provider" includes-

(a) a body or an organisation that provides for the conduct of mediation under this Act and the rules and regulations made thereunder and is recognised by the Council; or

(b) an Authority constituted under the Legal Services Authorities Act, 1987; or

(c) a court-annexed mediation centre; or

(d) any other body as may be notified by the Central Government: Provided that the bodies referred to in clauses (b), (c) and (d) shall be deemed to be mediation service providers recognised by the Council;

(2) The mediation service provider shall be recognised by the Council in the manner as may be specified."

[67]Id., s. 41. It reads:- "The mediation service providers shall perform the following functions, namely:-

(a) accredit mediators and maintain panel of mediators;

(b) provide the services of mediator for conduct of mediation;

(c) provide all facilities, secretarial assistance and infrastructure for the efficient conduct of mediation;

(d) promote professional and ethical conduct amongst mediators;

(e) facilitate registration of mediated settlement agreements in accordance with the provisions of section 20; and

(f) such other functions as may be specified."

[68]Id., s. 42.

[69]Id., s. 43(1). "It reads:- Any dispute likely to affect peace, harmony and tranquillity amongst the residents or families of any area or locality may be settled through community mediation with prior mutual consent of the parties to the dispute;

Where a community dispute is settled through community mediation then the settlement has to be made in to writing which must be signed by all parties to dispute and countersigned by the community mediators. A copy of such a settlement must be served to all parties to dispute. Where the parties could not reach to settlement than a non- settlement report will be presented by the mediators to the District Magistrate or Sub- Divisional Magistrate or the concerned authority and to the parties[70].

III.VIII OTHER MISCELLENEOUS PROVISIONS

Lastly, Chapter- XI lays down other necessary miscellaneous provisions under the Act. A 'Mediation Fund' must be established to promote, facilitate and encourage mediation in India. All monies received from the Central Government, fees and charges, donations, grants, contributions etc. will be credited into the Mediation Fund. This fund will be utilized to incur the expenses towards salaries and other allowances of Chairperson, members, officers and employees and expenses of the Council[71]. The Council will prepare and maintain account books and records yearly which have to be audited by the

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(2) For the purposes of sub-section (1), any of the parties shall make an application before the concerned Authority constituted under the Legal Services Authorities Act, 1987 or District Magistrate or Sub-Divisional Magistrate in areas where no such Authority has been constituted, for referring the dispute to mediation;

(3) In order to facilitate settlement of a dispute for which an application has been received under sub-section (2), the concerned Authority constituted under the Legal Services Authorities Act, 1987 or the District Magistrate or Sub-Divisional Magistrate, as the case may be, shall constitute panel of three community mediators;

(4) For the purposes of this section, the Authority or District Magistrate or the Sub-Divisional Magistrate, as the case may be, shall notify a permanent panel of community mediators, which may be revised from time to time;

(5) The following persons may be included in the panel referred to in sub-section (4)-

(a) person of standing and integrity who are respectable in the community;

(b) any local person whose contribution to the society has been recognised;

(c) representative of area or resident welfare associations;

(d) person having experience in the field of mediation; and

(e) any other person deemed appropriate.

(6) While making panel referred to in sub-section (4) the representation of women or any other class or category of persons may be considered."

[70]Id., s. 44.(1). It reads:- "Any community mediation shall be conducted by the panel of three community mediators referred to in sub-section (3) of section 43 who shall devise suitable procedure for the purpose of resolving the dispute.

(2) The community mediators shall endeavor to resolve disputes through community mediation and provide assistance to parties for resolving disputes amicably.

(3) In every case where a settlement agreement is arrived at through community mediation under this Act, the same may be reduced into writing with the signature of the parties and authenticated by the community mediators, a copy of which be provided to the parties and in cases where no settlement agreement is arrived at, a non-settlement report may be submitted by the community mediators to the Authority or the District Magistrate or the Sub-Divisional Magistrate, as the case may be, and to the parties.

(4) Any settlement agreement arrived at under this Chapter shall be for the purpose of maintaining the peace, harmony and tranquility amongst the residents or families of any area or locality but shall not be enforceable as a judgment or decree of a civil court.

(5) The provisions of section 20 shall, mutatis mutandis apply, in relation to the registration of mediated settlement agreement under this section."

[71]Id., s. 45.

Comptroller and Auditor General of India[72]. The Council will be governed by the Central Government on policy matters[73]. The Central Government or State Government may lay down schemes or policies for the purpose of settlement of disputes through mediation where one of the parties to disputes is either Central or State Government[74].

IV. CRITICAL ANALYSIS OF THE PROVISIONS OF THE ACT

The concept of mediation is not new and there have been various laws which provide for mediation as a means of alternative dispute resolution mechanism or pre litigation resolution. However, the Mediation Act, 2023 is a welcome step towards strengthening and laying down legal and institutional framework for mediation regime in India. This Act recognizes and provides for institutionalization of mediation as an easy and cost effective dispute resolution mechanism. The Act consolidates and establishes a robust legal framework for mediation in India and provides for pre litigation mediation as an alternative to settle civil or commercial disputes before the parties go for formal adjudication of their disputes from the court of law. The Act embodies many features like the mediated settlement enforcement agreements, its conclusiveness and binding effect, its enforceability and its amenability to challenge, online mediation, mediation council of India, mediation service providers and mediation institutes, community mediation gives more credibility to the mediation. The pre litigation settlement of disputes will be helpful to Indian nationals as well as foreign investors because it alleviates the risk, delays and expenses in traditional adjudication of disputes in India[75].

There have been some lacunas in the Act. Firstly, the Act makes no provision for enforcement of mediated settlement agreements from intercontinental mediations conducted outside India. The provisions for appointment of mediators and interim relief leave too much space for interpretation. Secondly, the Act lays down provisions for challenge of a mediated settlement agreement before a court or tribunal having jurisdiction. This process may delay speedy and expeditious resolution of disputes due to the huge pendency of cases before courts and tribunals. Thirdly, India proactively agreed and signed the United Nations Convention on International settlement Agreements, (Singapore Convention on Mediation) 2019. However, the Act does not incorporate the provisions of this convention. The Singapore Convention provides for enforcement of mediated settlement agreements in the courts of the home country of the counter party. However, the Act has no provision for implementation of mediated settlement agreements from international mediations performed abroad[76].

V. CONCLUSION

The concept of mediation involves a procedure of negotiation by which all disputing parties, together with the aid of an impartial and neutral third person tries to resolve the dispute. The mediator who is third party to a dispute makes effort by discussions with

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[72]Id., s. 46.

[73]Id., s. 47.

[74]Id., s. 48.

[75]Dheeraj Nair, Vishrutyi Sahni and Ridhima Sharma, "Mediation Act, 2023: Salient Features" September, 18 (2023), (June 15, 2024)https://www.jsalaw.com/newsletters-and-updates/mediation-act-2023-salient-features/.

[76]Ibid.

the parties to a dispute to analytically identify and isolate quarreled issues in order to develop options consider alternatives and to reach a consensual arrangement that will contain their rights and needs. The third party mediator does not have authority to decide the dispute, however, he only facilitates to make affable situation to enable the parties to determine their dispute harmoniously themselves. It has been rightly said by Christopher W. Moore[77] about the meaning, nature and scope of mediation that

"Mediation is essentially a negotiation that includes a third party who is knowledgeable in effective negotiation procedures and can help people in conflict to co-ordinate their activities and to be more effective in their bargaining. Mediation is an extension of the negotiation process in that it involves extending the bargaining into a new format and using a mediator who contributes new variables and dynamics to the interaction of the disputants."

In our country, there has been huge burden on our justice delivery system which results in high pendency of cases in courts and tribunals. An ideal justice dispensation system requires expeditious, speedy and effective settlement of disputes. The passing of the Mediation Act, 2023 is a very good and effective development for settlement of disputes between parties through mediation. It will boost the mediation process by laying down enhanced confidentiality, high standards, presenting incentives and guaranteeing enforceability. Thislawwill significantly reshape the mediation landscape in India's justice delivery system. The Act encourages mediation as the primary tool for settlement of disputes, aiming to make more efficient legal process while nurturing a culture of cooperation and collaboration between disputing parties. This Act represents an important trend towards a more effective, efficient and harmonious approach to settlement of disputes in India.

[77]CHRISTOPHER W. MOORE, THE MEDIATION PROCESS: PRACTICAL STRATEGIES FOR RESOLVING CONFLICT (Jossey- Bass, 4th edn., 2014).

THE CONCEPT OF RESPONSIBLE PARENTING AND THE EMERGING ISSUES

Dr. Priyanka*

Abstract

The parents are the natural protector of the rights of the child. The care, protection, and guidance of parents mark a lifelong impact on overall psychological development of the individual. Parents or other persons legally responsible for the child need to fulfill with care their rights and responsibility to provide direction and guidance to their children in the exercise child's rights. There is a need to consider appropriate ways of ensuring a balance between parental authority and the realization of the rights of the child. The present article explores the emerging dimensions of parental responsibilities. This article provides a description of international and national efforts taken to assure the responsible parenthood.

Key words
Jurisprudence, Law, Parent, Care

1. INTRODUCTION

The family justice system is progressively seeking to respond the changes in family life. The family structure has changed dramatically in the last few decades. Changes in women's roles, new reproductive technology, nuclear families, and the problems of child rearing have all contributed to these shifts. As the family structure has changed, so have family roles and relationships. These changes in family responsibilities and relationships result from and contribute to the family's newly redefined functions. Family life has become more complicated and stressful. Many families confront crises and problems on a regular basis, such as unemployment, violent crime, drug and alcohol abuse, marital and child abuse, and the stress caused by competing time demands. The growing mobility of modern families frequently leads in family members losing stability, a lack of social support systems and increased isolation[1]. Along with changes in family structure, many of the functions performed by the family for its members have also altered. Historically, the family has provided its members with emotional, spiritual, economical, and educational support. In the global arena, the State now undertakes many of the functions that were formerly only undertaken by the family. For example, States have gotten more involved in education and in caring for our society's dependent members through public aid and social security. This devolution of family functions to

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[1]See Barbara A. Babb, "An Interdisciplinary Approach to Family Law Jurisprudence: Application of an Ecological and Therapeutic Perspective" 72 (3) INDIANA LAW REVIEW, 775-808 (1997).

the State has contributed to a new picture of the family, which must be reflected in current family law and policy making. The fields of marriage, divorce, family support, and parent-child interactions are undergoing a fundamental change in the legal systems of Western nations. Family legislations frequently started to take into account concerns with child abuse, juvenile delinquency, family violence, substance addiction, economics, and physical or mental health problems[2]. Many modern States are attempting to direct family life through their welfare policies. There are significant variances in this effort ranging from the declared aims, to the measures taken and the actual resources invested.

2. EVOLUTION OF PARENTIG JURISPRUDENCE

Historically, at initial stages, the focus was on parental rights rather than parental duties. The proponents of proprietary theory of parenthood claim that a child is owned by his or her parents because parents give birth to the child and since children are considered to be the property of their parents, there are no obligations on the part of parents to raise their children[3]. The idea that children are the parents' belonging is supported by Aristotle. According to *Aristotle,* "*a child is a parent's possession since it is a bodily manifestation of that parent, much like a tooth or hair and parents love their child as being a part of themselves*[4]." He believes that "*the relationship of children to parents is like a relation of men to god as to something good and superior; for they have conferred the greatest benefits, since they are the cause of their being and of their nourishment and education from their birth*[5]." Contemporary philosopher Jan Narveson also believes in property account of children. In the Libertarian Idea, he holds that the lack of rationality on the part of children precludes them from being right-bearers[6]. The proponents of the labour theory also contended that as children are the product of their parents' labour and thus owned by them. During the middle of the 20th century, attention was turned from the physical roles of the parents to the psychological well-being of the child. Attachment theory, for instance, explains that a child's interactions with parents and family create a strong emotional and psychological bond between them. This family bonding and attachment is essential for a child's healthy emotional development and lack of such an attachment can give a severe and permanent psychological trauma to the child[8].

However, even before that, two philosophers of the seventeenth and eighteenth century Jean Jacques Rousseau and John Locke entered into this debate and both supported the theory of parental obligations. John Locke plainly rejected the idea of children being owned by their parents. He emphasizes that every person is born equal and free so

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[2]Ibid

[3]See Anne McGillivary, "Children's Rights, Paternal Power and Fiduciary Duty: From Roman law to the Supreme Court of Canada" 19(1) THE INTERNATIONAL JOURNAL OF CHILDREN'S RIGHTS 21-54 (2011)

[4]ARISTOTLE, NICOMACHEAN ETHICS (TRANSLATED BY W.D. ROSS) 141 (Batoche Books, Kitchener, 1999)

[5]Ibid

[6]Mark Vopat, "Contractarianism and Children" 17(1) PUBLIC AFFAIRES QUARTERLY 49-63 (2003)

[7]See Dara E. Purvis, "The Origin of Parental Rights: Labor, Intent and Fathers" 41 FLORIDA STATE UNIVERSITY LAW REVIEW 645-696 (2014)

[8]Ibid; see also Ferdinand Schoeman, "Rights of Children, Rights of Parents and the Moral Basis of the Family" 91 (1) THE UNIVERSITY OF CHICAGO PRESS JOURNAL 6-19 (1980)

"begetting of chidren makes them not slaves to their fathers". As per Locke's opinion "a child is free by his father's title, by his father's understanding, which is to govern him till he hath it of his own." Locke rejected the common perception of parental power as for him "parental power is nothing but that which parents have over their children to govern them, for the children's good, till they come to the use of reason[9]." John Locke's assertion to responsible role of parents reflects in the following statement from his Second Treatise of Government: "Adam and Eve, and after them all parents were, by the law of nature, under an obligation to preserve, nourish, and educate the children they had begotten; not as their own workmanship, but the workmanship of their own maker, the Almighty, to whom they were to be accountable for them. This is that which puts the authority into the parents' hands to govern the minority of their children. God hath made it their business to employ this care on their offspring, and hath placed in them suitable inclinations of tenderness and concern to temper this power, to apply it, as his wisdom designed it, to the children's good, as long as they should need to be under it.[10]"

A child's mind, according to Locke, is like a white paper, empty of all characters, with a few intrinsic tendencies but mostly like wax, to be molded and fashioned as one pleases. Lock said that in order to build positive habits, early training must establish the parents' authority. Early on, the child should be taught to yield to logic. Parents should refrain from using harsh penalties, such as beatings, as well as manufactured rewards because they lead by example. Children should spend a lot of time with their parents, who should then observe their temperament and try to exploit the child's inherent need for freedom and play to make learning as similar to recreation as possible. According to Locke, courage must constantly be praised and cruelty must always be avoided. Increased familiarity should be maintained as the child matures so that the parent could find a friend in their grown up child. Locke's recommendations always aimed for insight and truthfulness as well as virtue, breeding, and a free liberal spirit[11].

On the other hand, Rousseau believed that kids are born with intrinsically positive innate tendencies. In addition to rejecting the notion of original sin, Rousseau also argued against socialization of children. He was one of the first to realize that children weren't just little adults, but rather had multiple developmental stages. Both epigenesist and reformation are incorporated into his thinking. According to him, a child is born with a set of fixed traits that make him unique, but the environment in which he grows plays a crucial role. As Rousseau invokes the mankind to "*love childhood; encourage its sports, its pleasures, its lovable instincts*", he also stood against child cruelty and noted that "*the years that ought to be bright and cheerful are passed in tears amid punishments, threats, and slavery. For his own good, the unhappy child is tortured; and the death thus summoned will seize on him unperceived amidst all this melancholy preparation. Who knows how many children die on account of the extravagant prudence of a father or of a teacher? Happy in escaping his cruelty, it gives them one advantage; they leave without*

[9]JOHN LOCKE, TWO TREATISES OF GOVERNMENT, Chapter XV, Para. 170 The Project Gutenberg eBook of Second Treatise Of Government, (2 February 2023). https://www.gutnberg.org/eBook/7370.

[10]JOHN LOCKE, TWO TREATISES OF GOVERNMENT, Chapter VI, Para. 56, The Project Gutenberg eBook of Second Treatise Of Government, (2 February 2023). https://www.gutnberg.org/eBook/7370.

[11]Ibid

regret a life which they know only from its darker side[12]." The great Germanphilosopher and enlightenment thinker Immanuel Kant also suggests that parents have obligations to their children because the parents have *brought a person into the world without his consent for which deed the parents incur an obligation to make the child content with his condition so far as they can*[13].

John Stuart Mill was also a great supporter of parental responsibilities and child rights. Following statement is from Mill's On Liberty "one would almost think that a man's children were supposed to be literally, and not metaphorically, a part of himself, so jealous is opinion of the smallest interference of law with his absolute and exclusive control over them; more jealous than of almost any interference with his own freedom of action: so much less do the generality of mankind value liberty than power. Consider, for example, the case of education. Is it not almost a self-evident axiom, that the State should require and compel the education, up to a certain standard, of every human being who is born its citizen? Yet who is there that is not afraid to recognize and assert this truth? Hardly anyone indeed will deny that it is one of the most sacred duties of the parents (or, as law and usage now stand, the father), after summoning a human being into the world, to give to that being an education fitting him to perform his part well in life towards others and towards himself. But while this is unanimously declared to be the father's duty, scarcely anybody, in this country, will bear to hear of obliging him to perform it. Instead of his being required to make any exertion or sacrifice for securing education to the child, it is left to his choice to accept it or not when it is provided gratis. It still remains unrecognized, that to bring a child into existence without a fair prospect of being able, not only to provide food for its body, but instruction and training for its mind, is a moral crime, both against the unfortunate offspring and against society; and that if the parent does not fulfill this obligation, the State ought to see it fulfilled, at the charge, as far as possible, of the parent.[14]"

In International legal regime, the Declaration on the Rights of the Child 1924 adopted by League of Nations is perhaps the first document which confers the responsibility on adults for the well-being of children. This declaration consists of five basic principles. One of these principles requires that 'the child must be given the means requisite for its normal development, both materially and spiritually'. In 1959, General Assembly of United Nations adopted the Declaration on the Rights of the Child in an extended form[15]. The Preamble to Declaration clearly states about the need of children for special care and protection before as well as after birth. The Declaration states about the children's right to special protection for physical, mental and social development; the right to adequate nutrition, housing, and medical services; the right to understanding and love by parents and society; the right to recreational activities and free education; the right to protection against all forms of neglect, cruelty, and exploitation; the right to be brought up in a spirit of understanding, tolerance, friendship among people, and universal

[12]JEAN JACQUES ROUSSEAU, EMILE OR CONCERNING EDUCATION TRANSLATED BY ELEANOR WORTHINGTON 43(D.C. Heath & Company, Boston 1889)

[13]See LARA DENIS (ED.), THE METAPHYSICS OF MORALS (Cambridge University Press, Cambridge 2017)

[14]JOHN STUART MILL, ON LIBERTY: THE SUBJECTION OF WOMEN 186 (Henry Holt and Company, New York 1895).

[15]UN General Assembly, Declaration of the Rights of the Child, G.A. res. 1386 (XIV), 14 UN GAOR Supp. (No. 16) at 19, UN Doc. A/4354 (20 November 1959).

brotherhood. The sixth principle of this declaration is most relevant to mention here that recognise the children's right to understanding and love by parents and society[16]. Article 24 of the International Covenant on Civil and Political Rights 1966 also provides for right of the child to have such measures of protection as are required by his status as a minor on the part of his family, society and the state.

The preamble of the United Nations Convention on the Rights of the Child 1989 recognize that the family, as the fundamental group of society and the natural environment for the growth and well being of all its member and particularly children, should be afforded the necessary protection and assistance so that it can fully assumed its responsibilities within the community. The child, for the full and harmonious development of his or her personality should grow up in a family environment, in an atmosphere of happiness, love and understanding[17]. As per Article 5 of the convention States parties shall respect the responsibilities, rights and duties of parents, extended family, legal guardians and other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention. According to Article 7 the child shall have the right to know and care for by his or her parents. Article 18 requires that both parents shall have common responsibilities for the upbringing and development of the child and further emphasises that parents and legal guardians, have the primary responsibility for the upbringing and development of the child. Article 28 of the convention recognises the principle that parents are children's first educators and they are expected to provide appropriate direction and guidance to young children and provide an environment of reliable and affection relationships based on respect and understanding.

According to United Nations Guidelines on Juvenile Delinquency 1990 (Riyadh Guidelines), parents and family can also contribute in prevention of juvenile delinquency as it is thought that by engaging in lawful, socially useful activities and adopting a humanistic orientation towards society and outlook on life, young persons can develop non-criminogenic attitudes. Riyadh guidelines require efforts on the part of the entire society to ensure the harmonious development of adolescents, with respect for and promotion of their personality from early childhood. Measures should be taken and programme developed to provide families with the opportunity to learn about parental roles and obligations as regards child development and child care, promoting positive parent-child relationship, sensitizing parents to the problem of children and young persons and encouraging their involvement in family and community-based activities.

In western countries, parents are responsible for not only the wellbeing of their children but also are liable for children's behavior and activities that result into harming others. In UK, for example, ienforcing parental responsibility for juvenile offences has been a major trait of youth crime control since the 19th century.A parent could be ordered by the court to take proper care and exercise proper control over the child. If the terms of the above sort are not followed, a fine could be imposed on the parent[18]. The Anti-social Behavior

[16]Ibid

[17]See the preamble of Convention on the Rights of the Child 1989, Para 5, 6, 7.

[18]The United Kingdom Criminal Justice Act, 1991, s. 58 repealed by Powers of Criminal Courts (Sentencing) Act, 2000 c. 6, s. 165

Act 2003 upholds the legal presumption that parents of children who commit crimes have not taken responsibility for their actions and can be forced to do so through the issuance of court orders and monetary fines[19]. Parental compensation orders can also be issued against a parent of the child to pay a specified amount to the person who is affected by the taking of the property or its loss or damage caused by the child[20]. Parents can be convicted of offences specifically designed to protect children and any general offence against the child. A parent who is liable to maintain a child is deemed to have neglected the child if the parent has failed to provide adequate food, clothing, medical aid or lodging for the child, or if unable to provide the same, he or she has failed to take steps to procure it. The duty to maintain a child including liability for child support payments is covered under the Child Support Act 1991. Besides, the parents of every child of compulsory school age have a legal duty to cause his or her child to receive efficient full-time education.

Similarly, in Australia, an important conceptual shift was brought by the Australian Commonwealth Family Law Reform Act 1995 which replaced the concept of 'parental rights' with that of 'parental responsibility. The shift underscored that parenting is a matter of responsibility rather than entitlements. Parental responsibility legislation, like that of other Western legal jurisdictions, is being promoted and implemented in Australia as well. Parents are deemed responsible for their children at all times, and if they fail to supervise and care for their children's welfare then they are likely to be sanctioned under such laws[21]. Taking a step ahead, Northern Territory of Australia, holds parents responsible for the costs of detaining their child in a juvenile detention centre if they are unable to convince the court that they were adequately supervising and controlling their child[22]. In three Canadian jurisdictions (Manitoba, British Columbia, Ontario) legislation governing parental responsibility has been enacted allowing victims of juvenile crime to obtain damages from parents whose children are involved in wilfully stealing, damaging, or destroying property.

3.NEED AND JUSTIFICTIONS OF RESPONSIBLE PARENTING

A child is better protected in the safe environment of the family under parental support and care. The civil rights of the child begin within the family. The family has an important role to play as to the right of the child to be registered with a name, to a nationality, to know as far as possible his or her parentage, and to preserve his or her identity. Socialization and acquisition of values are developed within the family for freedom of expression and association, for privacy and discipline, and for the child not being subject to cruel, inhuman or degrading treatment or punishment, including neglect, corporal punishment, and sexual or verbal abuse. The family is an essential agent for creating awareness and preservation of human rights, and respect for human values, cultural identity and heritage, and other civilizations. There is a need to consider

[19]Barry Goldson and Janet Jamieson, "Youth Crime, the 'Parenting Deficit' and State Intervention: A Contextual Critique" 2 (82) YOUTH JUSTICE 284-310 (2002)

[20]The United Kingdom Crime and Disorder Act, 1998, s. 13A(3)

[21]Nancy White, Martha Augoustions, et.al., "Parental responsibility for the illicit acts of their children: Effects of age, type and severity of offence" 59 (1) AUSTRALIAN JOURNAL OF PSYCHOLOGY 43-50 (2007)

[22]Youth Justice Act, 2005(NT), s. 133(1)

appropriate ways of ensuring a balance between parental authority and the realization of the rights of the child[23].

Family and parents are the most influential factors in a person's life. Early childhood Experience affects a person's whole life in different ways. The overall psychological, moral, ethical, and social development of a person is highly affected by his or her upbringing and family atmosphere. Parents should raise their children with the child's best interests in mind. Parental rights are determined by a parent's ability to provide their child with the ideal environment for development. Children have many important interests that are related to their parents. A child who is having responsible parents can develop into an autonomous person capable of pursuing and enjoying intimate healthy relationships. The psychological and emotional health of the children can thrive fully only if they receive the kind, attentive, and concentrated care from their parents. Responsible parenting may also help the child develop the capacity to produce and pursue worthwhile goals in life. Lack of such care and attention may have a very negative impact on a child's growth and future prospects. A child may not be able to acquire the benefits of more responsible parenting if parents are not making personal contributions to the child's well-being.

"The Family has the prime responsibility for the nurturing and protection of children from infancy to adolescence. Introduction of children to the culture, values, and norms of their society begins in the family. For the fully and harmonious development of their personality, children should grow up in a family environment, in an atmosphere of happiness, love, and understanding. Accordingly, all institutions of society should respect and support the efforts of parents and other caregivers to nurture and care for children in a family environment.[24]" Active and positive participation of parents during early childhood and adolescence is most important for the child development goals. As noted by United Nations Committee on the Rights of the Child (UNCRC) "factors known to promote the resilience and healthy development of adolescents include strong relationships with and support from the key adults in their lives, opportunities for participation and decision-making, safe and healthy local environment and respect for individuality.[25]"

An analysis of the evolving standards and practice within the United Nations human rights regime reveals the existence of a clear international normative consensus, built around the recognition of the family as a fundamental social unit and the centre of various educational, nurturing and caring functions they perform towards their members. This makes families relevant actors in relation to promoting the enjoyment of the basic human rights of their members, including the rights to an adequate standard of living, notwithstanding the primary obligations that pertain to state in this regard. From this perspective, the recognition of the family as a social institution in international

[23]UN Committee on the Rights of the Child, Report adopted by the Committee at its 130th meeting, on 28 January 1994, CRC/C/24 (8 March 1994) Annex V, P. no. 63.

[24]UN Secretary General, Plan of action for implementing the world declaration on the survival, protecting and development of children in 1990s- Report of the Secretary General, UN Doc A/45/625 (October 18, 1990), para18.

[25]UN Committee on the Rights of the Child, General comment no. 20 (2016) on theimplementation of the rights of the child during adolescence, CRC/C/GC/20 (6 December 2016) Para 17

human rights law concurs with and elaborates upon the recognition of the role of families in poverty eradication and sustainable development[26].

International human rights law protects children from being discriminated against within the family on the basis of gender, disability, family status or any grounds. Children should be recognized as rights holders. In addition, family responsibilities should be discharged equally for boys and girls, especially in relation to access to education, feeding and health care[27]. Furthermore, States should ensure that children with disabilities enjoy equal rights in relation to family life, included preventing their "concealment, abandonment, neglect and segregation." Children born of de facto unions or out of wedlock should also enjoy equal rights in relation to those born from married couples, including the rights to be registered and to have a name. The Committee on the Rights of the Child has called for States to protect children from discrimination based or their own or their parents or legal guardian's sexual orientation or gender identify[28].

The UNCRC also observed that parents and other primary caregivers have a vital role to play under the Convention on the Rights of the Child. Under normal circumstances; a young child's parents play a crucial role in the achievement of their rights, along with other members of family, extended family or community, including legal guardians, as appropriate. This is fully recognized within the Convention (especially article 5), along with the obligation on state parties to provide assistance, including quality childcare services (especially article 18). The preamble to the Convention refers to the family as "the fundamental and particularly children". The committee recognizes that "family" here refers to a variety of arrangements that can provide for young children's care, nurturance and development, including the nuclear family, the extended family, and other traditional and modern community-based arrangements, provided these are consistence with children's rights and best interest[29].

Parental rights, powers and parental authority come along with corresponding duties, liabilities and obligations. As noted by Supreme Court of India parental rights cannot be exercised, availed of, demanded or granted without the corresponding duties, responsibilities and obligations per se in respect of the person or property of the minor child[30]. According to Samuel Pufendorf parental authority over children imposes on parents a care for their children. "Parents' authority over children is established when they acknowledge them, feed them and undertake to shape them into good members of

[26]UN Human Rights Council, Annual report of the United Nations High Commissioner for Human Rights and Reports of the Office of the United Nations High Commissioner for Human Rights and Secretary-General: Protection of the family: contribution of the family to the realization of the right to an adequate standard of living for its members, particularly through its role in poverty eradication and achieving sustainable development, A/HRC/31/37 (15 January 2016)

[27]Ibid, Para. 41

[28]Ibid, Para. 42

[29]UN Committee on the Rights of the Child, General comment no.7 (2005): Implementing Child Rights in Early Childhood, CRC/C/GC/7/Rev.1 (20 September, 2006) Para 15

[30]Nirali Mehta v. Surendrakumar Surana, AIR 2013 Bom 123

human society[31]." In Pufendorf's view "nature lays the obligation of raising children on the parents. The parents also undertook the laborious and expensive task of bringing them up and making them fit members of human society, and have given them the means to lead comfortable and prosperous lives. The duty of parents consists principally of properly supporting their children, of forming body and mind by an appropriate and intelligent upbringing, so that they become decent and useful members of human and civil society, honest, intelligent and of good character. They should also put them in the way of a suitable and honest occupation, and establish and advance their fortune so far as means and opportunity allow[32]. The duty of children, on the other hand, is to honour their parents, that is, to show respect for them not only by outward signs but much more in their own inner valuation of them, as authors of their life and of so many other benefits; to obey them; to take care of them, so far as they can, especially in need or old age; to do nothing of great importance without their advice and authority; and finally to bear patiently with any fretfulness or faults they find in them.[33]"

John Locke also asserts that "the power that parents have over their children arises from that duty which is incumbent on them, to take care of their offspring during the imperfect state of childhood. To inform the mind, and govern the actions of their yet ignorant nonage, till reason shall take its place and ease them of that trouble, is what the children want, and the parents are bound to.[34] " He further observed that "though the obligation on the parents to bring up their children and the obligation on children to honour their parents contain all the power, on the one hand, and submission on the other, which are proper to this relation, yet there is another power ordinarily in the father, whereby he has a tie on the obedience of his children.[35]"

4. REPONSIBLE PARENTIN IN INDIA: ISSUES AND CHALLENGES

Unlike in Western countries, particularly the United Kingdom, Australia, and Canada, parenting in India is more of a social issue than a legal one. There are no specific legal provisions or legislation that govern the child-parent relationship or outline parents' duties and responsibilities in particular. Adult offspring in India, on the other hand, have filial responsibility and are legally obligated to provide for their parents' basic needs and care for their parents under the Maintenance and Welfare of Parents and Senior Citizens Act 2007. The parental responsibility regarding their minor children is yet to be codified in the Indian legal system, as State intervention in family matters is very minimal in India. In the United Kingdom, Australia, and Canada, the law can intervene in family matters to protect a child even without the involvement of a family member or anyone else. But, in India, the parent-child relationship and child rearing are considered personal and private family matters, and the law generally comes into play when someone seeks a legal remedy in a court of law. For example, the issue of child

[31]SAMUEL PUFENDORF ON THE DUTY OF MAN AND CITIZEN ACCORDING TO NATURAL LAW ed. by JAMES TULLY 124 (Cambridge University Press, Cambridge, 1991)

[32]Ibid, p. 127

[33]Ibid, p. 128

[34]Supra note 9, Chapter VI, Para. 58.

[35]Ibid, Para 72,

maintenance arises only when there is a matrimonial dispute between the child's parents or when the parents are getting separated or divorced. Parents in India do not owe a legal obligation regarding the health, development, food, shelter or education of their children. It is mostly left to the discretion and decision of parents as to how to treat their own children.

According to Indian law, it is largely the State's duty to defend children's rights, welfare, health, and development. Parents play a very small part in ensuring their children's legal safety, and they are not held liable in court for the general wellbeing of the child. However, parents are obligated to look after their children and are expected to do so. In India, general common law, including the Constitution, human rights laws, and criminal law, all address the issue of child protection. There aren't many specific clauses that address child safety within the family or give parents direct responsibility for the welfare of the child. The Indian Constitution holds the State accountable for the welfare of children. Furthermore, making parents accountable for their minor children's acts and transgressions is a western legal trend that the Indian legal system has yet to formally adopt. However, some Indian legislation reflects the tendency towards parental responsibility. In terms of civil liability, parents are often not held accountable in tort proceedings since the parent-child relationship does not establish vicarious liability. However, in circumstances of accidents caused by minors, parents may be held accountable to pay compensation. Parents may also be required to participate in youth justice system, especially in the cases of juvenile delinquency.

In the case of *Nirali Mehta v. Surendrakumar Surana*[36] the Bombay High Court tried to explain parental duties and responsibilities in context of India with the help of Children's Act 1989 of UK. The Court noted that "the prerequisite and qualifications for applying for any custody or access to a child, even by a parent, in UK is upon the premise of 'responsibility' and not 'right'. Hence such an applicant must show and offer parental responsibility if he desires to have any contract with the child. Parental responsibility is explained in Section 3 of the Children's Act 1989 in the UK." The Court further observed that "it is imperative to note that none is granted legal 'rights' over the person of any child under any law. Similarly, the law in the UK has not granted any 'rights' over any child. The expression 'parental responsibility' under Section 3(1) of the Children's Act 1989 cited above embraces within itself any right alongside the duties, powers and responsibilities that the position of such person entails. Hence a person who, as the father of the child in this case, shirks his duties and responsibilities would have no corresponding rights over the child." The guardianship rights were also explained by the Court with reference of UK legislation as "for any person other than the parents of the child, the guardianship would be considered only in their absence. There 'rights' are similar for such guardians under Section 3(2) of the Children's Act cited above. These rights cannot be exercised, availed of, demanded or granted without the corresponding duties, responsibilities and obligations per se in respect of the person or property of the minor child. Such would be the duties only of his own guardian - the father, and in his absence, the mother.

As observed by Law Commission of India, "with rapid social and economic change, conjugal and familial relationships are becoming more complex and so are the

[36] AIR 2013 Bom 123

conditions of their dissolution. As these social changes that affect family life escalate, we need to update the laws governing the family relationships, during and after the marriage. At present, our legal framework for custody is based on the assumption that custody can be vested with either one of the contesting parties and suitability is determined in a comparative manner. But, just as the basis for dissolving marriage has shifted over time, from fault based divorce to mutual consent divorce, we need to think about custody differently and provide for a broader framework within which divorcing parents and children can decide what custodial arrangement works best for them.[37]"

The Commission rightly observed that "father is still deemed the natural guardian under both religious and secular family laws, while the mother is not. Further, in our society, equality in conjugal and family life is still a distant dream. A large number of women continue to disproportionately bear the burden of housework and childcare, even when they have a paid employment outside the home. Thus, when during the subsistence of marriage, there is no equality in parental and care giving responsibilities, then on what ground can one claim equality in parental rights over children after the dissolution of the marriage? Our Constitution and the legal framework direct the state to pursue substantive equality. Substantive equality recognizes the difference in the socio-economic position of the sexes within the home and outside of it, and aspires to achieve equality of results. We therefore reject the position of the father's rights groups on shared parenting based on the rhetoric of equal rights over children.[38]"

As noted by the Supreme Court in the case of *Yashita Shahu v. State of Rajasthan*[39] "the child is the victim in custody battles. In this fight of egos and increasing acrimonious battles and litigation between two spouses, our experience shows that more often than not, the parents who otherwise love their child present a picture as if the other spouse is a villain and he or she alone is entitle to the custody of the child." The court further noted that love and affection of both parents is a child's human right, "a child, especially a child of tender years requires the love, affection, company, protection of both parents. This is not only the requirement of the child but is his/her basic human right. Just because the parents are at war with each other, does not mean that the child should be denied the care, affection, love or protection of any one of the two parents. A child is not an inanimate object which can be tossed from one parent to the other. Every separation, every re-union may have a traumatic and psychosomatic impact on the child. Therefore, it is to be ensured that the court weighs each and every circumstance very carefully before deciding how and in what manner the custody of the child should be shared between both the parents. Even if the custody is given to a parent the other parent must have sufficient visitation rights to ensure that the child keeps in touch with the other parent and does not lose social, physical and psychological contact with any one of the two parents. It is only in extreme circumstances that one parent should be denied contact with the child. Reasons must be assigned if one parent is to be denied any visitation rights or contact with the child. Courts dealing with the custody matters must

[37]Law Commission of India, Report No. 257 "Reforms in Guardianship and Custody Laws in India" p. no. 32, Para 3.3.1 (May 2015).

[38]Ibid, p. no. 31-32, Para 3.2.4

[39](2020) 3 SCC 67

while deciding issues of custody clearly define the nature, manner and specifics of the visitation rights.[40]

Parents in India are not even legally responsible to educate their children. Parents or guardians have moral obligation under Section 10 of the RTE Act to enroll their children or wards in school and make sure they do not lose their right to an elementary education. According to the clarification issued by the government of India on the provisions of RTE Act, the Act covers a range of population from different backgrounds, for instance, child labour, children living in ecologically depleted areas where they have to fetch fuel, water, and fodder as well as perform other household chores, children living in extremely impoverished slum communities and uprooted urban dwellings, children from families who work as scavengers and other such stigmatised professions, children of itinerant or seasonal labourers who lead mobile and transient lifestyles like construction workers, road workers, and employees on large construction sites, etc.The obligation of the relevant local government and government to provide free and mandatory elementary education in a neighbourhood school should also be taken into consideration when reading this provision. The purpose of this provision is not to compel parents who do not choose to participate in free and compulsory education to enrol their children in the local school[41].

5. CONCLUSION AND SUGGESTIONS

It is clear that the family has a crucial part to play in ensuring that a child has the right to be registered with a name, to a nationality, to know as much as possible about his or her parentage, and to maintain their identity. Within the family, a child develops socialisation and acquires values related to freedom of expression and association, privacy and discipline, and the avoidance of cruel, inhuman, or degrading treatment or punishment, such as neglect, corporal punishment, sexual or verbal abuse. The family is a crucial force in promoting respect for human values, cultural identity, and other cultures, as well as human rights awareness and preservation. There is a need in the legal and societal framework of India to consider appropriate ways of ensuring a balance between parental authority and the realization of the rights of the child.

In last few decades, the jurisprudence of parenting has emerged as branch of both developmental jurisprudence as well as therapeutic jurisprudence. In India, there is an unavoidable need to address the ever evolving challenges of family and parenting issues. Parenting in India needs to be brought up within the periphery of law as for now the parenting is regarded more of a social matter than legal one. Family relations and parenting matters must be dealt with as per the norms and standards settled by international treaties and conventions. As a nation we are lagging far behind in terms of parenting laws.

There is a need of parental responsibility laws and policies in India to ensure that the best interests of children are met. Children must have the benefit of both of their parents who are having a meaningful involvement in their lives. These laws also needed to

[40] Ibid

[41] Ibid

protect children from physical or psychological harm and from being subject to, or exposed to abuse, neglect or family violence. Through appropriate parenting legislation it can be assured that children receive adequate and proper parenting to help them achieve their full potential. The parents are required to fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children. Parents in India must be made legally responsible for child welfare as without the active involvement of family and parents the protection of child rights is not possible. Parents must take prime responsibility regarding children's needs of food, nutrition, health, housing and education.

It is also needed to support parents who are raising their children in challenging situations to develop their parenting abilities and raise more reliable, well-behaved kids who will require less expensive supervision and intervention in the future. Adults who feel worried, punished, and alienated are less likely to be good parents than those who have social and practical support. The results of criminological study highlight the potential value of strengthening-the-family initiatives in the fight against youth criminality[42]. Since family, societal and contextual factors are commonly linked to juvenile offending, youth crime prevention strategies and programmes need to avoid a restricted focus on the crime. So, juvenile criminal behaviour should be seen less as a specific violation of the law and more in the context of the family's inability to teach appropriate behaviour.

[42]See Raymond Arthur, "Punishing Parents for the Crimes of their Children" 44 (3) THE HOWARD JOURNAL 23-353 (2005)

GROWING IMPLICATIONS OF METAVERSE IN HUMAN BEINGS' LIFE: A LEGAL ANALYSIS

Dr. Kuljit Singh*

Abstract

"Metaverse" is not a new concept, rather, it has its origin in an ancient Indian Epic-"Mahabharata (Bhishma Parva)". Nowadays, the same technology is being used in different fields of life of human beings, such as Advertisement, Education, Human Resource Training, Sports, Social Media, etc. Imagination is one of the functions of brain of human beings, the Central Processing Unit of a human body has capacity to imagine without any limitation on a particular subject, which might or might not exist in the real world. Physically, every Country has its own definite territory, where its own law of land (Lex loci) applies. The Developed Countries can develop the capacity to govern the world of "Metaverse", a parallel universe with enactment of the new Legal Frameworks and formulation of the new Models in future.

Key words

Metaverse, Augmentative Reality, Virtual Reality, Virtual World, Avatars.

I. INTRODUCTION

A specialist, Mr. Matthew Ball said that "the Metaverse is a massively scaled and interoperable network of real time rendered 3D virtual worlds that can be experienced synchronously and persistently by an effectively unlimited number of users with an individual sense of presence." First of all, the word "Metaverse" was introduced by writer "Neal Stephenson" in his "sci-fi novel- Snow Crash" in 1992. Currently, "Metaverse" is becoming a reality; it did not remain merely a dream. The imagination of a Virtual World, which can be felt with our human senses, where billions of people live, learn, work, interact and shop with each other, such as they are currently doing these activities in this real Globe. It is possible for human beings by remaining under their couches from their computer screens of personal places. This concept is known as "Metaverse"[1]. It is pertinent to know that "Virtual reality (VR)" is mainly a technology, which permits the users to observe by way of a "headset or other devices", so that the users can have access to "Metaverse", "a shared virtual area or a virtual environment", where Avatars

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[1]Dr. Kashif Laeeq, "Metaverse: Why, How and What," Research Gate 2 (February, 2022).

representing the persons can perform various acts without doing these activities physically, using a variety of device platforms.[2] Further, "Augmented Reality (AR)" is a technology made to enhance the reality. In other words, "AR allows the users to experience the Real World in an enhanced version, wherein one can find interactive digital elements. An AR app will facilitate visual, auditory, and other sensory interactive information in Real World ecosystems to enhance the experience for the users."[3] The term "Avatar" suggests graphical representation of a person's identity or "digital account", which is used to have access to "Metaverse". It may be manifested as an inanimate object, an animal or a person.[4] Speaking from the discipline of Physics, the term "Metaverse" is similar to or same as Metaphysics, i.e., beyond what is really present before us, but which can be perceived by our naked eyes. In this world, human beings create their own digital facsimiles or avatars, which are looked as real as human beings, which can move freely and can bear our identities and transact with other persons in "Virtual World".

II. HISTORICAL BACKGROUND

In Ancient times, concept of "Metaverse" had been reflected in an ancient Indian Epic. In "Mahabharata", the incident of giving "Divya Drishti" to Sanjay by "Rishi Veda Vyasa" [4a] for watching the war, which came into notice after going through the Epic. In the Modern Era, the same thing is known by way of Meta. The creation of the new concept was first proposed by Mark Zuckerberg, CEO of the most reputed American company "Facebook" in 2021 and he renamed his WhatsApp as 'Meta'. Recently, he also introduced the features of AR calls on messenger, thus, he increased the ambit of such concept. This is a global project and most of the technology companies are making it on a large scale by investing their huge capital therein.[5]

At present, various legal thinkers have developed "Metaverse Theory" and affirm that it is a new discipline of study that must be recognized as a separate legal field entirely, others reject this view that "Metaverse Law" is a separate legal branch, but they believed that it is a sub-discipline. "Metaverse Law" is a new subject-matter for research, hence, legal research is required to solve the arising new legal problems and to develop a new legal system. This can only be possible by studying this concept with broader approach rather than confining it only to the technologies used for the limited purposes.[6]

"Metaverse" is an old concept, but its power is now felt by various Nations, such as USA, India, Canada, and Russia and its growth is still in its developing stage. It has the

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[2] "Understanding Metaverse and Law: Challenges and Solutions", IPRD, (Oct. 5, 2024) https://www.iiprd.com/under standing-metaverse-and-law-challenges-and-solutions/.

[3] "What is augmented reality and why is it important for the Metaverse?," Blockchain Council, (Oct. 5, 2024). www.blockchain-council.org

[4] Supra note 2.

[4a] Ramkrishna Bhattacharya, "Of Mahabharata and Internet", frontier, (Oct. 5, 2024) https:// frontierweekly.com/ articles/vol-50/50-49/50-49-Of%20Mahabharata%20and%20Internet.html

[5] George Lawton, "History of Metaverse Explained," Tech Target (March, 2024). https://www.techtarget.com

[6] Suwinto Johan,"Metaverse and its Implication in Law and Business," 10 JURNAL HUKUM PROGRESIF 153-166 (October, 2022).

potential to assist an individual to resolve its problems of any kinds, whether it be social, economic, or legal. In respect of relationship of "Metaverse" with law, the meaning of law is well explained in jurisprudence by various exponents of its various schools. "According to Black's Law Dictionary, a body of rules of action or conduct prescribed by controlling authority, and having binding legal force. That which must be obeyed and followed by citizens subject to sanctions or legal consequence is a law." Now, a pertinent question arises- Is there any relationship between "Metaverse" (virtual concept) and Law? To answer this question in an affirmative or negative way, at the initial stage, there is no need for a fanciful interpretation, for the purpose, first of all, there is need to understand the types of activities, which are possible in that parallel Universe. At present, this new techno revolution is limited to the social and economic spheres, but it has the potential to facilitate urban development, places of worship, etc. Today, it is possible in this Virtual World by using VR (Virtual Reality) and AR (Augmentative Reality), there is a dire need to amend the existing laws and enact the new legislations, which deal with these subject-matters. In India, there are various economic laws, which regulate the economic affairs between the individuals, such as "the Foreign Exchange Management Act, 1999 (FEMA)", "the Prevention of Money Laundering Act, 2002 (PMLA)", and for development of Urban Infrastructure, there is an authority constituted under "the Public Works Department (PWD)". Further, if any person enters into the world of "Metaverse" and commits the economic offences by using AR devices, then it is a specific violation of economic regulatory laws and for dealing with such a situation, at present, there is no ready-made solution under any principal law. Further, by way of using "Metaverse", urban development is possible or not, it is yet to be explored. A question can be arisen- Is the jurisdiction of "Public Works Department (PWD)" maintainable at the use of Meta-tech? Furthermore, could the Places of Worship (Special Provisions) Act, 1991 apply while people are using this tech to exercise their Constitutional, Fundamental and Religious Rights mentioned under Articles 25 and 26, of the Constitution of India ?

In "Metaverse", human transactions and their legal relationships are possible. In India, there is no legislation to regulate such a situation, when any law is violated with the help of technology in Metaverse and its practical implication is felt in the Real World. There is no well-established law for governing the legal relations, which develop by using technologies in "Metaverse", universally. The circumference of this universe is narrow and limited only to some activities performed on a tech platform developed by tech giant Facebook and Microsoft following the philosophy of platformization.[7]

There are ample possibilities that the offence of money laundering can be committed in "Metaverse" by using these platforms, as businesses are growing by purchasing virtual land out of the funds evaded from the Real World. Human beings in "Metaverse" can do business as they are doing in the Real World. Further, an inference could be drawn that all rights, which are mentioned under "Part III of the Constitution of India", which are available to citizens, especially Article 19(1) (g) could be exercised in Metaverse and reasonable restrictions could be imposed in future as imposed in the Real World under

[7]Z. Allam, et. al., "The Metaverse as a Virtual Form of Smart Cities: Opportunities and Challenges for Environmental, Economic, and Social Sustainability in Urban Futures," 5 SMART CITIES 773 (July, 2022.).

the Constitution of India.[8] Whether the judgments given by the High Courts and Supreme Court of India regarding these subject-matters in the Real World could have the applicability as a precedent in the cases of Virtual World in future, it is a question of law, which needs to be addressed by the Legislature and Judiciary of the country, particularly by Supreme Court of India. If yes, then there is a dire need to amend "the relevant provisions of the Constitution of India" by Parliament in order to expand the jurisdictional extent of judgments of a Court of Law to Virtual World, if possible.[9] "Metaverse" is not bound by the Local or National laws, because the human behaviour is governed by "Metaverse Company" itself, a private entity, which governs the human relationship by its own rules. At present, there is no effective and strict interference of a Sovereign Country and its laws for governing the conduct and activities of its subjects performed by them from the Real World over the "Virtual World". In view of the above provisions, it can be inferred that there must be relationship between Law and "Metaverse" in context of regulating the affairs of human conducts, such as private affairs of entering into contract for the businesses and social interactions, but these conducts are regulated by the rules, which are drafted by the private entities and it is regarded as a creator of the "Parallel Universe" known as "Meta", where there are no limitations like the real world, where limitations can be imposed by the State in the form of reasonable restrictions on civil and political rights.[10]

A. Legal System in the Foreign Countries for regulating the Metaverse

The Countries, such as Singapore, Indonesia and South Korea, are already involved in "Metaverse" and these Countries will likely to develop their regulatory measures and technical laws in collaboration with the technology giants. South Korea's "Ministry of Science and Computers and Information Technology" and "Military Institute of Science And Technology (MIST)" had signed a Memorandum of Association (MOU) with "Groupe Speciale Mobile Association (GSMA)" in February, 2022 at Mobile world Congress (MWC), Barcelona to cooperate and develop "Metaverse norms", which can be applied nationally and internationally and to identify opportunities and issues related to it.[11] Besides, China is likely to take major steps on the development of "Metaverse". In October, 2021, China got an input regarding the lacuna of this concept and asserted that it amounts in this growing sector and the US congress is likely to take "wait and watch approach" to regulations of "Metaverse". The initial focus of congress would ensure the US Companies, so that these companies could invest in this sector by building AR and VR in order to use these technologies. Currently, "the Block Chain and Automation" are now effective in the United States.

"Privacy" is also a major question in "Metaverse" as a user requires to control over its data and "how it is collected, used, and shared". It can lead to possibility of violation of legislation of protection of data, such as "the General Data Protection Regulation (GDPR) in the European Union", it came into effect on May 25, 2018.[12] Legislations for protection

[8] The Constitution of India 1950.

[9] M. P. JAIN, INDIAN CONSTITUTIONAL LAW 1299-1316 (LexisNexis, Haryana, 8th edn., 2018).

[10] P. Kataria and D. Bothra, "Metaverse: Legality and Regulatory Concerns in India", Mondaq (May, 2022).

[11] GSMA, "GSMA PUBLIC POLICY" (March, 2023). https://www.gsma.com

[12] "What is GDPR, the EU's new data protection law?," GDPR.EU, (Oct. 5, 2024) https://gdpr.eu/what-is-gdpr/.

of the Privacy in "Metaverse" is being developed, but various legislations provide for protecting the privacy in "Virtual World", such as "the California Consumer Privacy Act (CCPA), 2018 in the United States", which provides for certain rights regarding protection of data to an individual, that is, "right to have access, correct, and delete personal information"12a. Besides, "the Health Insurance Portability and Accountability Act (HIPAA) in the United States[13] and "the Personal Information Protection and Electronic Documents Act (PIPEDA) in Canada" provide for special protection to sensitive personal data, such as Health Information.[14] A special example of the legislation for protection of privacy in "Metaverse" is "the Children's Online Privacy Protection Act (COPPA) in the United States" that regulates the collection of Personal Information from children under the age of thirteen years. It mentions that Websites and Online Services directed should obtain the verified consent of parent before collection, use, and disclosure of Personal information from Children.[15]

·"The European Union Intellectual Property Office and the United States Patent and Trademark Office" have recently issued guidelines to classify the terms, such as "Virtual Goods" and "Non-Fungible Token" and recognised IP rights in "Intangible Goods" for the first time. The change in the scope of Protection of Trademark has prompted to seek new registrations for "Downloadable Virtual Goods" and "Online Virtual Services" under the relevant class of the Nice Classification. It is notable that the significance of protection of one's trademarks in the "Metaverse" is now in the general practice of registration of trademark, for example, "filing of McDonald for registration of the mark McCafé for the services of a virtual restaurant at the USPTO."[16]

The U.S. Copyright Act, 1976 "provides for protection of original works of authorship, including literary, dramatic, musical, and artistic works, such as those that may be created in the Metaverse".[17] In addition to the Copyright Act, the Digital Millennium Copyright Act (DMCA) also "protects copyrighted works in the digital environment. It includes provisions for the safe harbour of online service providers and the notice and takedown system for removing infringing content".[18]

[12a]The California Consumer Privacy Regulation Act (CCPA), State of California, Department of Justice, (Oct. 5, 2024) https://oag.ca.gov/ privacy/ccpa#:~:text= The%20California%20Consumer%20Privacy%20Act,how%20to%20 implement%20the%20law .

[13]The Health Insurance Portability and Accountability Act, 1996, (Oct. 10, 2024) https://aspe.hhs.gov/reports/health- insurance-portability-accountability-act-1996.

[14]The Personal Information Protection and Electronic Documents Act (PIPEDA), Office of the Privacy Commissioner of Canada, (Oct. 10, 2024) https://www.priv.gc.ca/en/privacy-topics/privacy-laws-in-canada-the-per sonal -information-protection-and-electronic-documents--act-pipeda/.

[15]Children's Online Privacy Protection Rule ('COPPA'), Federal Trade Commission. (Oct. 5, 2024) https://www.ftc.gov/legallibrary/browse/rules/childrens-online-privacy-protection-rule-coppa. 16.

[16]Nayantara Sanyal and Amishi Vira, "Intellectual Property Rights in the Metaverse-Trademarks", Bar and bench. (Oct. 10, 2024)https://www.barandbench.com

[17]"Copyright Law of the United States", U.S. Copyright Office, (Oct. 10, 2024) https://www.copyright.gov/title17

[18]G. Stobbs, "The Digital Millennium Copyright Act," MULTIMEDIA SECURITY TECHNOLOGIES FOR DIGITAL RIGHTS MANAGEMENT 457– 482 (2006).

Currently, legislation for jurisdiction in "Metaverse" is being developed, but various legislations can provide for determination of jurisdiction in "Virtual World", such as "the Brussels Regulation (Regulation (EU) No 1215/2012) in the European Union"[19] and "the Federal Courts Jurisdiction and Venue Clarification Act, 2011 in the United States" provides rules for determination of jurisdiction in cross-border disputes.[20] Besides, "the Convention on Cybercrime (also known as the Budapest Convention), adopted by the Council of Europe", provides for international cooperation in investigation and prosecution of cybercrime.[21] It is pertinent to mention that if there is a new legislation enacted for "Metaverse" and regulates the cybercrimes between two countries, it would be complicated due to "nature of cross-border investigation and different legal frameworks of each country".

B. Relevant Foreign Case Laws

In the case of Hermes International v. Rothschild,[22] in February, 2023, after the various days trial, a Federal Jury unanimously decided that Rothschild violated the right of trade mark of Hermes and was guilty of cybersquatting. The jurors found that the NFTs were not protected speech under the First Amendment to the Constitution of the United States. The Jury awarded the brand $133,000 in compensation. The compensation consisted of $110,000 of estimated profits from sales of Rothschild's NFT and $23,000 for cybersquatting for registering the metbirkins.com domain. Subsequently, in June, 2023, Judge Rakoff followed up the Jury's decision by issuing a permanent injunction blocking Rothschild from promoting and profiting from the MetaBirkin's NFTs. "Judge Rakoff took into notice that Rothschild would have been entitled to protection of First Amendment to the Constitution of the United States, if the Jury had found even a modest semblance of artistic expression in his work but instead, in fact, the jury found that Rothschild was a swindler purely".

In *Yuga Labs, Inc. v. Ripps case*[23], a knockoff collection of NFTs was using the "Bored Ape Yacht Club" trade mark, the District Court conducted a bench trial on July 31, 2023 protection under First Amendment to the Constitution of the United States (Protection of Free Speech), and normative fair and affirmative defence of unclean hand as well as defendants' counterclaim for misrepresentation of infringing activity. Further, "under the Lanham Act for false designation of origin and cybersquatting, District Court granted Yuga Labs Inc., creator of Bored Ape Yacht Club NFT collection, $1.375 million in disgorgement of profits and $200,000 in statutory damages as well as permanent injunction, attorneys' fees and costs against Ripps, creators of knockoff collection of NFTs".

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[19]Dr. Otto Schmidt, "Regulation (EU) No. 1215/2012 of the European Parliament and of the Council, 12 December, 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Re- cast)," Brussels Ibis Regulation.

[20]The Federal Courts Jurisdiction and Venue Clarification Act, 2011, (Oct. 10, 2024) https: //www. congress. Gov //plaws/publ63/PLAW-112publ63.

[21]Budapest Convention–Cybercrime, (Oct. 10, 2024) https://www.coe.int/en/web/cybercrime/the-budapest-conventon.

[22]22-cv-384 (JSR) (S.D.N.Y. Jun. 23, 2023).

[23]CV 22-4355-JFW (JEMx) (C.D. Cal. Oct. 26, 2023).

In the case of *Nike, Inc. v. StockX LLC*,[24] in the year 2022, Nike filed a lawsuit against StockX, an online marketplace for reselling sneakers and other articles. The dispute related to StockX's Vault NFTs, digital tokens linked to physical products kept in StockX's Vault. Nike claimed that these NFTs, which took images of Nike-branded sneakers, violated its trade mark's right and created confusion among consumers. On the other hand, StockX contended that its Vault NFTs were simply digital receipts showing ownership of physical articles kept safely. It claimed that these NFTs offer the collectors' convenience and security making sure the authenticity and reducing the risk of fraud.

"Nike accused that StockX was selling the fake Nike sneakers and also challenged authentication process of StockX's. Initially, lawsuit stressed on violation of trade mark, subsequently, the lawsuit includes claims of counterfeiting and false advertisement after finding the fake shoes. If the court is in the side of Nike, NFTs can be seen as standalone products, which must observe strict law of trade mark. It means companies would require permissions and licenses expressly to utilize the branded images and names in their NFTs. On the other, if StockX wins, it would make sure that NFTs can act as digital receipts for physical articles. Furthermore, it could provide for new opportunities for leveraging NFTs in the market of sports memorabilia, and offer fans a secure and transparent way to purchase, sell, and trade the collectibles. Two questions arise here- (a) Will NFTs require strict control of trade mark? and (b) Can they be operated as Digital Receipts without requirement of permission of branding expressly? The answers of these questions could be obtained after the decision of the case of Nike v. StockX".

C. The Indian Legal System for regulating "Metaverse"

The Metaverse is an attempt to increase the ambit of our experiences in areas, such as social interaction, productivity, health care and social well-being by using the "Virtual Reality (VR)" and "Augmentative Reality (AR)" on online platforms by the power of the Internet. However, this futuristic techno 3D advancement raises concerns around the circle related to the issues of vital importance, such as Data Protection, Intellectual Property Rights (IPRs), Social Interactions and Crimes in the Virtual World. Due to increase in investment by the Tech Gants, such as Meta and Google, in developing the Metaverse, every citizen is ready to invest in a financial company like IX Global, which is using this technology in finance. It requires a Country to take notice of and sustainably regulate these activities to avoid the misuse of this boon across all the Countries at the start of a new era, and in order to cope with these new problems, a certain policy is required to be formulated.

The most important issue in using Meta Tech is Protection of Data, after filling the personal information at the relative platform by the users, there is a question- How will the users' data be protected? In future, it cannot be misused by the Tech Company, which operates this virtual platform. In respect of India, the existing data protection system is governed by a set of rules under the "Information Technology Act, 2000". Under a particular rule,[25] "a Company shall provide a privacy policy for dealing in personal information including sensitive personal data and ensure that the same are available for

[24]CV-00983 (VEC) (SN) (S.D.N.Y. Jan. 9, 2023).

[25]The Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011, rule 4.

view by a provider of information under lawful contract. Such policy shall be published on its website and shall provide for clear and easily accessible statements of its practices and policies, type of personal or sensitive personal data collected, purpose of Security and Privacy Concerns: In Meta Platform, there are the possibilities of sensitive personal data leakage. Clicking on "the Cookies Option" on the website make the data of a person user-friendly. Such a situation requires a type of strong protection policy. Since this platform gathers information connected to mind and body of the users, such as Biometric Data Collection for Aadhar Card and Pan Card, this would come under the definition of "Sensitive Personal Data or Information" under a rule of the IT rules, 201125a. The IT Act, 2000 empowers the Government to issue orders in order to authorize the interception of information to "ensure the Security, Sovereignty, or Integrity of the Sate".[26] By way of application of this provision of the IT Act to the Meta technology, the Government can monitor the data in environment of "Metaverse," and if it is proved that it is against the aforesaid parameters, then an action could be taken by the concerned authority and can pass an appropriate orders to remove the information inserted in the Meta platform and the company can be penalized for violating the laws. In "Metaverse," it is expected that the law would make its entry in such a way that could strike the balance between the individual and social interest following the theory of Roscoe Pound of social engineering. Until today, it is a dream, because the controlling power is not in hands of the "State", directly, but it lies with "the CEO of the Tech Company Meta." It is pertinent to mention that approximately "80% of users of Metaverse are younger than sixteen years," it suggests us that "Virtual World" is influencing the new generation and they are aware about circulation of their personal information to some extent, which may lead to cybercrime. Hence, it is the sine qua non to enact a legislation to protect the data in "Metaverse". "The Digital Personal Data Protection Act, 2023"[27] has provisions to protect the privacy of individuals, children or a disabled person. It also regulates the collection of personal information from the persons under eighteen years or the disabled persons. The provision provides for compulsory "Verifiable Parental Consent" before collection, use, or disclosure of personal data of children or the disabled persons from websites or online.

Infringement of Intellectual Property Rights: Since the introduction of Metaverse in technological hubs, the market for virtual products has witnessed an expansion, starting from a fashion company Nike to Adidas, in apparel, users are very interested to expend real money on "Virtual Fashion Article" for their "Avatars". "Metaverse" has experienced the accusations of a wide range of trade mark infringements, due to the unrestricted trading conditions, hence, the virtual products can be copied. Businessmen are now concerned with the extension of their trade marks to their online media. It is notable that "Reliance has completed registration in India for Ajio Luxe (Application bearing number 5248715 in class 9 with the Indian Trade Mark Registry) to be utilized in "Metaverse" for virtual footwear and apparel." Now, it appears that owners of big brands are rapidly noticing the requirement to protect their trade marks in not only the physical world, but also in the "Virtual World". "Though the Nice classification provides scope to register for

[25a] Id., rule 3.

[26] The Information Technology Act, 2000, sec. 69.

[27] Supra note 4; The Digital Personal Data Protection Act, 2023, sec. 9

protection of the Virtual Goods in India, there is no particular exhaustive Municipal Law to protect the trade marks in Metaverse in case of infringement."[28]

Furthermore, the Legislation for the protection of "Intellectual Property Rights" in India are silent, for example, "the Copyright Act, 1957" and "the Trade Marks Act, 1999". There is an immediate requirement to amend these laws as they currently deal with the issue of infringement at the physical level, not at virtual level. Though, the issue of infringement is currently handled by the "Block Chain Technology", which is a temporary and substitutive solution for the companies, but not a permanent one, for which certain regulatory measures are required to increase the ambit of the laws, which protects the creativity of the citizens.

No law for expanding the Jurisdiction of 'State': Since the concept of "Metaverse" is at growing stage, but it may be possible that developed countries could form a parallel Universe to expand their rule of law, but in respect of India, who is not an expansionist State, can make a vision of expansion of its dominion over that parallel world, it can only be possible, if the Central Government starts working on it by creating its own Meta like Techno Company and enacts an appropriate legislation to govern it, at present, it is a big dream for us.

(b) A Recent Landmark Judgment in India:

In *Digital Collectibles Pte Ltd. v. Galactus Funware Technology Pvt. Ltd. case*, the Delhi High Court had an opportunity to analyse the impacts of Non-Fungible Tokens or NFT-based digital player cards in respect of Intellectual Property Rights in India. While the judgment appears to be confined to the scope to assessing the right of publicity in India, it has far-reaching implications for the regulation of NFTs, beyond just the skill-based online gaming sector and fantasy sports. Actually, it is the first example of the Indian Higher Judiciary recognising the challenges of NFT technology through a legal dispute. Under such circumstances, the Delhi High Court considered the key technical aspects of NFTs in a comprehensive way and passed a well-reasoned decision rejecting the plea for issuing the injunction against a "Fantasy Sports Game" for using NFT-based digital player cards. The High Court correctly observed that NFTs are only an underlying technology designed to make sure the security and authenticity as a means of proof of ownership and maintenance of an irrefutable record of transactions. The Court noted that this technology was freely available to any person, and no person could claim to have an exclusive right over the utilisation of NFTs. Ultimately, the creation of an NFT does not, by itself, mean the existence of a valuable asset, but, it is the value of the underlying asset, to which the NFT relates, which decides the value.[29]

IV. LEGAL CHALLENGES AT THE TIME OF USING THE METAVERSE

There has been much discourse about the "Metaverse" in the field of Science and Technology, but the Techno-Legal Research Articles are less on this subject-matter. It was reported as late as May, 2021 that attention from legal practitioners is nascent in this area. When a person is using "Metaverse", one of the issues arises as to whether a

[28] Supra note 16.

[29] Judgment delivered on April 26, 2023, 2023 DHC 2796

feeling developed by an Avatar for another Avatar in the Virtual World would really transmit in the Real World. If it is possible, then a probable legal complication could arise in front of the administration, for example, when a Male person by using his Avatar develops a feeling towards another female person's Avatar against her will, it results in commission of a sexual offence punishable under the criminal laws of a Nation, such as, "the Protection of Children from Sexual Offences Act 2012 (POSCO)," and "the Bharatiya Nyaya Sanhita, 2023 (BNS)" in India. Would a person, who commits such an act in "Metaverse", by using a tech platform, liable under the Criminal Laws of land? Thus, it presents a problem of Real-World" with the Meta, because it may be possible for people to experience a whole range of emotions in the "Metaverse" without interacting with another person in the Real World.[30]

When users interact with their Avatars for commission of a particular act by violating the law, there would be a situation, where some sort of messes could occur during interactions, this situation could be the same as violating the law by the persons directly, if they interact with each other in the Real World. Such incidents could be under tort, which covers the damages or crimes under criminal law, which punishes an offender for commission of the crime (mens rea and actus reus).The legal issue is as to whether an Avatar violates the law or a natural person would be punishable for the act done in the Virtual World. A probable solution to this issue would be that a legal system might make that Avatar liable by imposing some legal liabilities on it, but such liabilities would be complicated as an Avatar is not capable of holding rights and duties and cannot be recognized as a legal person. There are no standards or criteria available to distinguish between an Avatar and a natural person, who operates that Avatar.[31]

In India, "the Company Act, 2013" creates a legal fiction in respect of a company and the company is regarded as a separate legal entity distinct from its shareholders, and if any act is committed by its shareholders in the name of the company, then applying the Doctrine of alter ego and Corporate Veil[32], the alter ego of the company i.e., the shareholders and directors become liable for the act committed by them in the name of the company. The same reasoning could be applied in case of an Avatar, it could be recognized as a separate legal person by the law distinct from a natural person, who has created them, and if any act is committed by that avatar in the Virtual World, then a person, who has created it i.e. the very alter ego behind that avatar would be liable for the acts done by the Avatar.. There is no such similar doctrine propounded like the doctrine aforesaid under the Company Act, which would provide a legal personality distinct from a creator of an Avatar. One more legal issue, which often comes in the way of the legal system of various jurisdictions, is as to whether an Avatar should be granted the same rights as a human being possesses in this real world. Logically, there are certain rights provided by the Statues and the Constitution of a Country, which are enjoyed by a natural person by his consciousness of mind, if in the near future, it is presumed that an Avatar could possess a type of consciousness distinct from the natural human beings and accordingly in spite of receiving the commands from their respective

[30]Arian Dizaji and Ali Dizaji, "Metaverse and its Legal Challenges", 5 SYNESIS e2395-141 (2023).

[31]B. C. Cheong,"Avatars in the Metaverse: Potential Legal Issues and Remedies,"3 INT. CYBERSECURITY LAW REV. 4 (June, 2022).

[32]DR. N.V. PARANJAPE, COMPANY LAW 80 (Central Law Agency, Allahabad, 9 th edn., 2018).

human beings, then a legal system needs to determine and resolve such an issue, which is very crucial, sensitive and far reaching consequences.

Most of the Companies, which are in "Virtual World", they need to protect their trademarks, such as "Second Life, Minecraft, Roblox, and World of Warcraft". They have developed "Terms of Service Agreements" for their users. These agreements particularly specify the Rules and Regulations to have access to "Virtual World" and rights and obligations for "Company and Users". Further, "Virtual Reality (VR)" Companies use several ways under the Terms of Service Agreements to make sure that users have the safe and enjoyable experience in their "Virtual World". The common way is "User-Reporting", where users can report about other users, who have violated the "Terms of Service Agreements". Subsequently, a company investigates and takes an appropriate action, such as "warning or banning the offending users". Some "VR Companies" use automated systems, such as "Machine Learning Algorithms" to detect and flag the possible violation of the "Terms of Service Agreements." Furthermore, some Companies have "Moderation Teams", which monitor the "Virtual World" for violation and act accordingly. Some "VR Companies" also use "Third-Party Software", such as "Anti-Cheat Programmes for finding and prevention of cheating or hacking in the Virtual World". Besides, there are some other platforms, which have their own "Terms of Service Agreements" to regulate the behavior of users and to safeguard the rights of Company and users. These agreements make rules for availing the platforms, and prohibiting the activities, such as "cheating, hacking, hate speech, and sharing personal information."[33] Some platforms have also started to safeguard the users from such activities, for example, "in Meta's Horizon, Avatars can activate a Safe Zone to create a protective bubble around themselves, where they cannot be touched, spoken to, or interacted with by other users" [34] It is notable that most of "Gaming Platforms" in "Metaverse" have drawn the attention of users, who are minors, which results in increasing the violent actions and abuses against them, such as "cyber bullying and sexual harassment." These crimes are completely distinct, therefore there should be a competent Legislation for the world except "Terms of Service Agreements" and existing various Cyber Laws.

V. SCOPE OF METAVERSE AND ITS EXPANSION IN FUTURE

The present circumference of this notion is narrower one, which has extended only to some aspects, of this virtual world, such as Horizon Home, AR (Augmentative reality) Calls, Gaming Sectors, Education, Virtual Stores, Fitness, Future of Work and minor surgical operations of Medical Sector. All these amenities can be felt and sensed in this virtual world by using some of the technologies such as "VR (Virtual Reality) headsets", and "AR (Augmentative Reality) glasses". There has not been much research-work of the affairs regarding "Metaverse." It is pertinent to mention that this notion has wider scope and can be analysed in the ideology of making a parallel world and establishing a rule over the Virtual World by using Computers as a medium to convey the commands followed by the users in the sense of Law. In this context, the Developed Countries, such

[33]Maria Kalyvaki, "Navigating the Metaverse Business and Legal Challenges: Intellectual Property, Privacy, and Jurisdiction", 3 JOURNAL OF METAVERSE 90 (2023).

[34]Sukanya Majumdar, "Online Harms and Safety in the Metaverse", Bairstow, (Oct.12, 2024) https://www.bristows.com/news/online-harms-and-safety-in-the-metaverse/.

as America, Russia and China have the vision of expansion of their dominion over "Metaverse," which is not tangible, but can only be felt by the senses of the human beings. The idea of expanding the State in the real world is at its peak. Such ideology would be used for controlling the "Metaverse," thus, time would come, when the powerful countries would extend their territorial laws (*Lex loci*) to the parallel Virtual World. By using a medium of computers, these countries will invite a citizen of other countries to join this Virtual World and to become the subject of their own countries ultimately, where the same law of the countries will apply as it applies in the "Real-World."

It might be possible that a person can acquire the "Virtual Citizenship" by creating "a Virtual ID? and password in order to log in such a "Virtual World". The country America started working India, if the Government of India focuses on such Imagination, it could be possible, where all the amenities and services could be rendered by the State in a Virtual World by fulfilling the objectives mentioned under the Preamble to the Constitution of India following the ideologies of Socialism and Welfare State. For the purposes, there is a dire need to amend the present laws, most importantly, "the Information and Technology Act, 2000", which deals with the subject matter of technology. If the country India intends to create a new "Virtual World", where the State has its own rule of law, then it has to seriously work on it with complete research work in the areas of Jurisprudence, Constitution and application of laws[35]. Besides, "the Law Commission of India" has to conduct the research on this subject-matter to materialise this big dream abovementioned.

VI. CONCLUSION AND SUGGESTIONS

From the abovementioned provisions of the Article, it can be inferred that the new technologies have the potentials to transform the human lives and pattern of living. Presently, its ambit is narrow and limited to the economic and social spheres, there might be possibility that its unrealized power can be realised in the near future and then, the Developed Countries, such as USA, Russia and China, by using the new technologies, will create a parallel Universe, where everything is possible at the touch of a button and its implications could be felt in this Real World. Furthermore, the creation of "Metaverse" brings the complicated legal menaces in the "Virtual World" in lack of the competent legislations for its governance, therefore there must be the well-established legislations to regulate the "Virtual World". Eventually, enactment of an exhaustive universal legislation to regulate the "Metaverse" is challenging, but it is the sine qua non to address it immediately for safeguarding the privacy and rights of the users.

There are the following suggestions in order to regulate the affairs of "Metaverse":

As "Metaverse" cannot be restricted to "Geographical Borders", it would lead to chaos about the "jurisdiction and application of legislations" and rules and regulations made by various countries in the world. A competent uniform legislative system must be adopted and executed globally, which must address the aforesaid issues and prevent the conflict of various "Municipal Laws" in the world.

[35]Dr. Radhey Shyam Jha, Dr. Nidhi Tyagi and Dr. Manya Gupta, "Metaverse and Virtual Society: Socio-Legal Challenges", 75/3 GURUKUL PATRIKA 200 (2024).

- There are possibilities that the users can make and sell Digital Duplications of the articles and goods of "Real-World" in "Metaverse" without any authority, which are branded with the trademarks of "Real-World". It is challenging to protect the trade marks across various jurisdictions of the States, therefore, there should be a competent unified legal framework to provide a mechanism to the brands' owner to take legal action effectively and to prevent and punish the infringers globally.
- Additionally, it is the sine qua non for the legislatures of the various countries to regulate the affairs of "Virtual World". The Legislatures require to make the "Domestic Laws, Rules, and Regulations" in such a way, so that they can regulate and cause to show the "unlicensed and unauthorized trademarks" in all digital platforms and "Metaverse".
- The "Virtual World" attracts a large number of persons as the users including minors, who involve in social interactions and commercial transactions by doing various acts and repose trust in various platforms, their privacy, rights and security should be protected by way of enactment of a competent unified legislation.
- After considering the significance of legal implications of "virtual commerce and property rights", it is observed that there should be commercial relation between "Virtual World and Real- World". "Virtual Assets", such as "Avatars" and "Virtual Property", hold value of "Real-World", therefore, there is need of protection and recognition of "Avatars" and "Virtual Assets", legally and globally.
- There is a possibility that a criminal act of an offender in "Metaverse" can violate the privacy of an individual and can cause harm, there is requirement of a stringent unified legislation to regulate the criminal act and punish a convict, if found guilty.

Besides a competent uniform legislative system, the Developing Countries including India must develop their own Operating Systems (OSs), therefore, a Developing Country must enact and execute its own competent Laws, Rules and Regulations to regulate the affairs of "Metaverse".

AGAINST THE SOVEREIGNTY INTRANSIGENCE IN TRANSBOUNDARY ENVIRONMENTAL HARM CASES

Swati Singh Parmar*

Abstract

The pivotal sense in which the environment is quintessential for human existence, environmental concerns have never been the pivot for humans in the similar sense. Environmental concerns— in that sense and gravity—are placed at a low pedestal in epistemological discourse. Environment finds its 'rhetorical' place in some educational degree courses and its 'aesthetic' place in paintings and alike fields. Beyond these, environment has been pushed as a peripheral concern— one that is invoked or surfaces occasionally as conference theme, during natural disasters, or other such sporadic events. When we think of environment at international plane, one is confronted with technical legal issues that make realisation of protection of environment even more complex. International environmental law did not develop with the 'vigour' and at a 'pace' like that of other domains of international law (such as international economic law, trade law, law of seas). It has tangled itself in fundamentally complex questions of jurisdiction in cases of cross-boundary or transboundary issues. Transboundary environmental issues have harnessed a prominent worry among the thinkers as well as state leaders. The concerns of 'state sovereignty' add to its legal and political complexity. The universalised statist view of international environmental law presents a competing ground for state sovereignty and transboundary environmental harm, thereby deflecting a possibility of finding a common ground.

Key words -
Transboundary harms, Development, Sovereignty, State responsibility, universal jurisdiction.

I. INTERNATIONAL BORDERS AND THE ENVIRONMENT: AN INTRODUCTION

Let us assume a situation. State A builds a nuclear powerplant in a province that shares an international boundary with State B. The nuclear powerplant owner flouted the environmental norms and deflated the environmental impact in its Environment impact assessment for a smooth and swift establishment of the plant. The environmentalists of State A alarm the government against this and its serious ramifications in case of any crisis in or by the plant. Due to flouting the safety measure norms and use of sub-standard mitigation gears, one of tankers with radioactive substance explodes, killing two hundred people of State A. Within a week of the explosion, there were unexplained deaths of several people in State B's province that shared its boundary with the province

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of State A where the plant was situated. Upon series of thorough enquiries and tests, the government of State B concluded that the water stream of State B was contaminated with the radioactive substance flowing from State A after the date of explosion in the State A's nuclear power plant. Suppose there is no legal principles to govern such environmental harm permanently disparaging a water stream of a State by an act in other State. What recourse do people of State B have? What can State B do? Was there any responsibility on State A to have taken possibly preventive measures? Can State A be held liability for its action/inaction for this? Does an explosion of such magnitude reach the threshold of 'severity' to hold State A liable by State B? If yes, which principle/theory may justify it?

This hypothetical problem lays down the central argument of this paper. The three major concerns to be dealt in this paper include: State responsibility to take preventive measures, state liability in such cases of transboundary harms[1] in the backdrop of thoughtless rampant development.

As a global common[2], environment poses profound challenge on international law and its agencies specifically in cases of transboundary harm. The laws on transboundary environmental harm have largely remained customary. One of the most contested yet widely acknowledged and celebrate principle to check exploitation of 'global commons' is the 'common heritage of humankind' principle[3]. Early scholarship on state sovereignty has considered the environment within a state to be under "absolute" authority of the state to "exploit", but recently transboundary harms are considered as elements of comprehensive security[4]. The state sovereignty's stance poses the strongest resilience to the treatment of environment (within a state's territorial limits) as a "global common".

In this milieu, striking an optimal yet achievable balance between international environmental law and state sovereignty compulsions, in cases of transboundary environmental harm, may be tricky-and this is the motivation of this paper. This paper attempts to showcase the inherent tensions between state sovereignty and transboundary harm. It further aims to search a common ground of co-existence where state sovereignty cedes its territory, with the agency of the 'responsibility' paradigm of sovereignty, to transboundary environmental concerns. This paper is divided into six parts. The first part introduces the transboundary harm and its underlying complexity through a hypothetical situation. The second part brings to the fore the narrative of development with the capitalistic logic and its placement at the centre-stage. The third part traces the sedimentation of the idea of sovereignty in early times, and the ramification of its intransigence of sovereignty on environment. It further analyses the Sovereignty-rooted principle of Permanent Sovereignty over Natural Resources and the concept of 'good neighbourliness'.The fourth part showcases a few incidents of

[1]For a detailed account of perspectives, aspects, kinds, and rules on and of Transboundary harm, see XUE HANQIN, TRANSBOUNDARY DAMAGE IN INTERNATIONAL LAW CUP 2003.

[2]For a nuanced understanding of international law dealings on global commons, see SUSAN J. BUCK, THE GLOBAL COMMONS, AN INTRODUCTION(Island Press 1998).

[3]See generally Karin Mickelson, Common heritage of mankind as a limit to exploitation of the global commons, 30 EJIL, 635-663(2019).

[4]G. Sjöstedt, 'Transboundary Environmental Problems: Risk Analysis and Practical Lessons' in L. HEDEGAARD ET. AL. (eds.), THE NEBI YEARBOOK187 (Springer 1998).

transboundary environmental harm to reveal the intricacies of such environmental harms. The fifth part attempts to find a common ground for the competing claims of state sovereignty and environment. The sixth and final section conclude the issues discussed in the five previous parts.

II. THE DEVELOPMENT NARRATIVE

The idea of development and modernity, through the agency of globalisation phenomena, has pushed the humankind into a developmental race[5]. Globalisation has its supporters, who regard it to be a channel of poverty reduction and betterment of human life, while the globalisation sceptics see it as an agency of capitalism, inequality[6], environmental destruction, and growing poverty[7]. Scholars have revealed the linkages between globalisation and poverty[8], but for States, globalisation remains a eulogized venture to promote capitalist inclinations under the tag of 'development economics.' For instance, a scholar highlights that globalisation "has been facilitated by the reconfiguration of capitalism and by the transmission and reproduction of deeply embedded social hierarchies and prejudices rooted in a past characterized by territorial concepts of belonging and notions of civilization that both generated and were generated by racial inequalities"[9].

The terminology of development, including "poverty reduction", "participation", and "empowerment", create justification and legitimisation for international developmental policies[10]. Arturo Escobar presents a provocative account of how developmental narrative creates a pervasive control apparatus similar in magnitude and tone to colonial counterparts[11]. On a statement by the Department of Social and Economic Affairs, United Nations in 1951, on the necessity of development, Arturo Escobar maintains:

"The statement quoted earlier might seem to us today amazingly ethnocentric and arrogant, at best naive; yet what has to be explained is precisely the fact that it was uttered and that it made perfect sense. The statement exemplified a growing will to

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[5]See generally E CREWE & E HARRISON, WHOSE DEVELOPMENT? AN ETHNOGRAPHY OF AID(Zed Books, 1999).

[6]See generallyGERALD M MEIER, THE IMPACT OF GLOBALIZATION, BIOGRAPHY OF A SUBJECT: AN EVOLUTION OF DEVELOPMENT ECONOMICS (Oxford University Press 2004)

[7]For a brief account of prospects and consequences of globalization, seeGoldin, Ian, 'Globalization and development' in DEVELOPMENT: A VERY SHORT INTRODUCTION, VERY SHORT INTRODUCTIONS (Oxford University Press 2018);

[8]Ann Harrison, 'Globalization and Poverty: An Introduction' in ANN HARRISON (ed.), GLOBALIZATION AND POVERTY (The University of Chicago Press 2007);

[9]Deborah A. Thomas & M. Kamari Clarke, Globalization and Race: Structures of Inequality, New Sovereignties, and Citizenship in a Neoliberal Era, 42 THE ANN. REV. ANTHRO. 305, 305 (2013).

[10]A. Cornwall& K. Brock, What do buzzwords do for development policy? A critical look at 'participation', 'empowerment' and 'poverty reduction',26 THIRD WORLD QUAR. 1043 (2005). doi: 10.1080/01436590500235603.

[11]ARTURO ESCOBAR, ENCOUNTERING DEVELOPMENT: THE MAKING AND UNMAKING OF THE THIRD WORLD (Princeton University Press 2012).

transform drastically two-thirds of the world in the pursuit of the goal of material prosperity and economic progress. By the early 1950s, such a will had become hegemonic at the level of the circles of power."[12]

Despite such compelling accounts revealing the role of development narrative in creating, sustaining, and furthering imperialism, international law and the modern global order continue and preserve this eulogization by evaluating States on the scales of development. Ntina Tzouvala in her pioneer work 'Capitalism as Civilisation: A History of International Law', shows the inexplicable, and often invisiblised, link between capitalism and imperialism[13]. She reveals the links between " 'the standard of civilization' and the spread and consolidation of capitalist relations of production and exchange"[14]. She demonstrates how the 'standard of civilisation' "oscillated between the two logics", "logic of improvement" and "logic of biology"[15]. She argues that "these two logics have co-existed in international legal argumentation since the nineteenth century, mapping the contradictions of imperialism as a specifically capitalist phenomenon of unequal and combined development that tends to generate both homogenisation and unevenness on a global scale[16]."

Despite the sporadic theoretical confrontations, there has been unprecedented industrialization, technological advancement, and agricultural interventions, that have far-reaching, sometimes irreversible, ramifications on the environment. In cases an environmental harm originates where factories and industrial establishments are situated at or near the international borders, the environmental harm is transported to neighbouring states as well-that opens a pandora box of complexity of competing claims of state sovereignty and environment.

III. THE EARLYINTRANSIENCE OF SOVEREIGNTY AND ITS RAMIFICATIONS FOR ENVIRONMENT

The concept of sovereignty, in its earliest and crude sense, accords absolute control over one's territory and its resources to the exclusion of others[17]. It has even been considered as a "grundnorm" of the international society,[18] though now it is not treated as sacrosanct it was earlier[19]. This absolutist conception defies any space to transboundary concerns from other states, rather such an instance might be seen as a transgression of one's sovereignty in early times.In his article, The Antecedents of 'Sovereignty as Responsibility', Glanville argues, ". . . sovereignty was established sometime around the 17th century and, since that time, states have enjoyed 'unfettered' rights to self

[12]Ibid at 4.

[13]NTINA TZOUVALA, CAPITALISM AS CIVILISATION: A HISTORY OF INTERNATIONAL LAW (Cambridge University Press 2020).

[14]Ibid at 44.

[15]Ibid 44-87.

[16]Ibid 45.

[17]This exclusion of other States and actors is a hallmark of Westphalian absoluteness of sovereignty. See S. D. KRASNER, SOVEREIGNTY: ORGANIZED HYPOCRISY 9 (Princeton University Press 1999).

[18]C. Reus-Smit, Human Rights and the Social Construction of Sovereignty, 27 REV. OF INT'L STUD.519 (2001).

[19]See J. Chopra &T. Weiss, Sovereignty Is No Longer Sacrosanct: Codifying Humanitarian Intervention, 6 ETHICS & INTERNATIONAL AFFAIRS 95(1992). doi:10.1111/j.1747-7093.1992.tb00545.x

government, non-intervention and freedom from interference in internal affairs"[20]. The absolute sovereignty thrusts upon the absoluteness of the state authority over its territory, resources or any other.

III. 1. Roots of the 'Permanent Sovereignty Over Natural Resources' principle in sovereignty

The principle of Permanent Sovereignty over Natural Resources, adopted by the United Nations General Assembly Resolution 1803[21] in the year 1962, sediments this position of States in a non-negotiable paradigm. This non-negotiability of the Permanent Sovereignty over Natural Resources principle is a product of the decolonialisation-born out of the fear of recolonisation- when the principle was being ideated. For sustaining the liberation and independence of the decolonised states, the principle of embodies "full and absolute" rights to the States in matters of natural resources over their territory[22]. It legitimises, to an extent, excessive use, and exploitation of one's natural resources, even if it casts serious environmental harm to any other state. If viewed through the lens of a state's sovereignty, environmental harm within its territorial limits has deflated harm. Only a change of lens that projects environmental harm within a State's territorial limits casting harm on other states and hence, globally-would give a better and appropriate panorama. Echoing the same, a scholar highlights,

"Environmental interferences in one state affect ecosystems in other states. We have no exact knowledge of how these chain effects happen or what their consequences are. It is often times very difficult to gain a complete understanding of the cause and effect relationships between environmental intervention and environmental destruction. Environmental interventions are seemingly unproblematic and harmless viewed in isolation."[23]

The interpretation of principles in isolation are not only myopic but also are a disregard to the exact principle of the other neighbouring States, especially in case of a transboundary environmental harm. A narrow interpretation of the Permanent Sovereignty over Natural Resources principle is sustained by its legal status. Nicolai Nyland highlight this, "States can also interpret their international environmental obligations narrowed, or completely disregard them. The legal basis for this is the sovereignty principle, which means that states are not subject to the will of other states."[24]

There have been sincere steps taken by the United Nations and other international organisations to codify the global environmental law into treaties and conventions but

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[20]L. Glanville, The Antecedents of 'Sovereignty as Responsibility, 17 EUR. J. INT'L REL. 234(2011).

[21]United Nations General Assembly Resolution 1803 (XVII) of 14 December 1962, "Permanent sovereignty over natural resolution", 1962.

[22]See PHILIPPE SANDS & JACQUELINE PEEL, PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW 11(Cambridge University Press 2012).

[23]Nicolai Nyland, Ought states to be legally obliged to protect the sustainability of the global environmental system?, 2 NORD. ENV'L. L. J.(2019).

[24]NICOLAI NYLAND, ARE STATES INTERNATIONALLY COMMITTED TO PROTECTING THE ENVIRONMENT, Doctoral dissertation, (University of Oslo, Unipub publisher 2009).

the efforts are still in fluid state. Some nations have arrangements of such nature for environment protection but they are majorly aspirational in nature. Also, most of the decisions of the international environmental law cases have eventually led to the fading of the concept of permanent sovereignty.

III. 2. The 'good neighbourliness' in transboundary environmental harm

Ever since the establishments of the United Nations, the usage of the term 'good neighbours' in its Charter's preamble[25] has rooted the concept of 'good neighbourliness' in international law[26] as a scale of value. It has expanded in its role as a legal obligation expected to be observed in the state conduct[27]. The 'good neighbourliness' principle has a special relevance in international environmental law.

Rüdiger Wolfrum claims that there is a sense of obligation upon the states that transfrontier harm should not be caused[28]. Fitzmaurice and Elias underline its fundamental role in shared resourced between states[29]. Justice Weeramantry in his celebrated dissent in the Advisory Opinion of the *Legality of the Threat or Use of Nuclear Weapons*[30] underscored that the 'good neighbourliness' principle was one of the touchstones of the modern international law and casts a general duty as per the United Nations Charter's words. Hans Kelsen even argued that as a principle of international law, 'good neighbourliness' should have been placed in the explicit wording of the United Nations Charter[31]. Though it did not find place in the Charter as a principle, several state obligations can be traced to the 'good neighbourliness' concept[32].

Though this theoretical relevance of the 'good neighbourliness' concept must be confronted with the realities of the praxis. The concept is regarded as customary rule of international law, but represent Daniel Bodansky's "myth system"[33] as it is seen as 'customary' but does not reflect in the state practice. He argues that in regarding a rule as customary, we focus on an empirical approach than normative-customary rule of international law is descriptive (in the sense it describes the state behaviour) than prescriptive (prescribing the State behaviour as the rest of the international law rules such as treaties and conventions do)[34].

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[25]Preamble, The Charter of the United Nations, 1945. The Preamble reads, "...to practice tolerance and live together in peace with one another as good neighbours".

[26]For a brief account of the principle in international law, see Sompong Sucharitkul, The Principles of Good-Neighborliness in International Law, Paper 559 GLODEN GATE UNIVERSITY PUBLICATIONS (1996).

[27]See C. W. Jenks, Tolerance and Good Neighbourliness: As Concepts of International Law, 9 MALAYA L. REV.1(1967).

[28]Rüdiger Wolfrum, Purposes and Principles of International Environmental Lav, 33 GER. Y.B. INT'L L. 308, 309 (1990).

[29]M. FITZMAURICE ET. AL., WATERCOURSE CO-OPERATION IN NORTHERN EUROPE: A MODEL FOR FUTURE5 (Cambridge University Press 2004).

[30]Advisory Opinion of 8 July 1996 of the Legality of the Threat or Use of Nuclear Weapons, Dissenting Opinion of Judge Weeramantry, ICJ Rep. 1996, p. 505.

[31]HANS KELSEN, THE LAW OF THE UNITED NATIONS: A CRITICAL ANALYSES OF ITS FUNDAMENTAL PROBLEMS 11-13 (London Institute of World Affairs 1951).

[32]C.J. JENKS, LAW IN THE WORLD COMMUNITY 92 (Longmans 1967).

[33]Daniel Bodansky, Customary (And Not So Customary) International Environmental Law, 3 INDIANA J. OF GLO'L LEGAL STUD. 105 (1995).

[34]Ibid at 109.

IV. INCIDENTS OF TRANSBOUNDARY ENVIRONMENTAL HARM

In the celebrated *The Trail Smelter Arbitration*, which the earliest case on global environmental law, the duty of a state towards the global environment was recognised. A State's responsibility was set for the environmental harm even beyond its territorial limits in this case. The arbitral tribunal declared that "No State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or person therein, when the case is of serious consequence and the injury is established by clear and convincing evidence[35]." Trail Smelter case has harnessed a prominent place in the international environmental jurisprudence. On this, David Bodansky exclaims,

"…most writers on customary international environmental law instinctively assume a state of affairs where third-party dispute resolution is available, and subconsciously address their arguments to legal decisionmakers, such as courts and arbitrators. These legal decisionmakers are the real target audience for the voluminous writings on customary international environmental law. The problem is that courts and arbitral tribunals currently play only a relatively minor role in addressing international environmental issues. Third-party dispute resolution has resolved few environmental problems. That is why Trail Smelter must bear such a heavy load in current scholarship on customary international environmental law[36]."

The tensions between absolute sovereignty and environmental issues have been witnessed by the international community several times. There have been occasions of dispute over international rivers between States, and many a times such disputes have even taken a violent turn. For instance, dispute over the Nile Basin water among eleven countries due to which there were many negotiations between states over the construction of a dam in Ethiopia. Droughts and armed conflict in Somalia due to water crisis was other significant conflict. Public discontent and outrage over water shortage in Yemen took violent turn in terms of political and economic crisis[37]. And in transboundary conflicts like these, states show their trump card of national sovereignty and claim that they can act as per their will within the territorial limits of them, as United States' Attorney General Judson Harmon said, "the rules, principles, and precedents of international law impose no liability on obligations upon the United States." The issue regarding the water diversion of the river Rio Grande by United States in 1895, met with Mexico's protest. In an answer, Harmon advocated,

The fact that the Rio Grande lacks sufficient water to permit its use by the inhabitants of both countries does not entitle Mexico to impose restrictions on the USA which would hamper the development of the latter's territory or deprive its inhabitants of an advantage with which nature had endowed it and which is situated entirely within its territory. To admit such a principle would be completely contrary to the principle that USA exercises full sovereignty over its national territory[38].

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[35]Arbitral Trib., 3 U.N. Rep. Int'l Arb. Awards 1905 (1941).

[36]Supra note 34 at 117.

[37]10 Violent Water Conflicts, RELIEF WEB (Sept. 4, 2024), https://reliefweb.int/report/world/editor-s-pick-10-violent water-conflicts.

[38]PATRICIA BIRNIE & ALAN BOYLE, INTERNATIONAL LAW AND THE ENVIRONMENT 332 (Oxford University Press 2002).

This later became U.S. practice and came to be known as Harmon doctrine. It is often termed as the most notorious[39] of all the doctrines on international water sharing rules. It was soon done away with by the U.S. itself and has little support in state practice in the contemporary times[40].

V. A META-STATIST VIEW OF SOVEREIGNTY AND ENVIRONMENT

V. 1. Evaluating the possibility of a common ground

The theoretical intransigence of State Sovereignty and its preservation by the states through praxis casts a herculean task on the international legal society to ideate on transboundary issues. The early principles on natural resources such as the Permanent Sovereignty over Natural Resources were born with the Westphalian absolutism. There does exist certain limits on this principle, but "the precise extent of these limits remains somewhat unclear and is subject to innumerable local variations as a result of bilateral or multilateral regional practice[41]." Despite the acknowledgment of 'good neighbourliness' concept in the Charter of the United Nations and other international law circles, its status remained customary and therefore, was treated devoid of serious nature unlike any treaty provisions. Even after institutionalisation of international environmental law principles, in a consent-based system that international law is, the States have the choice to enter into a treaty arrangement. To sign and ratify or to not remains the prerogative of the State and therefore, a sovereign decision. In such a situation, whether a common field for the competing claims of state sovereignty and transboundary environmental harm be found? Can we accommodate the competing claims of both? Can state sovereignty cede its territory for the accommodation of transboundary environmental concerns?

If we revisit the hypothetical situation discussed in the beginning of this paper, and assume that State B recognises 'good neighbourliness' as a customary rule of international law, would it make the situation different? Would State B's recognition of it as a customary rule of international law, bind State A? This assumption is a peephole to David Bodansky's[42] concern about customary status of an international law rule. Even if the 'good neighbourliness' concept has a customary status for State B, till it does not enjoy the same status for State A, and reflects the same in State A's and B's practice, it does not apply in this situation and not bind State A.

This tells us a curious case foregrounded in two fundamental problems: first, a customary rule on *transboundary environmental harm* cannot readily apply without the presence of state practice and opinion juris for both or more states involved (like any other customary international law rule); second, as international law is consensual system of law, a treaty or a convention would apply only when it is entered into by the

[39]Steohen C. Mccaffrey, The Harmon Doctrine one hundred years later: Buried, not praised, 36 NATURALRES.J. 549(1996).

[40]Supra note 37 at 301; M.A.S. SALMAN & K. UPRETY, CONFLICT AND COOPERATION ON SOUTH ASIA'S INTERNATIONAL RIVERS: A LEGAL PERSPECTIVE 12 (BRILL 2002).

[41]Aaron Schwabach, 'Transboundary Environmental Harm and State Responsibility: Customary International Law' in AARON SCHWABACH & ARTHUR JOHN COCKFIELD, INTERNATIONAL LAW AND INSTITUTIONS(EOLSS Publications 2009).

[42]Supra note 33.

states concerned. Then, what could be the redressal of such *transboundary environmental harms*?

V. 2. The possibility of a meta-Statist perspective on transboundary environment

A change in the position from where we view state sovereignty could offer a redressal to this situation. State sovereignty has been interpreted across time and space. From absoluteness to a liberal interpretation, state sovereignty has undergone sea change. The major change perception of state sovereignty finds place in the principle of the United Nations embodied in Article 2 (1) of the Charter of the United Nations[43]. It reads, "The Organization is based on the principle of the sovereign equality of all its Members[44]." The embodiment of Sovereign Equality as a United Nations principle altered the construction of Sovereignty.

There exists scholarly intervention showing the linkages between sovereignty and the obligation to not cause transboundary environment harm[45]. Even for the state sovereignty in its rudimentary form, the sovereign rights have corresponding duty, as outlined in the Island of Palmas Case[46]. Arbitrator Max Huber noted, "This right [exclusive right for State activities] has as corollary a duty: the obligation to protect within the territory the rights of other States[47]". Notably, Scholars have also argued that there is no 'conflict' between the Permanent Sovereignty over Natural Resources principle and a duty against causing transboundary environmental harm[48].

A simplistic logical deduction would lead us to these conclusions that place sovereign rights over environment and respect for transboundary environment at the same pedestal. Then why are we compelled to see these two as competing? Why do we see sovereignty and transboundary harm in conflict with each other? Why do we look for co-existence of both? My answer to this would be two-fold.

- First-deduced through praxis-the purported caricature of sovereignty in any transboundary environmental harm case. Through transboundary environmental harm case, a clash is projected between the State sovereignty where the harm originated and other State's environment that is harmed.In majority cases, sovereignty is (mis)used by States to shy away from an obligation towards other States' environment.
- Second-a normative one-any transboundary environmental harm is approached from the Statist view. The term 'transboundary' is entrenched in statist connotations of boundary and borders, and therefore, the view of state self, detached from others.

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[43]See generally Hans Kelsen, The Principle of Sovereign Equality of States as a basis for International Organization, 53 YALE L. J.207 (1944).

[44]The Charter of the United Nations, 1945.

[45]Franz Xaver Perrez, The Relationship Between 'Permanent Sovereignty' and the obligation not to cause Transboundary Environmental Damage, 26 ENVIRON'L L. 1187 (1996).

[46]Island of Palmas Case, 2 RIAA (1949), (23 August 2023) https://pcacases.com/web/sendAttach/714.

[47]Island of Palmas Case, 2 RIAA (1949), pp.829-90. (23 August 2023) https:// pcacases.com /web/sendAttach/714.

[48]Supra note 45.

The second concern is larger, insidious, and complex and, also serves the roots for the first concern. A statist view of international law or its any event is an obvious, normal, and standard approach-one that is so entrenched within the states, furthered by international institutions, that it is not acknowledged, let alone be critiqued. The normalisation of Statist view in international law showcases every entity (from environmental harm to other states) from the eyes of a state. This deflects the possibility of viewing other States' environment as own or as collective. Even with the theoretical presence of concepts around this idea of 'collectivity' such as "global commons", the omnipotence of State overshadows it. Rohini Sen reveals, in a compelling tenor, "the powerful meta image of the state.[49]" In simplest sense, the statist view ensures three non-exhaustive things,

- First(for treaty law on environment), viewing of international law as a choice-based system of law, making entering into a treaty arrangement optional. This optionality operates at a sublime level in altering how a state perceives its obligations towards others.
- Second (for customary law on environment), states' impetus on showing lack of state practice or opinion juris to evade from state responsibility and state liability in cases of harm to other states.
- Third, a battlefield view of state-binaries where one has to defend its obligations. This also leads to a competing and conflicting view between States' rights and duties.

These sureties of statist view operate in a way that codification and progressive development in the field of state responsibility, state liability, and international environmental law in general do not translate into environmental protection. For instance, on lack of clarity on assessing liability and responsibility in case of transboundary environmental harm, Maurizio Arcari highlights, "the conditions for establishing how the critical obligation of States to prevent environmental harm has been breached remain rather obscure. The Articles on the Responsibility of States for Internationally Wrongful Acts, adopted by the UN ILC in 2001, do not help to clarify the issue of whether preventive commitments of States in the field of environmental protection can be classified as obligations of conduct…"[50].

This leads us to my argument of transversing beyond state and created an imaginary meta-state view for international law situations. An exceptional argument is forwarded by Sundhya Pahuja and Luis Eslava in their pioneer work on State[51]. They expose the linkages between state, international law, and economic development. Their compelling argument is even more so in case of transboundary environmental harm, where the role of statist understanding of economic development and statist perspective on environment have an insidious presence.

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[49]Rohini Sen, A Queer Reading of International Law and its anxieties, III GNLU L.& SOCY. REV.33 (2021).

[50]M. Arcari, 'The Breach of the Obligation to Prevent Environmental Harm and the Law of State Responsibility' in M. ARCARI, I. PAPANICOLOPULU, L. PINESCHI (EDS.) TRENDS AND CHALLENGES IN INTERNATIONAL LAW. (Springer, 2022), https://doi.org/10.1007/978-3-030-94387-5_7.

[51]Luis Eslava & Sundhya Pahuja, The State and International Law: A Reading from the Global South, 11 HUMANITY: AN INT'L J. OF HUM. RTS., HUMANITARIANISM AND DEVELOPMENT118 (2020).

A meta-statist perspective on transboundary environmental harm will avoid the legal ontology of 'transboundary', 'responsibility', and 'liability'. It would allow environment to mean 'environment' as a whole and not one state's environment separate from other states' environment. This would in turn bolster the normative framework of viewing environment as a "global common" and ensure its possibility to become a reality. Such a meta-statist view would also disallow viewing other state's environment as a 'responsibility' and 'liability'. It would be an exceptional unlearning and unviewing process to adopt a meta-statist view, and its forecasted ramifications are worth this tedious preceptory change. Besides, this would entail a disordering of international law[52] its dominant, universalised and forced yardsticks that perceive international law in a certain way and allows for negligible spaces to the alternative critical thinking.

VI. CONCLUDING REMARKS

The narrative of development economics has shaped the modern international law discourse. With the terminology of capitalism, it has created a compelled view for states on the scales of development. The logic of development- culminating in the classification of states into the developed, the developing, and the under-developed-has been placed at the centre of all the concerns of the states. States, valuing the economic paradigm of development and overlooking the concerns of environment, enter a race of industrialisation. In this State-centric individualist race for development fuelled by capitalist-imperialist complex, environmental concerns are decentered and displaced.

The absolutist conception of state sovereignty and the Permanent Sovereignty over Natural Resources principle foregrounded in it complicate this picture of State and environment. Transboundary environmental harm concerns, in this milieu, are at impasse, where states do not assume their obligations under customary international law (such as of 'good neighbourliness') and to be bound by treaty arrangement remains a choice-based possibility. These issues are testified by the absence of practical translations of the otherwise extensive institutionalisation of international environmental law. The recent developments in international environmental law, in terms of state responsibility and state liability, do not ensure corresponding value for the states. These and other problems relating to the transboundary environmental harm are rooted in the standard statist view of international law. Political, economic, legal processes viewed by the eyes of state create a state-centric image that sees processes and rules in isolation. This paper presents an argument for an alternative-a meta-statist view. This would ease out the purported tensions between state sovereignty and transboundary environmental issues, but is not limited only to this. Such a view would diffuse several issues in transboundary environmental issues entwined with the state sovereignty and state-centeredness.

[52]Michelle Staggs Kelsall, Disordering International Law, 33 EUR. J. INT'L L.729 (2022).

SOCIAL MEDIA AND ITS IMPACT ON THE ELECTORAL PROCESS IN INDIA: A CRITICAL STUDY

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Abstract

Social media's rise has completely changed how political debate and election procedures are conducted in modern democracies. Social media has a significant and varied influence on the electoral process, influencing the dynamics of political communication, governance, and involvement in the digital era. The Research paper examine the multifaceted impact of social media on electoral processes, with a particular emphasis on how it intersects with the fundamental rights to speech and expression and the right to vote and drawing on theoretical frameworks from political science, communication studies, and legal scholarship, it offers insights into how policymakers, electoral authorities, and social media platforms can navigate these challenges while safeguarding the fundamental rights of citizens.

Key words-
Democracy, freedom of expression, Social media, Election process, Fundamental Rights.

I- Introduction

The advent of social media has profoundly transformed various facets of society, including the electoral process. A country like us which is characterized by its vibrant democracy and diverse populace, Social media's incorporation into the electoral process has had a larly significant influence particularly significant impact. The role of social media in India's electoral process, highlighting its benefits and challenges while exploring the legal framework governing its use. India's digital revolution has seen exponential growth in internet users, with social networking sites such as Facebook, Twitter, WhatsApp, and Instagram becoming ubiquitous. By January 2024, India had 462 million active social media users, representing 32.2% of the country's total population, establishing it as one of the largest global markets for these platforms. This widespread adoption of social media has significantly influenced how political campaigns are conducted, how candidates communicate with the electorate, and how voters access information[1].

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[1]S. Prasad, "The Role of Social Media in Indian Politics". 12(3), J. POL. COMMN, 45-67 (2019). .

In India, social media has revolutionized political campaigning by providing parties and politicians with direct access to voters. Platforms like Twitter and Facebook enable candidates to share their messages swiftly and interactively, bypassing the traditional media gatekeepers. This direct communication fosters a more engaged electorate, as voters can receive real-time updates, participate in discussions, and directly question their representatives. In the general elections of 2014, 2019, and 2024, social media was crucial in influencing public sentiment and energising voters. Most of the political parties effectively utilized social media to run targeted campaigns, reaching millions of potential voters. The success of such strategies underscores the significant influence social media wields in modern electoral politics[2].

Social media acts as a versatile tool, capable of disseminating information, marketing products and ideologies, and promoting the activities of political parties or individuals, either directly or through their supporters. This targeted spread of information is referred to as social media marketing. These dynamics influence not only the information people receive but also their interaction with it, impacting political dynamics, corruption, public perception, and societal values. Furthermore, social media's impact has globalized politics, making it more vulnerable to public opinion and reducing privacy. In India, over 830 million people have access to internet-connected devices, and globally, this number exceeds 4 billion. With such a large audience potentially exposed to social media platforms, these platforms wield significant influence over public thoughts and ideas. Unquestionably, these networking sites has made information more accessible to all, but it has also made it easier for false information to proliferate, endangering the integrity of the election process. During elections, the rapid dissemination of false information can mislead voters, manipulate public opinion, and undermine democratic principles. The 2019 general elections in India witnessed a surge in misinformation campaigns, with numerous instances of fake news related to candidates and parties circulating on social media platforms[3].

A fundamental element of a successful democracy is the presence of free and fair elections. This process remains genuinely free only when voters can select their preferred representatives without coercion, fully informed about the candidates' actions and promises, and able to make their choices independently. However, these conditions can gradually deteriorate unnoticed, severely affecting the democratic process. This deterioration is often driven by the spread of false information and politicized propaganda, which people encounter daily through social media and other platforms. India's legal framework has struggled to keep pace with the rapid evolution of social media. The primary legislation governing elections, the Representation of the People Act, 1951, was enacted long before the advent of digital communication technologies. Consequently, existing laws and regulations often fall short in addressing the unique challenges posed by social media in the electoral context.

The Election Commission of India (ECI) has attempted to address these challenges through guidelines and regulations. For example, in 2013, the ECI issued guidelines for

[2]R. Gupta, "Misinformation in the Digital Age: Challenges for Indian Democracy." 15(2), INDIAN JOURNAL OF MEDIA STUDIES, 112-129 (2020).

[3]Election Commission of India. (2013). "Guidelines on Social Media Use During Elections". (15 September 2023) https://www.eci-gov.in

social media use in election campaigns, requiring candidates to report their social media expenses and adhere to the Model Code of Conduct (MCC) online. Recently on 6th May 2024 ECI published a detailed guideline for 2024 general election context of use of social media in electoral Process or campaigns. However, enforcing these regulations has proven difficult due to the decentralized and global nature of social media platforms[4].

The political process is significantly influenced by social media corporations themselves. Social media sites like Facebook and Twitter have taken steps to counteract false information, including content moderation guidelines and partnerships with fact-checkers. Nonetheless, there is ongoing discussion on these metrics' efficacy. Opponents contend that the platforms' algorithms, which place a high value on interaction, may unintentionally spread sensationalist and divisive content, including false political information. The intricate relationship between social media and election legislation has been brought to light by a number of Indian court decisions. "Section 66A of the Information Technology Act, 2000, for example, was overturned by the Supreme Court in the 2015 case of *Shreya Singhal v. Union of India*" after it was seen to have the potential to restrict online free speech. Although this ruling supported the right to free speech[5]. Examining international perspectives can provide valuable insights into addressing the challenges posed by social media in elections. Countries like the United States and the United Kingdom have faced similar issues with digital misinformation and political advertising transparency. Studying their regulatory approaches, such as the Honest Ads Act in the US[6] and the UK Electoral Commission's guidelines on digital campaigning[7], can inform India's strategies in creating a more robust legal framework.

II-SOCIAL MEDIA AND RIGHT TO SPEECH AND EXPRESSION

The Indian Constitution's Article 19(1)(a) guarantees "the right to freedom of speech and expression[8]. This right is not absolute and can be subject to reasonable limitations under Article 19(2) for the sake of public order, decency, morality, state security, Indian sovereignty and integrity, and other objectives"[9].

The regulatory framework for digital communications in India is provided by the Information Technology Act, 2000 and its revisions. Notably, in the seminal case of *Shreya Singhal v. Union of India* (2015), the Supreme Court invalidated Section 66A of the IT Act, which made it illegal to convey "offensive" statements over electronic communication[10]. The court determined that Section 66A was unconstitutional because it infringed upon the right to freedom of speech and expression and was excessively broad and ambiguous, potentially resulting in abuse and capricious implementation.[11]"

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[4]A. Singh, The Impact of Algorithms on Political Discourse. 9(4), JOURNAL OF DIGITAL GOVERNANCE, 78-93 (2018).

[5]AIR 2015 SC 1523.

[6]U.S. Congress. (2019). Honest Ads Act. Retrieved from www. congress.gov.

[7]UK Electoral Commission. (2018). Digital Campaigning: Increasing Transparency for Voters (15 September 2023). https://www.electoralcommission.org.uk

[8]Constitution of India, art. 19, (1)(a).

[9]Constitution of India, art. 19, (2).

[10]Information Technology Act, 2000, No. 21, Acts of Parliament, 2000 (India).

[11]AIR (2015) 5 SCC 1

John Milton famously said, "Give me the liberty to know, to utter, and to argue freely according to conscience, above all liberties." He believed that without human freedom, progress in science, law, or politics is impossible, as these fields require open discussion. "John argued that truth will always prevail over falsehood, so free expression of all ideas, whether true or false, should not be feared. He believed that truth evolves over time and that open debate prevents complacency." Discussing false views helps reinforce the basis of true ones. Mill, in his work "On Liberty published in 1859, also defended freedom of expression. He believed that silencing any opinion is unjust because every opinion holds value to its owner". According to Mill, speech should only be suppressed to prevent direct harm, not for economic, moral, or personal reasons.

One could assert 'Freedom of speech and expression' is considered as cornerstone of liberty, often called the "mother" of all other freedoms. It's widely acknowledged today that this right is essential for society and should always be protected. A free society's foundation is the unrestricted exchange of ideas in public. Sharing opinions without fear of punishment is crucial for societal and state development, making it a fundamental right that should be protected from state interference. It is important for personal growth and the success of parliamentary democracy. In a democracy, this right extends beyond individuals; it's the community's right to receive and share information. International accords including the "Universal Declaration of Human Rights", "European Convention on Human Rights", and "the International Covenant on Civil and Political Rights", safeguard this right. These texts expressly uphold the right to free speech and expression.

Reasonable Restrictions and Public Order

The idea of reasonable constraints under Article 19(2) has been central to free speech jurisprudence. The Supreme Court has continuously upheld the requirement that limitations be specifically crafted and supported by an urgent societal necessity. This balance is especially challenging in the social media setting since digital content spreads quickly and can reach a large audience. The Supreme Court addressed the problem of internet shutdowns in Jammu and Kashmir in *Anuradha Bhasin v. Union of India*, highlighting the constitutional guarantee of online freedom of speech and expression[12]." The court ruled that any restrictions on internet access must pass the test of proportionality and reasonableness. This case underscores the importance of maintaining digital connectivity as a facet of free speech, even in the face of security concerns. Social media platforms have become breeding grounds for hate speech and misinformation, posing challenges to public order and societal harmony. The jurisprudential approach to hate speech in India involves balancing free expression with the need to prevent harm. In "*Pravasi Bhalai Sangathan v. Union of India*, the Supreme Court highlighted the necessity of combating hate speech while respecting free speech rights"[13].

The spread of misinformation on social media, particularly during critical events like elections, has also been a matter of concern. The Election Commission of India has

[12](2020) 3 SCC 637

[13](2014) 11 SCC 477

sought to regulate social media use during elections to prevent the dissemination of false information. While these measures aim to protect the integrity of the electoral process, they must be carefully calibrated to avoid undue restrictions on free expression[14].

Social media companies, as intermediaries, play a crucial role in regulating content on their platforms. "The Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021" outline the responsibilities of intermediaries in monitoring and managing online content[15]. These rules mandate the removal of unlawful content and require intermediaries to trace the origin of certain messages.

The legality and implications of these rules have been challenged on the grounds of privacy and free speech. Critics argue that the rules grant excessive power to the government and could lead to surveillance and censorship. The jurisprudence on intermediary liability continues to evolve as courts balance the need for accountability with the protection of fundamental rights[16].

"*The Information Technology Act, 2000*" is the primary legislation regulating digital communications and cyber activities in India. Its aim is to grant legal recognition to electronic commerce and simplify the electronic filing of documents with the government. Additionally, it includes provisions addressing cybercrimes and the liability of intermediaries.

"Section 69A of the IT Act" gives the government the authority to restrict public access to any information via any computer resource if doing so would protect India's sovereignty and integrity, state security, good relations with other countries, public order, or prevent incitement to commit any crime that is punishable by law[17]. The procedures and safeguards for blocking such information are outlined in the "Information Technology (Procedure and Safeguards for Blocking for Access of Information by Public) Rules, 2009."[18]

Under these rules, intermediaries are required to appoint a "Chief Compliance Officer, a Nodal Contact Person, and a Resident Grievance Officer, all of whom must be residents of India."[19] They must also publish a monthly compliance report detailing the number of complaints received and actions taken[20].

The rules also introduce a "traceability" requirement for significant social media intermediaries, which mandates the identification of the first originator of specific

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[14]Election Commission of India, "Guidelines for Social Media Use During Elections," 2019, (15 August 2023) https://eci.gov.in.

[15]Ministry of Electronics and Information Technology, "Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021," Government of India, 2021.

[16]V. Raghavan, "Regulating Social Media: Privacy and Freedom of Expression," 12 (1), INDIAN JOURNAL OF INFORMATION TECHNOLOGY LAW, 34-50 (2022).

[17]Information Technology Act, 2000, No. 21, Acts of Parliament, 2000 (India), S. 69A.

[18]Information Technology (Procedure and Safeguards for Blocking for Access of Information by Public) Rules, 2009, G.S.R. 781(E).

[19]Information Technology (Intermediary Guidelines and Digital Media Ethics Code) Rules, 2021, Rule 4.

[20]Ibid.

messages upon a judicial or governmental order[21]. This provision has raised concerns regarding user privacy and the potential for government overreach.

III-Social media and the electoral process

Social media has transformed communication and is becoming more and more important in influencing elections and public opinion. With a parliamentary system of governance based on the promise to hold frequent, free, and fair elections, India functions as a constitutional democracy. The members of the state and union territory legislative assemblies, the two chambers of parliament, and the administration are all chosen via these elections. India's general elections, which elect legislators, are the biggest event of their kind in the world. More than 800 million voters cast ballots at more than 800,000 polling places spread over a variety of climatic and geographic regions, such as sparsely inhabited areas, deserts, and snow-capped mountains.

The key constitutional provisions and mechanisms related to elections in India include-

"Article 324 establishes the Election Commission of India" as an autonomous constitutional authority responsible for overseeing election processes at both national and state levels. This article grants the Commission the power of supervision, direction, and control elections to Parliament, state legislatures, and the offices of the President and Vice-President. "Article 326 guarantees the right to vote to every Indian citizen aged 18 and above subject to certain legal disqualifications". "Articles 327 and 328" grant Parliament and state legislatures the authority to legislate on election-related matters. While Parliament can pass laws covering all aspects of elections to both central and state legislatures, state legislatures are empowered to create laws for elections to their own bodies.

Election Process

The election process in India involves several key stages:

- Delimitation of Constituencies: Constituencies for elections to the Lok Sabha (House of the People) and the state legislative assemblies are delimited based on the latest census to ensure equitable representation.
- Preparation of Electoral Rolls: The ECI is responsible for updating and maintaining the electoral rolls, ensuring that all eligible voters are registered.
- Nomination of Candidates: Political parties and independent candidates submit their nominations, which are subsequently reviewed by the Election Commission of India (ECI) to ensure they meet the eligibility requirements.
- Election Campaign: Candidates and political parties conduct campaigns to reach out to voters, adhering to the model code of conduct issued by the ECI to ensure fair play.
- Polling: Voting is conducted through Electronic Voting Machines (EVMs) at designated polling stations across the country.
- Counting and Declaration of Results: Votes are counted under the supervision of the ECI, and results are declared for each constituency.

[21] Ibid., Rule 4(2).

- Social media allows political parties to reach a broad audience at a relatively low cost. During elections, platforms are used to:
- Disseminate party manifestos and policy positions.
- Engage with voters through live chats, Q&A sessions, and interactive content.
- Mobilize volunteers and coordinate campaign activities.

Parties can increase the efficacy of their campaigns by customizing their messaging for particular demographics through the use of data analytics and targeted advertising. For instance, the Bhartiya Janata Party (BJP) made great use of social media to reach young voters and spread its message during the general elections in 2014 and 2019[22].

Misinformation and Fake News

A major challenge is the proliferation of misinformation and fake news. False information can deceive voters, cause confusion, and erode the integrity of elections. The rapid spread of misinformation on platforms like WhatsApp and Facebook has prompted calls for greater regulation and accountability[23].

Hate Speech and Polarization

Social media can also be a breeding ground for hate speech and divisive rhetoric. The anonymity and reach of these platforms can exacerbate societal divisions and lead to violence. For instance, during the 2019 and 2024 elections, there were numerous reports of communal and hate speech circulating on social media, prompting the Election Commission of India (ECI) to issue warnings and directives to platforms[24].

Regulatory Framework

The ECI has issued guidelines and directives to regulate social media use during elections, including the pre-certification of political advertisements and monitoring of online content to prevent violations of the Model Code of Conduct[25].

IV-Judicial opinion

Regarding the interpretation and application of constitutional principles to the control of social media during the political process, the Indian judiciary is essential. Judicial opinions provide guidance on the balance between free speech rights, privacy concerns, and the integrity of elections. This analysis examines key judicial opinions and their implications for the regulation of social media in the electoral context.

The landmark case *Shreya Singhal v. Union of India*[26] apex court struck down Section 66A, and emphasizing the need to protect freedom of speech and expression online. The ruling has significant implications for social media use during election campaigns,

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[22]Gaurav Vivek Bhatnagar, "Social Media, Big Data and Elections in India," Observer Research Foundation, October 3, 2019, (11 July 2024) https://www.orfonline.org.

[23]Pankaj Jain, "Combating Misinformation in India: The Role of Social Media," Economic and Political Weekly, vol. 54, no. 15, April 2019, pp. 45-52.

[24]Anuradha Raman, "Hate Speech and Elections in India: The Role of Social Media," The Hindu, May 6, 2019, (11 July 2024) https://www.thehindu.com.

[25]Election Commission of India, "Guidelines for Social Media Use During Elections," 2019, (11 July 2024) https://eci.gov.in.

[26]AIR 2015 SC 1523

reinforcing the boundaries of permissible speech. Another important case *Facebook India Online Services Pvt. Ltd. v. Vinay Rai*[27]. In this case, a lower court in Delhi ordered "social media platforms, including Facebook, to remove offensive content that could incite enmity among different groups." While not directly related to elections, it highlighted the role of social media in spreading potentially harmful content and set a precedent for regulating online speech during election periods to maintain public order. Dr. Subramanian Swamy filed a petition requesting the establishment of guidelines for the use of social media by political parties and candidates. In response, the Election Commission issued directives emphasizing transparency in funding and ensuring compliance with the Model Code of Conduct on digital platforms. This case reinforced the need for clear regulations governing social media use in elections.

The intersection of social media and the electoral process in India has fundamentally transformed political communication, campaigning strategies, and voter engagement. This critical overview explores the evolving landscape of Indian elections in the digital age, examining the opportunities, challenges, and implications of social media on electoral democracy.

Social media has the potential to enhance voter engagement and participation by providing citizens with access to political information, facilitating dialogue between voters and candidates, and mobilizing marginalized communities. However, efforts to combat misinformation and hate speech are essential to safeguard the integrity of the electoral process and promote informed decision-making.

V- Election Commission of India (ECI) Guidelines

The ECI has issued several guidelines to regulate social media use during elections. These guidelines include:

- Pre-certification of political advertisements on social media by the Media Certification and Monitoring Committee (MCMC).
- Monitoring of social media content to identify and address violations of the Model Code of Conduct.
- Requiring political parties to submit details of their social media accounts and expenditures[28].

Functions of Electoral Commissions

Electoral commissions are responsible for administering elections and referendums, overseeing voter registration, and enforcing electoral laws.

Key functions include:

- Election Administration: Organizing and conducting elections in accordance with legal requirements and international standards.
- Voter Registration: Maintaining accurate voter rolls and ensuring eligibility criteria are met for voter participation.

[27] (2012) 01 DEL CK 0026

[28] Election Commission of India, "Guidelines for Social Media Use During Elections," 2019, (11 July 2024) https://eci.gov.in.

- Candidate Nomination: Facilitating the nomination process for candidates and ensuring compliance with eligibility criteria.
- Campaign Finance Regulation: Monitoring campaign expenditures, enforcing spending limits, and disclosing financial information to the public.
- Electoral Dispute Resolution: Adjudicating disputes related to electoral processes, including allegations of fraud, irregularities, or misconduct.

VI-Conclusion and Suggestions

Social media platforms have revolutionized the exercise of free speech by providing immediate and widespread access to audiences. They enable individuals to share their thoughts, opinions, and creativity without the traditional barriers associated with print and broadcast media. This accessibility has led to the proliferation of diverse voices and perspectives, enriching public discourse[29]. Social media platforms are used to mobilize and engage voters, including the effectiveness of online campaigns, hashtags, and viral content in increasing voter turnout and participation in the electoral process. Social media has also become an essential tool for journalists, activists, and political leaders. It allows for real-time and also reel time reporting and commentary on current events, fostering a more transparent and accountable society. For instance, during significant events such as elections, protests, and natural disasters, this type of networking sites serves as a vital source of information and a platform for civic engagement[30]. "Meta" and many other companies play a significant role in managing content on their platforms. They employ algorithms and artificial intelligence to moderate content and enforce community guidelines. However, these mechanisms are not full proof and often face criticism for lack of transparency and accountability[31].

For instance, Facebook's handling of hate speech and misinformation in India has come under scrutiny, with allegations of bias and inadequate action against violators. Twitter, too, has faced challenges in balancing free speech with the need to curb harmful content. The role of these companies in shaping public discourse and their accountability in enforcing content standards is a critical area of ongoing debate[32].

While these regulations aim to enhance accountability and curb harmful content, they have also raised concerns about privacy and free expression. Critics argue that the rules grant excessive power to the government and could lead to overreach and censorship. Balancing the need for regulation with the protection of fundamental rights remains a delicate and complex task[33].

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[29]S. Ganesh, "Social Media and Freedom of Expression in India," 7 INDIAN JOURNAL OF CONSTITUTIONAL LAW, 45-67 (2019).

[30]R. Deshpande, "The Role of Social Media in Indian Elections," 15 (2) JOURNAL OF POLITICAL STUDIES, 112-129. (2020),

[31]K. Sharma, "The Algorithmic Governance of Free Speech," 9 (3) INDIAN JOURNAL OF DIGITAL GOVERNANCE, 56-74. (2022)

[32]B. Roy, "Social Media Platforms and Content Regulation: Challenges in India," 10 (2) JOURNAL OF MEDIA STUDIES, 67-85. (2021).

[33]V. Raghavan, "Regulating Social Media: Privacy and Freedom of Expression," 12 (1) INDIAN JOURNAL OF INFORMATION TECHNOLOGY LAW, 34-50 (2022) .

Moving forward, it is essential to foster digital literacy among the populace to combat misinformation and promote critical thinking. Public awareness campaigns and educational initiatives can equip users with the skills to discern credible information and engage responsibly online[34].

Moreover, collaborative efforts between the government, social media companies, civil society, and academia are crucial to developing balanced and effective regulatory frameworks. Ensuring transparency, accountability, and respect for fundamental rights should be at the core of these efforts[35].

Social media has fundamentally reshaped the exercise of the right to free speech and expression in India. While it provides unparalleled opportunities for communication and engagement, it also brings significant challenges that require careful legal and policy interventions. As India navigates the complexities of the digital age, it is crucial to find a balance that safeguards both free expression and social harmony, ensuring that the transformative power of social media is leveraged for the greater good.

We can have said that Social media significantly influences the electoral process, offering both benefits and drawbacks. On the positive side, it enhances political engagement, particularly among younger demographics, by facilitating discussions and debates, thereby encouraging higher voter turnout and a more informed electorate. It also increases accessibility and inclusivity, allowing politicians to directly reach a broad audience, including marginalized groups previously excluded from political discourse. The rapid dissemination of real-time information enables swift responses to political events and mobilizes supporters for rallies or voting drives, thus boosting campaign responsiveness. Additionally, social media promotes transparency and accountability by allowing the public to monitor and scrutinize politicians' actions. However, the cons include the spread of misinformation and fake news, which can mislead voters and undermine election integrity. Social media often creates echo chambers, reinforcing existing beliefs and increasing political polarization, which hampers constructive dialogue. There are also concerns about manipulation by domestic and foreign actors through targeted ads, bots, and trolls, threatening electoral integrity and also the use of social media raises privacy and data security issues, as political campaigns often micro-target voters with personalized messages, potentially infringing on privacy rights and leading to data misuse like a "The Cambridge Analytica scandal, in this case the improper acquisition and use of personal data from millions of Facebook users to influence voter behavior during the 2016 U.S. presidential election. Cambridge Analytica, a political consulting firm, harvested data from approximately 87 million Facebook profiles without users' consent through a third-party app disguised as a personality quiz". This data was used to create detailed voter profiles and deliver highly targeted political advertisements and messages. The scandal raised significant apprehension about data security and privacy, and the ethical use of personal information in political campaigns. It exposed the vulnerabilities of social media

[34]N. Patel, "Promoting Digital Literacy to Combat Misinformation in India," 18 (1) JOURNAL OF EDUCATIONAL TECHNOLOGY, 23-40 (2022).

[35]S. Mehta, "Collaborative Governance for Digital Media Regulation," 14(2) INDIAN JOURNAL OF PUBLIC ADMINISTRATION, 56-73 (2021) .

platforms in safeguarding user data and sparked a broader debate on the regulation of digital political advertising and the need for greater transparency in how personal data is used by political campaigns. The fallout from the scandal led to investigations, fines, and stricter regulations on data privacy and protection.

Suggestions

The influence of social media on India's electoral process involves a complex interaction between democratic values, individual rights, and societal concerns. From a legal perspective, it is crucial to strike a balance between the right to free speech and expression, and the need to uphold the integrity of the electoral process, while safeguarding against misinformation and manipulation. Philosophically, the discourse can be rooted in the principles of deliberative democracy, which emphasizes the importance of informed and rational debate in the public sphere. Social media, as a modern agora, holds the potential to enhance democratic engagement by facilitating access to information and enabling diverse voices. However, it also poses risks such as echo chambers, fake news, and the manipulation of public opinion through targeted political advertising and data analytics.

To address the challenges posed by social media on the electoral process in India, a multi-faceted approach is essential. Strengthening legal frameworks through robust mechanisms to regulate political advertising and content on social media platforms is crucial; this includes mandatory disclosures of funding sources, clear labelling of political ads, and stringent penalties for spreading false information. Enhancing digital literacy programs will empower citizens to critically evaluate online information, fostering a well-informed electorate vital for democracy. Encouraging political parties to adopt ethical guidelines for social media use, emphasizing transparency, accountability, and respect for privacy, aligns with the philosophical principles of justice and fairness. Additionally, establishing an independent oversight body to monitor social media activities during elections will help investigate and address electoral malpractices. By integrating these jurisprudential and philosophical perspectives, India can harness social media's benefits for democratic engagement while safeguarding the electoral process, ensuring technological advancements enhance rather than undermine democracy's foundational principles.

EXPLORATION OF NON-UNIFORM BAIL JURISPRUDENCE CONCERNING ORGANISED CRIMES IN INDIA

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Abstract

Organised crime encompasses illegal activities carried out by groups of individuals, whether operating on a transnational, national, or local scale, with a structured framework primarily motivated towards achieving financial profits. These unlawful activities often extend beyond geographical boundaries and socio-economic contexts, influencing financial systems on a global scale. The continuous exposure to such criminal activities often fosters the development of innovative methodologies by syndicates, making them more rampant.

This paper examines the implications of the evolving legal landscape surrounding organised crime in India. By delving into the core issues surrounding bail provisions and analyzing the practical ramifications of existing anomalies, this paper aims to contribute to a deeper understanding of the challenges and opportunities in effectively addressing organised crime in contemporary India by putting forward various suggestions in this regard.

Key words-
organised crime, bail, anomalies, magnitude, illegal activities.

I. ORGANISED CRIMES: AN INTRODUCTION

Organised crime involves illegal activities carried out by structured groups aiming to make money through unlawful methods. These activities cover a broad range, from kidnapping and robbery to drug trafficking, cybercrimes and prostitution. These groups, often called syndicates or gangs, do not just stick to traditional crimes; but get involved in social, political, and economic areas of crime. Driven by the desire for profit and influence, these criminal organizations may even commit acts of war, treason, or terrorism. The effects of organised crime go beyond individual victims and affect society as a whole. These crimes put people's lives and freedoms at risk and are a menace to the economic well-being of the nation. Much of the money made from organised crime drains away national resources, worsening social inequalities and hindering development efforts.

Organised criminal activity is not limited to specific incidents; it leaves deep scars on communities and societies. It undermines trust in institutions, fosters fear and corruption, and weakens social bonds. Moreover, as organised crime infiltrates various

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sectors of society, it perpetuates violence and instability, hindering progress and making it harder to achieve peace and prosperity.

"National Crime Records Bureau" (NCRB)[1] published its report according to which there has been a notable increase of 24.4 per cent in cybercrime cases registered in 2022 than the previous year, and the crime rate in this category rising from 3.9 in 2021 to 4.8 in 2022. It is no surprise that the metropolitan areas have experienced the most notable surge, demonstrating a substantial increase of 42.7% in cybercrimes over the preceding year. Additionally, there has been an 11.1 per cent rise in economic offences, with a notable increase of 15.8% observed in the registration of economic offences specifically within 19 metropolitan cities. The report also highlights a total of 2,250 cases of human trafficking registered in 2022, reflecting a modest increase of 2.8 per cent compared to the figures recorded in 2021.

The global community has acknowledged the gravity of this threat, prompting action at an international level. The "United Nations Office on Drugs and Crime" has assumed the vital role of raising awareness about organised criminal activities and advocating for initiatives to collaborate and counter its influence. The UNODC states that "Organised crime is a continuing criminal enterprise that rationally works to profit from illicit activities that are often in great public demand. Its continuing existence is maintained through corruption of public officials and the use of intimidation, threats or force to protect its operations.[2]"

While organised crime was once perceived primarily as a domestic issue, the growing recognition of its transnational dimensions prompted states to establish various multilateral frameworks to tackle these challenges. However, the cross-border nature of many crimes rendered existing agreements inadequate in addressing their full scope of impact. In response to this, the "United Nations Convention against Transnational Organised Crime" (UNCTOC) was adopted in Palermo, Italy, on December 15, 2000. The Convention aims to foster cooperation in preventing and combatting transnational organised crime.

The Convention refrains from offering a strict definition of organised crime due to its dynamic nature. Still Article 5[3] provides clarifications regarding the obligation to criminalize the involvement in organised criminal groups. As per the Convention, an 'organised criminal group' is defined as a structured assembly of three or more individuals acting in concert over time to commit one or more serious crimes for financial or material gain. A 'serious crime' is described as conduct constituting an offence punishable by a significant deprivation of liberty. Meanwhile, a 'structured group' refers

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[1]Ministry of Home Affairs, Government of India, National Crime Records Bureau, CRIMES IN INDIA 2022(2022), (7 June 2024) https://ncrb.gov.in/uploads/ nationalcrimerecordsbureau/custom/1701607577CrimeinIndia2022Book1.pdf.

[2]United Nations Office on Drugs & Crime, Module 1: Definitions of Organised Crime,(7june 2024) https://www.unodc.org/e4j/zh/organized-crime/module-1/key-issues/defining-organized-crime.html.

[3]United Nations, United Nations Convention Against Transnational Organized Crime and the Protocols Thereto,(7 June 2024)https://www.unodc.org/documents/middleeastandnorthafrica/organised-crime/UNITED_NATIONS_CONVENTION_AGAINST_TRANSNATIONAL_ORGANISED_CRIME_AND_THE_PROTOCOLS_THERETO.pdf.

to an assembly that is not spontaneously formed for immediate criminal activity and does not necessarily require formally defined roles or membership continuity. Despite these explanations, criticism has been directed at the Convention's definitions, with some arguing that they are overly vague and tend to focus more on the concept of gang criminality rather than capturing the broader spectrum of organised crime activities.

To address specific facets of organised crimes the global community has implemented various strategies. "A notable instance is the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances" (UNTOC), which was established in 1988. The manufacturing, trafficking, and circulation of illegal drugs globally are the efforts being taken under this treaty. UNTOC offers a thorough framework for international collaboration, encompassing measures to combat money laundering and enhance judicial cooperation for prosecuting individuals involved in criminal activities.

Basel Statement of Principles[4] also set out a significant step in combating organised criminal activity. The Basel Institute on Governance developed the principles for enhancing transparency and upholding integrity within the international financial landscape. Enacted in 1997, the Basel Statement underlines the importance of fostering collaboration between the public and private sectors while advocating for strict anti-money laundering measures and efficacious mechanisms to combat corruption. By setting forth these directives, the Basel Statement endeavours to stop the organised criminals in exploiting the international financial system and promote ethical conduct in financial transactions.

The FATF plays a pivotal role in fighting against instances of money laundering. Established as the foremost policymaker and regulator for combating money laundering on an international scale, FATF operates as a cooperative body comprising member jurisdictions from the world over. Founded in 1989, the FATF is recognized as the primary policymaker and overseer dedicated to countering money laundering globally. Operating as a collaborative entity consisting of member states worldwide, FATF is at the forefront of endeavours to formulate and enforce strategies aimed at combating both money laundering and terrorist financing. Its core responsibilities include establishing international standards, crafting policies, and assessing the adherence of member nations to regulatory standards through comprehensive evaluations.

II. EVOLUTION OF LEGAL FRAMEWORK ON ORGANISED CRIME IN INDIA

In the annals of India's history, organised crime has persisted in diverse forms. Howbeit, until recently, there existed no comprehensive central legislation expressly aimed at combating this crime. Instead, it was addressed through scattered provisions within existing laws. The "Indian Penal Code, 1860" delineates offences such as criminal

[4]Bank for International Settlements, Core Principles for Effective Banking Supervision (2012), (7 June 2024) https://www.bis.org/publ/bcbs213.pdf.

conspiracy[5], kidnapping for ransom[6], extortion[7], robbery[8], and dacoity[9], which touches upon aspects of organised crime.

Additionally, the legal system has enacted various other specialized laws to combat distinct facets of organised crime. For instance, the "Narcotic Drugs and Psychotropic Substances Act, 1985, focuses on curbing illicit drug trafficking, whereas the "Immoral Traffic (Prevention) Act", 1956, is geared towards combatting human trafficking. However, the ill-gotten gains from these criminal activities hold little value unless laundered back into the legitimate economy. The process of transforming such 'dirty' money into 'clean' assets, known as money laundering, is targeted by the "Prevention of Money Laundering Act", 2002, rendering it a punishable offence.

Despite these legal measures, the scattered provisions were deemed insufficient in effectively combating organised crime. As syndicates and gangs expanded their operations, instances of smuggling, kidnapping, and terrorism surged, instilling a heightened sense of fear within society. In response, various states undertook initiatives to formulate their comprehensive legislation. Maharashtra took the lead in this endeavour by enacting the Maharashtra Control of Organised Crime Act (MCOCA) in 1999, aimed at combating organised crime and terrorism. This legislation, later extended to Delhi, served as a model for subsequent state enactments. The MCOCA defined "organised crime" (non-verbatim) as:

"2(1)(e). "any consistent legal activity by a person, individually or jointly, either as a part of organised criminal activity syndicate or representing such syndicate, either by using violence or threat to violence or intimidation or duress, or other illegal way, with the aim of earning monetary gains, or attaining undue economic or other advantage for oneself or any other individual or promoting insurgency"[10]

Inspired by Maharashtra's example, other states such as Gujarat[11] and Karnataka[12] have also enacted similar laws, with Rajasthan[13] and Haryana[14] proposing bills in 2023. These legislative endeavours adopted a largely standardized procedural framework for addressing organised crime.

In a recent development, organised crime is codified as a penal offence by the Bharatiya Nyaya Sanhita, 2023. While the definition closely resembles that of the MCOCA,[15] it differs in one aspect - it explicitly mentions offences in a list that may fall under the purview of "organised crime", making it more definitive and inclusive. It is defined non-verbatim as -

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[5]The Indian Penal Code, 1860, §§ 120A, 120B.

[6]The Indian Penal Code, 1860, §364A.

[7]The Indian Penal Code, 1860, § 383.

[8]The Indian Penal Code, 1860, § 390.

[9]The Indian Penal Code, 1860, §391.

[10]The Maharashtra Control of Organised Crime Act, 1999, §2(1)(e).

[11]The Gujarat Control of Terrorism and Organised Crime Act, 2015.

[12]The Karnataka Control of Organised Crimes Act, 2000.

[13]The Rajasthan Control of Organised Crime Bill, 2023, Bill No. 11 of 2023 (India).

[14]The Haryana Control of Organised Crime Bill, 2023, Bill No. 07 of 2023 (India).

[15]The Maharashtra Control of Organised Crime Act, 1999.

111.(1) "Any continuous illegal activity which includes economic offences, robbery, extortion, vehicle theft, robbery, land grabbing, cyber-crimes, trafficking of persons, weapons or illicit goods or services, contract killing, drugs, human trafficking for prostitution or ransom, by any individual or a group of individuals acting in concert, singly or jointly, either as a part of an organised crime syndicate or on its behalf, by use of violence, threat of violence, intimidation, coercion, or by any other unlawful means to obtain direct or indirect material benefit including a financial benefit"[16].

Importantly, the purview of organised crimes as delineated by the BNS, states that certain offences are encompassed which are already subject to specialized legislation. Illustratively speaking, there are several statutes designed for countering economic offences such as, "The Prevention of Money Laundering Act, 2002, Foreign Exchange Regulation Act, 1973, Customs Act, 1962", and others. Similarly, for cybercrimes, specific provisions of the IT Act, 2000, are in force. The Immoral Trafficking Prevention Act addresses trafficking in persons, while trafficking in drugs is governed by the "Narcotic Drugs and Psychotropic Substances Act", and the Arms Act is the legal statute for weapon trafficking. Additionally, provisions within the BNS itself cover other specified offences like kidnapping, robbery, extortion, and so forth. In the case of "*State of Maharashtra v. Vishwanath Maranna Shetty*"[17], it was elucidated that in case a prosecution pertains to criminal activities within a designated law with individual legal principles for addressing matters arising therefrom, such provisions must be duly considered and applied.

The impending enforcement date of this central legislation, scheduled for July 1, 2024, signifies a significant shift that will override various laws concerning the subject matter. Hence, a thorough evaluation of newly enacted provisions is essential for ensuring their uniform application and mitigating any likelyhood of discrepancies resulting in their implementation.

III. ANALYSIS OF BAIL JURISPRUDENCE UNDER ORGANISED CRIMES

(a) CONTOURS OF BAIL JURISPRUDENCE

Talking about Bail, typically, bail provisions are addressed within sections 436-439 in CrPC, 1973, encompassing "anticipatory bail and regular bail" within its ambit. With the growing number of intricate types of criminal activities, specialized legislations have been introduced to combat emerging forms of organised crime. These enactments not only establish stringent procedures for dealing with offenders but also diverge from conventional bail conditions, introducing additional requirements which can be traced back to the enactment of the "Terrorism and Disruptive Activities Act", 1987 (TADA)[18],

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[16]The Bharatiya Nyaya Sanhita, 2023, §111.

[17](2005) 5 SCC 294 (India).

[18]The Terrorism and Disruptive Activities Act, 1987, §20.

"20(8). Notwithstanding anything contained in the Code, no person accused of an offence punishable under this Act or any rule made thereunder shall, if in custody, be released on bail or on his own bond unless, -

1. the Public Prosecutor has been given an opportunity to oppose the application for such release, and

2. where the Public Prosecutor opposes the application, the Court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail."

marking a significant departure from conventional bail norms. This was further affirmed by the 268th Law Commission Report[19], which recommended that in certain terrorism-related offences, bail cannot be granted until the authority responsible for taking the decision is fully satisfied that the conditions under scrutiny are exceptional and thus, supports bail plea. The "Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS)[20], the Prevention of Money Laundering Act, 2002 (PMLA)[21], the Companies Act, 2013[22] " and a spectrum of other legislations incorporated the mentioned conditions as the legal framework. The 268th Law Commission Report[23] also advocated for a stringent approach to addressing all types of economic offences and suggested that the existing factors must be taken into consideration in totality with the nature, severity, effect, and magnitude of the crime on monetary and economic loss caused by it. The commission suggested that the decision must be based on all these nuances apart from the existing ones. This approach provides for the necessity for differentiated treatment of bail in economic offences, ensuring that the severity and impact of such crimes are duly considered in the judicial process.

The dual conditions of bail, consistent across these provisions are as follows:

1. Under the bail conditions there is an opportunity for the Prosecutor to file an "opposition", and
2. When the "Opposition" is filed by the public prosecutor the court will examine whether he is guilty of the offence and if bail is granted then he should not be committing any crime. Upon being satisfied the court takes the decision in this direction.

The state laws and the specialised legislative policies concerning organised criminal activity encompass the two conditions mentioned above. Ergo, bail conditions outlined in various state laws, such as those governing MCOCA[24] and the Gujarat Act,[25] mirror those established in specialized enactments. "These legal frameworks makes it imperative for the accused to bear the burden of proving their innocence for securing their bail. Also, the accused is liable to make the court have faith in them that they will not commit any crime if bail is granted."[26] Notably, these conditions are applied cumulatively rather than separately. Therefore, fulfilment of both conditions simultaneously is necessary for obtaining bail.

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[19]Law Commission of India, Report No. 268, Amendments to Criminal Procedure Code, 1973 - Provisions Relating to Bail (2017).

[20]The Narcotic Drugs and Psychotropic Substances Act, 1985, §37.

[21]The Prevention of Money Laundering Act, 2002, §45.

[22]The Companies Act, 2013, §212(6)(ii).

[23]Law Commission of India, supra note 19.

[24]The Maharashtra Control of Organised Crime Act, 1999, §21(4).

[25]The Gujarat Control of Terrorism and Organised Crime Act, 2015, § 20(4).

[26]"The Prevention of Money Laundering Act, 2002, § 45"; "The Narcotic Drugs and Psychotropic Substances Act", 1985, § 37(1)(b); The Companies Act, 2013, § 212(6); The TADA, 1987, § 20(8); The MCOCA, 1999, § 21(4); The Gujarat Control of Terrorism and Organised Crime Act, 2015, § 20(4); The Drugs and Cosmetics Act, 1940, § 36AC; "The Unlawful Activities (Prevention) Act", 1967; The Uttar Pradesh Gangsters and Anti-Social (Prevention) Act, 1986, § 19(4).

Several legal precedents also establish additional conditions that need to be considered when addressing cases that include economic offences apart from the existing legal provisions. One notable decision is *Y.S. Jagan Mohan Reddy v. CBI*,[27] wherein the SC observed that, in granting bail, the judiciary will consider various factors. Thus, encompassing a strength of supporting evidence, the potential severity of the punishment of the offence, the character of the individual who is the accused, and situations that were unique to the accused. These factors significantly covered evidence tampering, ensuring that the accused must be present during the trial, and manipulating or hampering of the witness. It included the larger interests of the state or the public. The provisions provide for considering comparable situations or similar factors.

It is worth to note at this juncture that bail provisions have remained consistent across both state enactments and specialized legislations be it MCOCA, the NDPS Act or the PMLA. This uniform approach to these bail provisions indeed mitigates any confusion regarding the applicability of relevant provisions which in turn gets strengthened by the perusal of the CrPC that also reveals that bail provisions outlined in specialised legislations supersede those of the CrPC[28]. In the case of *Gautam Kundu v. Manoj Kumar*[29], this position was reaffirmed by the Apex Court. When examining the purpose behind the PMLA and the relevant section of the CrPC, it was determined that if there's a conflict, the rules outlined in the PMLA will take precedence over those in the CrPC.

Withal, it is also important to highlight that since PMLA lacks provisions concerning anticipatory bail, the constitutional courts have wrestled with the issue of whether the twin conditions as enshrined in the PMLA apply to anticipatory bail. This issue was decided affirmatively in *Vijay Madanlal*[30], according to it the conditions of Section 45 are uniformly applicable to both anticipatory bail and bail orders, which differ only in the stage of issuance of bail. This perspective was further upheld by the apex court in the recent case of *Directorate of Enforcement v. M. Gopal Reddy*.[31] The cautionary stance articulated in the *P. Chidambaram*[32] case was also reaffirmed in this decision, emphasizing the requirement for judicious discretion within "Section 438 of the CrPC" due to the societal impact of economic offences.

(b) DEPARTURING FROM "PRESUMPTION OF INNOCENCE"

The "presumption of innocence", a fundamental tenet in criminal justice systems worldwide, stands as a cornerstone principle dictating that individuals accused of crimes are considered innocent until proven guilty beyond a reasonable doubt by the

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[27](2013) 7 SCC 439 (India).

[28]The Code of Criminal Procedure, 1973, § 5.

"5. Saving - Nothing contained in this Code shall, in the absence of a specific provision to the contrary, affect any special or local law for the time being in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force."

[29]Gautam Kundu v. Manoj Kumar, Assistant Director, Directorate of Enforcement, Govt. of India, MANU/SC/1453/2015 (India).

[30]Vijay Madanlal Choudhary v. Union of India, Writ Petition (Criminal) No. 532 of 2021 (India).

[31]Criminal Appeal No. 534 of 2023 (India).

[32]P. Chidambaram v. CBI,2019 SCC Online SC 1380 (India).

State. This bedrock principle not only serves as a fundamental safeguard against wrongful convictions but also upholds the ethos of fairness and justice in legal proceedings. Embedded within the fabric of legal systems, the "presumption of innocence" is enshrined not only in national frameworks but in international treaties and conventions as well. Articles 11(1) of the "Universal Declaration of Human Rights" (UDHR)[33] and 14(2) of the "International Covenant on Civil and Political Rights" (ICCPR)[34] explicitly recognize the "presumption of innocence" as a fundamental right. Additionally, international bodies like the "Financial Action Task Force" (FATF) acknowledge the importance of upholding the presumption of innocence until proven guilty, reflecting a global commitment to safeguarding this fundamental principle.

In the Indian legal framework, the principle of "presumption of innocence" holds a prominent position, receiving explicit acknowledgement not only within Article 21 of the Constitution but also deeply entrenched within Article 20(3). This presumption is safeguarded through the inclusion of the right against self-incrimination within Article 20(3). It is quite recent that the "innocence of the accused" has been presumed until proven guilty owing to its validity under the Right to Life and Personal Liberty, Article 21. Through the judgments in cases like *Manu Sharma*[35], *Sahara*[36], and *Nikesh Shah*[37], "presumption of innocence" was recognised solidifying its status as an integral component of the constitutional framework and ensuring its protection as a fundamental right under Article 21, i.e., Right to Life and Personal Liberty. Historically, the Indian judiciary has only gradually come to recognize and underscore the paramount importance of this foundational principle. Its status as a fundamental right of the accused stemming from Article 21 remained unsettled for a considerable amount of time. In the *Gurbaksh Sibbia v. State of Punjab*[38] case, the Apex Court highlighted the salutary nature of this principle within our criminal jurisprudence but refrained from acknowledging it as directly emanating from Article 21. As affirmed in the *Narendra Kumar v. State of M.P.*[39] case and other subsequent cases to the legal statutes before it recognised the "presumption of innocence" as a human right backing it as a fundamental right. This observation was further upheld in landmark decisions like Ranjitsing Sharma[40], which upheld its validity as a human right.

The legal precedence established through several landmark judgments as stated by far is interwoven into various aspects of criminal proceedings, including the determination of bail conditions. Traditionally, bail provisions, as outlined within Sections 436-439 of the CrPC have been guided by the presumption of innocence. Furthermore, the stated principle is also exemplified similarly in Sections 480-483 of the BNSS, thereby reinforcing the presumption of innocence within the bail jurisprudence.

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[33]Universal Declaration of Human Rights, G.A. Res. 217A, U.N. Doc. A/810 (Dec. 10, 1948).

[34]International Covenant on Civil and Political Rights,999 U.N.T.S. 171 (Dec. 16, 1966).

[35]Sidhartha Vashisht @ Manu Sharma v. State (NCT of Delhi), AIR 2010 SC 2352 (India).

[36]Sahara India Real Estate Corporation Limited & Ors. v. SEBI, Civil Appeal No. 9813 of 2011(India).

[37]Nikesh Tarachand Shah v. Union of India & Anr., (2018) 11 SCC 1 (India).

[38]AIR 1980 SC 1632 (India).

[39](2004) 10 SCC 699 (India).

[40]"Ranjitsing Brahmajeetsing Sharma v. State of Maharashtra & Anr.", (2005) 5 SCC 294 (India).

A significant departure from the presumption of innocence is observed in specialized legislation targeting specific forms of organised and more sophisticated criminal activities, such as money laundering, trafficking in drugs, persons and weapons and others. The departure complicates the legal process as the accused has to prove their innocence in order to get the bail plea approved by the concerned court. This in other words is "reversing the presumption of innocence" as the court presumes that the accused is guilty of the crime he/she has been charged for.

Notably, Section 45 of the PMLA exemplifies this departure, where stringent bail conditions reflect a reversed presumption of innocence. This becomes particularly contentious in light of the standards set internationally. For example, the FATF, a prominent international body tasked with legislating against money laundering, underscores the importance of upholding the presumption of innocence until proven guilty as one of its core objectives. This highlights the complexity and divergence in approaches to addressing the provisions at the national and international levels.

The Apex Court, considering the objectives of specialized legislations, has validated this deviation from the "presumption of innocence". For instance, the court reviewed the constitutional validity of some of the provisions in TADA in "*Kartar Singh v. State of Punjab*"[41] case. The rationale for this review is the analogous nature of the provisions. The court upheld the law but struck down some of its provisions, particularly those related to presumptions of guilt and extended periods of detention without bail. The ruling aimed to maintain an equilibrium between the requirement of protecting national security and the rights and liberties of individuals. Another pivotal case on this matter is *Ranjitsing Sharma*[42], wherein the Court decided the implications of "Section 21(4) of the Maharashtra Control of Organised Crime Act (MCOCA)", which outlines the twin conditions for granting bail. While upholding the provision, the Court emphasized a careful examination of the proofs on record. The judgement can be cited as follows:

"The wording of Section 21(4), in our opinion, does not lead to the conclusion that the court must arrive at a positive finding that the applicant for bail has not committed an offence under the Act. If such a construction is placed, the Court intending to grant bail must arrive at a finding that the applicant has not committed such an offence. In such an, it will be impossible for the prosecution to obtain a judgment of conviction of the applicant. Such cannot be the intention of the legislature. Section 21(4) of MCOCA, therefore must be construed reasonably. It must be so construed that the court is able to maintain a delicate balance between a judgment of acquittal and conviction and on order granting bail much before commencement of trial."

The satisfaction that the accused is not guilty must rely on reasonable facts and evidence. This was emphasized in the "*Chenna Boyanna Krishna Yadav v. State of Maharashtra*"[43] court ruling. The verdict entailed that mere surface evidence cannot determine the accused to be guilty but there should be substantial causes to prove that an accused has not committed the crime for which he/she is facing the trial or charges.

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[41](1994) 3 SCC 569 (India).

[42]Ranjitsing Brahmajeetsing Sharma v. State of Maharashtra, supranote 40.

[43](2007) 1 SCC 242 (India).

These judicial pronouncements delicately strike a balance between preserving the fundamental and human rights of the individual by considering the legal validity of the "presumption of innocence" and the aim to combat organised crimes. Thus, showcasing a balance between the rights of the individual and the security of the state or public. However, the inconsistent jurisprudence surrounding bail conditions across legislation, particularly in specialized legislation, highlights the challenges in balancing the imperatives of justice, security, and human rights. The concern extends beyond bail conditions; it encompasses the assignment of the burden of proof. This ruling not only determines which party bears the initial burden of presenting evidence but also shapes the legal perspective of an accused individual. Whether someone is presumed innocent from the outset or deemed guilty profoundly impacts the confidence of the accused, undoubtedly undermining their sense of assurance. The lack of consistency in bail conditions within a single provision not only breeds confusion for the accused but also undermines justice, equity, and fairness.

© NAVIGATING CONTROVERSIES AND DISPUTES FOR GRANTING BAIL

It is worth mentioning that the constitutionality of "Section 45 of the Prevention of Money Laundering Act" (PMLA) which outlines the twin conditions for bail, has long been a subject of contention. In 2018, through its ruling in the *Nikesh Tarachand*[44], the Supreme Court invalidated this provision, considering it arbitrary and in contravention of the two articles within the Constitution of India that, guarantee equality before the law and the right to life and liberty that is, articles 14 and 21, respectively. The judgement ensured that individuals who are facing trial under the PMLA do not become victims of arbitrariness and unfair treatment. Thus, keeping the two fundamental rights as the pivot point the court invalidated section 45 of PMLA.

Subsequently, through the Finance Act of 2018[45], the section was amended, replacing the phrase "*punishable for a term of imprisonment of more than three years under Part A of the Schedule*" with "*under the Act*", effectively reviving the provision. Despite the amendment, there remains ambiguity regarding the interpretation and implementation of the bail conditions outlined in the provision. This uncertainty has led to divergent rulings by High Courts across the country, resulting in inconsistent application of bail provisions in cases related to money laundering. While several High Courts opined that mere substitution of words in the section would not revive the twin bail conditions[46], others interpreted the amendment as reinstating the bail conditions[47].

A three-judge bench consisting of Justices A.M. Khanwilkar, Dinesh Maheshwari, and C.T. Ravikumar in *Vijay Madanlal*[48] case reasserted the constitutional legitimacy of Section 45. The bench relied their verdict on the seriousness and impact of money

[44]Nikesh Tarachand Shah v. Union of India & Anr., supra note 37.

[45]The Finance Act, 2018, No. 13 of 2018 (India).

[46]Sameer Bhujbal v. Assistant Director, BA No. 286 of 2018 (India); Upendra Rai v. Directorate of Enforcement, 2019 SCC Online Del 9086 (India); Ahilya Devi v. State of Bihar, Criminal Miscellaneous No. 41413 of 2019 (India); Dr. Vinod Bhandari v. Assistant Director, 2018 SCC Online MP 1559 (India); Shivinder Mohan Singh v. Directorate of Enforcement, 2020 SCC Online Del 766 (India).

[47]Arun Mukherjee v. Enforcement Directorate, 2018 SCC Online Cal 15230 (India).

[48]Vijay Madanlal Choudhary v. Union of India, supra note 30

laundering crimes. The observations in *Y.S. Jagan Mohan Reddy*[49] case led to this stringent decision according to which the Court emphasized the necessity for a distinct approach to bail proceedings in the context of economic offences, as they constitute a distinct class, given their profound influence on the nation's economy as a whole. Moreover, it was noted that the stringent provision of Section 45 would extend beyond the realm of regular bail to encompass anticipatory bail proceedings as well. Hence, the dual bail circumstances would apply even when the accused individual seeks "anticipatory bail under Section 438" of the Criminal Procedure Code, 1972 (CrPC).

Previously, the dual conditions were meant for Special Courts in the context of Section 44 of the PMLA. It was uncertain whether they could apply to the High Courts under Section 439 of the CrPC which was declined later due to their status as Constitutional Courts. Recently, this position was clarified in the case of *Tarun Kumar v. Assistant Director Directorate of Enforcement*[50], wherein the Supreme Court has affirmed that the twin conditions will apply even in the context of bail petitions under Section 439 CrPC.

Subsequently, a review petition of *Vijay Madanlal*[51] was lodged, wherein the Supreme Court affirmed that the "twin conditions" for release as stipulated in the revised Section 45(1) of the PMLA are constitutionally valid. The Hon'ble Court elucidated that while the conditions given under Section 45 of the PMLA are quite strict, they do not completely restrict the opportunity to seek bail. Rather, the discretion to grant bail resides with the judiciary, guided meticulously by the legal principles enshrined within the aforementioned section of the Act.

Withal, this verdict has garnered several criticisms on multiple fronts, with certain aspects currently undergoing review. The matter concerning the legal validity of section 45 is sub judice and pending for further examination by the court.

It is paramount to accentuate that the Supreme Court has admirably championed the rights of the accused, affirming the presumption of innocence as a fundamental right[52] and upholding the principle of 'bail, not jail'[53]. Yet, this ruling stands in stark contrast to prior judgments, which not only bolster the powers of the Enforcement Directorate but also subject the accused to the discretionary powers of the judiciary.

In the bail applications filed under Section 45 of the PMLA, judges find themselves in the intricate position of not only appraising pre-trial evidence to ascertain guilt-where the burden rests solely upon the accused-but also tasked with preventing the commission of further offences while on bail. Such anticipatory assessment of the accused's future conduct, coupled with the determination of bail eligibility, appears arbitrary and lacks a discernible rational basis. Ergo, bail in PMLA cases becomes a luxury accessible

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[49]Y.S. Jagan Mohan Reddy v. CBI, supra note 27.

[50]2023 OnLine SC 1486 (India).

[51]Vijay Madanlal Choudhary v. Union of India, supra note 30.

[52]Gurbaksh Sibbia v. State of Punjab, supra note 38.

[53]"Moti Ram v. State of MP, 1978 AIR 1954, 1979 SCR(1) 335 (India); State of Rajasthan, Jaipur v. Balchand, MANU/SC/0152/1977 (India); Sanjay Chandra v. Central Bureau of Investigation, (2012) 1 SCC 118 (India); Arnab Manoranjan Goswami v. State of Maharashtra and Ors., MANU/SC/0902/2020 (India); Satendra Kumar Antil v. Central Bureau of Investigation, Miscellaneous App No. 1849 of 2021 in SPL (CRL.) No. 5191 of 2021 (India)."

primarily to those with the means to procure high-quality legal representation, further accentuating disparities within the legal system.

Currently, with the recent introduction of new criminal laws, the broad definition of organised crime under the BNS, which encompasses various offences within its scope has been incorporated as an offence under Section 111 of the BNS and the bail procedure in such cases is to to be governed by Sections 480 and 483 of the Bharatiya Nyaya Suraksha Sanhita, 2023 (BNSS), which bear resemblance to Sections 437 and 439 of the CrPC 1972. The deliberate inclusion of organised criminal activity within the BNS framework underscores the legislative intention for bail conditions pertinent to such offences. This is particularly notable given the set of similar provisions under state enactments such as MCOCA, which mandated the inclusion of "twin conditions" as fundamental prerequisites. Ergo, it is explicit that bail conditions delineated in the BNSS are in contrast with those specified under special legislations.

Moreover, if a specialized legislation exists for a crime included in this definition, such as trafficking in drugs and persons, bail proceedings will fall under provisions of that specialized legislation[54] that are based on a reversed presumption of innocence. Conversely, for offences not covered by specialized legislation, the bail of the accused shall be resolutely granted under BNSS, this is based on the assumption that the accused is innocent till not proven guilty. Ergo, this discrepancy in bail provision can potentially result in the dismissal of the plea and compromise of the fair trial rights the individual. This scenario undermines fundamental rights and necessitates careful consideration to ensure equitable legal proceedings. This inconsistency not only weakens the uniformity of the legal system but also poses challenges in ensuring fair and equitable treatment for individuals accused of offences under both statutes.

In light of this inconsistency, it becomes imperative to consider several intricate scenarios regarding the potential disparities arising from the bail provisions under the BNSS and the specialised legislation, notably PMLA[55].

In this context, let us presume that bail, initially granted to the individual facing the charges within the context of a scheduled offence remains in effect. Additionally, there are no instances of the accused being rearrested after the initiation of proceedings of the money laundering from which follows that the Special Court has acknowledged the case under Section 44 of the PMLA.

Firstly, let us envision a hypothetical scenario in which more than one individual is facing prosecution for organised crime as a syndicate under the BNS. Bail is granted to them under the provisions stipulated by the BNSS. Subsequently, as the legal proceedings progress, the trial for money laundering commences. In this particular

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[54]The Bharatiya Nyaya Suraksha Sanhita, 2023, § 5.

"5. Nothing contained in this Sanhita shall, in the absence of a specific provision to the contrary, affect any special or local law for the time being in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force."

[55]Tarsem Lal v. Directorate of Enforcement Jalandhar Zonal Office, SLP (Crl.) No. 969/2024 (India).

"Prima facie, it appears to us that once cognizance of a complaint filed under Section 44 is taken by the Special Court under the Prevention of Money Laundering Act, 2002 (for short "the PMLA Act"), the power to arrest vesting under Section 19 of the PMLA Act cannot be exercised."

instance, it is crucial to note that the individuals accused of organised crime will continue to enjoy the bail that was initially granted to them under the BNSS provisions, persisting throughout the trial for money laundering.

Moving forward, consider a lone individual committing a scheduled offence, thereby failing to meet the criteria for classification under organised crime as outlined by the BNS. Resultantly, the accused can be subjected to the laws under BNS but can be granted bail as per the BNSS. Should the trial for money laundering be initiated thereafter, the bail initially granted under BNSS provisions shall remain in effect throughout the subsequent legal proceedings.

In such a situation if an individual is accused under any of the specialised provisions then they will be granted bail under one of those provisions whether the "twin conditions" of bail prevail in those provisions or not. The subsequent trial for money laundering will not alter the bail initially granted to the accused under the specialized legislation.

Lastly, consider a scenario where the individual prosecuted for a crime listed in BNS differs from the individual who is prosecuted for a crime listed in PMLA. This situation might arise if one (or several) individual(s) commits a crime listed in BNS, while another is implicated only for laundering the proceeds of that crime. As a result, distinct bail conditions will apply to these individuals, even if the consequences stemming from the crime listed in the BNS are far more severe. For example, if an individual commits murder during a dacoity, the ramifications of the criminal activity listed in BNS are inherently more substantial as compared to those under the purview of PMLA. However, the individual involved in laundering the proceeds of the dacoity will face additional twin conditions under Section 45 of the PMLA wherein securing bail becomes comparatively challenging due to this shift in presumption. Hence, to uphold the principle of "rule of law" and protect fundamental rights, it becomes imperative for lawmakers to confront these disparities and endeavour to make the provisions more uniform.

IV. CONCLUSION AND SUGGESTIONS

The in-depth examination of inconsistencies in bail provisions between the BNSS and special legislations indicates that these disparities not only pertain to the specific rationale of bail but also challenge the foundational principle of "presumption of innocence", effectively diverting the onus of proof to the accused. Previously these provisions remained unchallenged and relatively uniform, as both state enactments and specialized legislations upheld "twin conditions" of bail. However, with lawmakers now incorporating organised crimes within the ambit of central legislation, there appears to be a tacit acknowledgement that the bail conditions are deemed unnecessary for such offences.

Complicating matters further is the intertwined nature of both laws, which often leads to instances in which courts have to determine which bail provision applies. The reversal of the onus of proving one's innocence poses practical challenges for the accused, who may lack the resources to adequately defend themselves, thus impeding their right to a "fair trial". Therefore, efforts should be made to streamline bail provisions to ensure consistency and fairness in their application, thereby safeguarding the rights of accused individuals from being unduly impacted by procedural irregularities. By promoting uniformity and clarity in these provisions, the legal system can uphold the principles of

justice and protect the rights of individuals facing criminal prosecution. The analysis presented in the research paper highlights the problematic reversal of the legal framework that considered the accused innocent until proven guilty. At its core, this fundamental principle transcends mere theoretical debates and overarches the other rights of the accused, thus strongly proposing aligning the conditions outlined in special legislations with the new BNSS along with the judicial precedents shaping bail jurisprudence. It is paramount that the presumption of innocence underpins the bail proceedings, particularly concerning economic offences-as endorsed globally and thus the same can be achieved either by making legislative amendments to reinstate the presumption of innocence or by declaring provisions contrary to this principle as unconstitutional.

LEGAL REGIME ON VICTIM COMPENSATION IN BRITAIN, USA AND INDIA: A COMPARATIVE HISTORICAL PERSPECTIVE AND WAY FORWARD

Dr. Anoop Kumar*
Mudit Soni**

Abstract

Historically, criminologists have ignored the issues related to victims in general and compassion in particular. Originally Criminal Justice system recognised victim as complainants or as witnesses. This perspective is now substantially changed by the transformation of the ideas, philosophy and law. At present, victims have become a substantial area of inquiry and research within criminology and victimology. Moreover, victimology has developed as an independent research-oriented subject. The paper intends to address the compensation mechanism for crime victims in India vis-à-vis in Britain and USA. The study offers an analytical insight and comparative description of victim compensation mechanisms. The comparison points out the convincing ideas that can be adopted for the betterment of the legal regime on victim compensation.

Key words -
Victim, Compensation, Criminal Justice System, Victim Protection.

I. INTRODUCTION

The criminal justice system of the contemporary world is based on 'war on crime model' where focus is concentrated on the criminals. This 'war on Crime model' in itself is the cause of suffering, because under this model the entire focus of the state is to punish the offender only and the position of victim is totally compromised. However, the ultimate purpose of formal and informal rules, laws, legal institutions and criminal justice system as a whole is to reduce the quantum of suffering in the society.

The criminal law in general is offender oriented and the sufferings of victim, often immeasurable, are entirely overlooked in misplaced sympathy for the criminal. The modern criminal law, which is supposed to represent the social spirits and norms, is designed to punish as well as to reform the criminal but it overlooks significant by-product of crime, the victim[1].

The criminal justice system today is excessively loaded in the favour of the accused. The fundamental principle on which the legal system is based is to let ninety-nine persons get away free than to have one innocent person punished. The principle while

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[1]S.P. SINGH MAKKAR AND PAUL C. FRIDAY, GLOBAL PERSPECTIVES IN VICTIMOLOGY (ABS Publications, 1993 first edition) at 147

preventing injustice to one innocent denies justice to ninety-nine victims of crime. The rights of offenders are statutorily protected for instance the offender has a constitutional right to be informed of ground of arrest and has the right to consult and to be defended by a legal practitioner of his choice[2]. The benefit of doubt always goes to the accused where the case fails on prosecutions inability to prove the case beyond reasonable doubt. However, the victim in spite of having suffered victimization[3] remains neglected.

The crime victims were neglected in the criminal justice system for several decades and continued to be the 'forgotten entity' resultantly losing a sense of belongingness to this kind of system[4] .The neglect, apathy and indifference of the laws and institutions only added to the plight of victims leading to secondary victimisation[5]. 'Forgotten entity', 'marginalised persons' and 'subject of secondary victimisation' are some of the common expressions that a crime victim is associated with in the criminal justice system[6]. The legislative and judicial endeavours have brought about significant changes in the criminal justice system catering the needs of victim.

The concept of victim justice is an aspiration of a progressive society. Victim justice is the coincidence of criminal justice focusing on rights, participation, protection and assistance to the victims of crime. Victim justice is about the arrival of the victim to the core of criminal justice system. In the same context, the present paper explores the different dimensions of the legal regime on victim compensation, including comparative historical evolution of law from International and national perspectives. A comprehensive, comparative and critical analysis of the legal regime on victim compensation in Britain, USA and India is also presented in the paper.

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[2]Article 22(1) of the Constitution of India, 1950, guarantees the right of an arrested person to be informed of the reasons for their arrest and to consult and be defended by a legal practitioner of their choice.

[3]Victimization is a process of being victimized or becoming a victim. There are different theories of victimization which are - Primary victimization, Secondary victimization, Re-victimization and Self-victimization. See generally, Stephen Schafer, The Victim & his Criminal (1968), where he gave the concept of "functional responsibility" according to the concept, the victimization occurs as a result of the functional interplay of causative elements. He believed that the responsibility of the victim is a critical issue in the problem of crime, some victims often contribute to crime by their acts of negligence, precipitation or provocation.

[4]See generally Tim New burn, Criminology Routledge publication (2017), Chapter 18, Victim, Victimisation and Victimology, p.366, "It is now the standard practice to observe that the 'victim' has long been the forgotten party in criminal justice. Occasionally victims would appear on the scene as complainant and applicants for the compensation, or as a witness in the Court, but thereafter they were often largely neglected." also see, Adv. Amit Bhaskar," Analysing Indian Criminal Justice Administration from Victims' Perspective", Bharati Law Review, Oct.-Dec., 2013, available at: http://docs.manupatra.in/newsline/articles/Upload/D4A9C7F0-8A98-4E34-B88E-0145775149D7.pdf (last visited 6thJuly, 2024) "Unfortunately, in India, after the crime is reported and the criminal motion is brought into force, the entire focus tilts towards the accused, forgetting completely the victims' rights and perspectives. As a result, the victims are sometime termed as "forgotten entity" or "marginalized entity" in the Indian criminal justice administration."

[5]Secondary victimisation refers to the victimisation that occurs not as a direct result of the criminal act but through the response of institutions and individuals to the victim. Institutionalized secondary victimisation is most apparent within the criminal justice system. See generally, Handbook on Justice for Victims UNODCCP, 1999, p.132.

[6]Ranbir Singh, Victim Justice: A Paradigm Shift in Criminal Justice System in India (Book Review) (2017). 4(1) Journal of National Law University Delhi , 115-117 (2017).

II. HISTORICAL EVOLUTION OF VICTIM CONCERN

The historical evolution of victim concern may be classified broadly in two perspectives, one is concerned with the development of victimological theories justifying the victim concern and the other deals with the legal regime on victim compensation.

Victimology over the year developed and refined with the development of different approaches to victimology. Early research in victimology concentrated on the fact that the victim could be considered responsible for his own victimization[7]. Hans Von Hentig and Benjamin Mendelsohn were key early figures in developing the idea of Positivist Victimology. Hans von Hentig referred to the 'doer-sufferer relationship'[8] and Mendelsohn discussed the concepts of penal couple[9] , victim precipitation[10] and victimal receptivity[11]. The positivists began to explore the field of victimology by creating 'typologies'[12] .

The Positivist Victimology represented the concept of 'victim blaming' and 'penal couple'. The Radical[13] and Critical[14] Victimology emerged as a reaction to positivist victimology. The Contemporary debate on Victimology includes the study of Minority Victimology, Female Victimology, Child Victimology, and likewise.

It is an undisputed fact that the idea creates reality. These approaches to victimology serve as an idea that generates reality. The legal regime on victim compensation is the reality, which is rooted in these theories and approaches to victimology. The idea of victim compensation is now being nurtured through the tedious task of translation into an operationally administrative reality[15].

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[7]Positivist Victimology or the traditional approach to victimology

[8]Hans von Hentig referred to the victim's contribution to the genesis of crime and the 'causative' role of the victim. It takes for granted that the "doer" is always, and during the whole process which ends in the criminal outcome, active, the "sufferer" always inactive. He insisted that victims may incite, provoke or create a situation conducive to the committing of crime., see generally, HANS VON HENTIG, 'THE CRIMINAL AND HIS VICTIM: STUDIES IN THE SOCIOBIOLOGY OF CRIME' (New Haven: Yale University Press 1948).

[9]Penal couple theory argues that when crime takes place, it has two partners, one the offender and second the victim, who is providing opportunity to the criminal in committing the crime.

[10]Victim precipitation theory proposes that certain actions, behaviours, or characteristics of the victim may initiate or escalate the criminal act. It can be divided into two main types: active precipitation and passive precipitation.

[11]Victimal receptivity is where one unconsciously becomes victim.

[12]Benjamin Mendelsohn for example delineated a typology of victims and their contribution to the criminal act. The typology consists of six categories: (1) completely innocent victims; (2) victims with minor guilt; (3) voluntary victims; (4) victims more guilty than the offender; (5) victims who alone are guilty; and (6) the imaginary victims.

[13]Radical victimology argues that structural inequalities are responsible for victimisation.

[14]There was a confusion while defining the victim whether it can be termed as a label or stereotype or conditions or a self-perception or social construction etc. Hence, Quinney (1972) suggested that victim is nothing but a social construction which keeps on changing with the time and societal perception depending on their wisdom towards the understanding of any issue. Labelling theory argues that a person is victim because the sate defined such and such person to be victim. See also, Fattah, 2010, Sati, widow remarriage, child marriage are such examples of social construction of victims.

[15]Marvin E. Wolfgang, "Victim Compensation in Crimes of Personal Violence", University of Minnesota, Law School Scholarship Repository, MINNESOTA LAW REVIEW 234 (1965)

The positivist approach makes the victim responsible for his own victimisation therefore, the victim would not be entitled to any compensation. The radical and the critical victimology believing in structural inequality and state labelling for the victimisation of a person as a victim respectively, leave room for compensation mechanisms. The law on victim compensation evolved based on justifications laid down by the approaches to victimology.

The development of victim concern at the international level has indeed been shaped significantly by initiatives from the United Nations, aimed at creating a legal framework for victim compensation and support. This evolution reflects a growing recognition of the rights and needs of victims of crime and abuses of power.

The Seventh United Nations Congress on the 'Prevention of Crime and the Treatment of Offenders' was held in Milan in 1985was a significant milestone in recognizing the rights of victims of crime and abuse of power. The documents prepared for consideration by the Seventh Congress included a "*Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*"[16] prepared by the then Attorney-General of South Australia, Chris Sumner. The principles were derived from the report of a Committee of Inquiry into victims of crime in 1981[17], of which one of the findings dealt with compensation for victims. After considerable debate, the declaration was adopted by the Congress and formally approved by the General Assembly of the United Nations in December, 1985.

The UN Declaration[18], defines 'Victims of crime'[19] exhaustively embracing a broad concept of harm. The declaration includes the provisions dealing with Access to justice

[16]United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by the General Assembly at its 96th Plenary Meeting, 29th November 1985, A/RES/40/34, available at: https://www.ohchr.org/sites/default/files/victims.pdf, (last visited 24thJuly, 2024).

[17]Attorney General's Department South Australia Report of the Committee of Inquiry on Victims of Crime Government Printer Adelaide 1981.

[18]Supra note 16

[19]"Victims" means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power. A person may be considered a victim, under this Declaration, regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between the perpetrator and the victim. The term "victim" also includes, where appropriate, the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization. See also, Van Dijk, 1999 who views this as general Victimology and Cressey, 1988 as humanistic Victimology.

and fair treatment[20], Restitution[21], Compensation[22], Assistance[23] for the crime victims. The declaration also highlights the concept of 'Victims of abuse of power'[24] and possible measures of combatting the same.

III. VICTIM COMPENSATION REGIME IN BRITAIN

Historically in England, a criminal court may order restitution if stolen goods can be traced, with some safeguards for innocent holders. Further, the money found in the possession of the thief when arrested may be subject to an order for repayment as compensation. In felony cases, if the application is made shortly after conviction, the court may order compensation for loss of property up to the sum of one hundred pounds[25].

Ms. Margery Fry an eminent English magistrate and a pioneering advocate for victims' rights believed that victims of crime needed to be compensated for damages. Fry maintained that victims should not be denied compensation even when offenders were

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[20]Judicial and administrative mechanisms should be established and strengthened where necessary to enable victims to obtain redress through formal or informal procedures that are expeditious, fair, inexpensive and accessible. Victims should be informed of their rights in seeking redress through such mechanisms. Informal mechanisms for the resolution of disputes, including mediation, arbitration and customary justice or indigenous practices, should be utilized where appropriate to facilitate conciliation and redress for victims.

[21]Offenders or third parties responsible for their behaviour should, where appropriate, make fair restitution to victims, their families or dependants. Such restitution should include the return of property or payment for the harm or loss suffered, reimbursement of expenses incurred as a result of the victimization, the provision of services and the restoration of rights.

[22]When compensation is not fully available from the offender or other sources, States should endeavour to provide financial compensation to:

(a)Victims who have sustained significant bodily injury or impairment of physical or mental health as a result of serious crimes;

(b)The family, in particular dependants of persons who have died or become physically or mentally incapacitated as a result of such victimization.

The establishment, strengthening and expansion of national funds for compensation to victims should be encouraged. Where appropriate, other funds may also be established for this purpose, including in those cases where the State of which the victim is a national is not in a position to compensate the victim for the harm.

[23]Victims should receive the necessary material, medical, psychological and social assistance through governmental, voluntary, community-based and indigenous means. Victims should be informed of the availability of health and social services and other relevant assistance and be readily afforded access to them. Police, justice, health, social service and other personnel concerned should receive training to sensitize them to the needs of victims, and guidelines to ensure proper and prompt aid.

[24]"Victims" means persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that do not yet constitute violations of national criminal laws but of internationally recognized norms relating to human rights. States should consider incorporating into the national law norms proscribing abuses of power and providing remedies to victims of such abuses. In particular, such remedies should include restitution and/or compensation, and necessary material, medical, psychological and social assistance and support. States should periodically review existing legislation and practices to ensure their responsiveness to changing circumstances, should enact and enforce, if necessary, legislation proscribing acts that constitute serious abuses of political or economic power, as well as promoting policies and mechanisms for the prevention of such acts, and should develop and make readily available appropriate rights and remedies for victims of such acts.

[25]Supra note 15 at p.229

not able to compensate their victims. Compensation, in these cases then, should come from public funds. In response to her advocacy, Britain established the Criminal Injuries Compensation Scheme in 1964, which provided state-funded compensation programs[26].

The Criminal Injuries Compensation Scheme,1964 was a non-statutory scheme establishing an administrative board to assess and award compensation to victims. The payment of compensation was made ex-gratia in the shape of a lump- sum amount arrived at in the same manner as a civil award of damages for personal injury based on tort. Compensation was available from the board for a broad range of crime related injuries ranging from loss or damage, physical harm, loss of earnings, pain and suffering, and to an injury as minimal as loss of clothing provided the injury was personal and directly related to a crime of violence[27]. Overall, the Criminal Injuries Compensation Scheme marked an important evolution in the approach to victim support in the Britain. The success of this scheme influenced subsequent developments in victim compensation and support services, paving the way for more comprehensive statutory schemes in the years to come.

With a view to giving statutory form to the scheme, the British Government incorporated Part VII of the Criminal Justice Act, 1988 to the Criminal Injuries Compensation Scheme[28]. According to the provisions the scheme would be administered by a statutory board appointed by the Secretary of State. Here compensation was the most appropriate action only after the conviction of offender and claims for compensation were to be determined and the amounts payable to be assessed on the basis of principles of tortious liability[29]. Impact of the statutory framework may be summarised as Enhanced Credibility, Broader Access to Justice, by linking compensation to convictions, the scheme aimed to streamline the process for victims, and Increased Support for Victims.

In the interim, the existing Criminal Injuries Compensation Scheme was replaced with a new tariff scheme in 1994 on the recommendation of the Law Commission in the white paper on 'Compensating victims of violent crime: changes to the criminal injuries compensation scheme[30]' presented to the parliament in 1993 and the first statutory scheme under Criminal Injuries Compensation Act 1995.

The Criminal Injuries Compensation Act,1995 has replaced all the other earlier compensation schemes which were based on common law concept of damages. The scheme of 1995 is a tariff-based system for determining injury awards by weighing of loss. Injuries of comparable severity are combined together for which a fixed payment is made and a lump sum award related to the severity of the injuries is paid[31].

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[26]JANET K. WILSON, THE PRAEGER HANDBOOK OF VICTIMOLOGY 99-100, (Greenwood Publishing Group 2009)

[27]154th Law Commission Report (1996) at p. 57 para 4.3.2. See generally, Marvin E. Wolfgang, "Victim Compensation in Crimes of Personal Violence", MINNESOTA LAW REVIEW 240 (1965)

[28]Criminal Justice Act, 1988, Part VII: Compensation by Court and Criminal Injuries Compensation Board, (24th July, 2024) https://www.legislation.gov.uk/ukpga/1988/33/part/VII .

[29]154th Law Commission Report (1996) at p. 58 para 4.3.3

[30]Compensating victims of violent crime: changes to the criminal injuries' compensation scheme, available at: https://assets.publishing.service.gov.uk/media/5a74c563e5274a3cb28670bd/2434.pdf (last visited 24th July, 2024).

[31]Supra note 27 at p.58 para 4.3.4.

The Criminal Injuries Compensation Scheme of 1995 is finally replaced by 'The Criminal Injuries Compensation Scheme 2012' which awards compensation to 'victims of violent crime' who have sustained a 'criminal injury'. One of the changes that resulted in 2012 is an introduction of an explicit definition of a 'crime of violence'[32] on the face of the Scheme. The aim was to provide transparency and clarity around the circumstances in which victims of violent crime may be eligible for compensation under the Scheme[33].

The Criminal Injuries Compensation Scheme 2012 is administered by the Criminal Injuries Compensation Authority (CICA), the rules of the Scheme and the value of the payments awarded are set by the Secretary of State and approved by Parliament. To qualify for an award, an injury must be described in the tariff of injuries at Annex E[34] of the Scheme. Decisions are made on individual applications by claims officers independently of the Secretary of State[35]. The Scheme 2012provides that the applicants should apply for compensation as soon as reasonably practical and within two years of the date of the incident; the time limit can be extended where due to exceptional circumstances the applicant could not have applied earlier. Awards can also be reduced or withheld in circumstances where the applicant's conduct contributed to the injury, or where applicants do not cooperate with the CICA to progress the claim[36].

Victim compensation mechanism in the Britain have evolved over time, with improvements in legal systems and increased consideration and recognition of victim rights. The Code of Practice for Victims of Crime (2020)[37] is the major developments relating to victim and his rights. The code describes under the head of 'Right 5' that a victim has right to compensation. The code enumerates that there are three recourses for victim compensation. First being Court ordered compensation in the form of sentence secondly, compensation available under Criminal Injuries Compensation Scheme and lastly, Civil (non-criminal) compensation available from the suspect or offender outside of the criminal justice process by resorting to civil courts[38].

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[32]Annex B of the Criminal Injuries Compensation Scheme, 2012 defines "Crime of violence" is a crime which involves:

(a) a physical attack;

(b) any other act or omission of a violent nature which causes physical injury to a person;

(c) a threat against a person, causing fear of immediate violence in circumstances which would cause a person of reasonable firmness to be put in such fear;

(d) a sexual assault to which a person did not in fact consent; or

(e) arson or fire-raising.

[33]Ministry of Justice, Criminal Injuries Compensation Scheme Review 2020, page 15 para 45, 46, (15thAugust, 2024) https://assets.publishing.service.gov.uk/government /uploads/system/uploads/attachment_data /file/901140/cics-review-2020.pdf.

[34]Annex E deals with Tariff of Injuries which is further divided in Part A and Part B; Part A: Physical and Mental Injuries, Part B: Sexual and Physical Abuse and Other Payments

[35]Supra note 33 atp.12 para 34

[36]Supra note 33 at p.13 para 38

[37]Code of Practice for Victims of Crime in England and Wales, November 2020, Presented to Parliament pursuant to section 33 of the Domestic Violence, Crime and Victims Act 2004, available at:

(15thAugust, 2024) https://assets.publishing.service.gov.uk/media/60620279d3bf7f5ceaca0d89/victims-code-2020.pdf.

[38]Ibid at pp. 20-21

IV. VICTIM COMPENSATION REGIME IN USA

At the beginning of the nineteenth century in the United States, several states implemented laws aimed at addressing the interests of victims in cases of larceny. These laws reflected an early recognition of the need for restitution in addition to criminal punishment, could be required to return to the owner an amount of money twice or three times the value of the stolen goods or, in the case of insolvency, to perform labour for the victim for a certain period of time[39] .

In the mid-1960s, there was a significant surge in interest regarding victim compensation legislation in the United States, driven by growing awareness of the needs of crime victims. Superior Court Judge Francis McCarty of San Francisco have been credited as the major stimulus for the victim compensation legislation in California. The judge wrote a letter to a state legislator requesting that legislation be developed to provide assistance to victims, Federal legislation was proposed in 1964 by Senator Ralph Yarborough of Texas and a bill was subsequently enacted in 1965[40]. California developed the country's first crime victim compensation program in 1965, and was followed by New York in 1966, Hawaii in 1967, Maryland and Massachusetts in 1968, and New Jersey in 1971[41].

The 1980s was a significant decade for victims' rights in the United States. The victim's rights movement grew out of a widespread sentiment that the legal system did not accord victims the respect or sympathy they deserved, and this lack of support resulted in negative interactions with the criminal justice system. In 1982, President Ronald Reagan appointed a 'Task Force on Victims of Crime', which issued a Final Report[42] making numerous recommendations[43]. As a result of the recommendation of the Commission, in 1984, the Victims of Crime Act (VOCA)[44] was passed which established

[39]Bruce R. Jacob, "Reparation or Restitution by the Criminal Offender to His Victim: Applicability of an Ancient Concept in the Modern Correctional Process", 61 (2) JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY, 155 (1970).

[40]Daniel McGillis and Patricia Smith, "Compensating Victims of Crime: An Analysis of American Programs" U.S. Department of Justice National Institute of Justice Office of Development, Testing, and Dissemination, 28, (16th August, 2024) https://www.ojp.gov/pdffiles1/Digitization/86442NCJRS.pdf .

[41]Supra note 27 at 58 in para 5.1.

[42]Final Report Washington DC US Government Printing Office 1982, Final Report of the President's Task Force on Victims of Crime, available at: https://www.ojp.gov/pdffiles1/ovc/87299.pdf, Also see: Adv. Amit Bhaskar," Analysing Indian Criminal Justice Administration from Victims' Perspective", BHARATI LAW REVIEW, 172-173, (Oct.-Dec., 2013). In 1982, the U.S. President Reagan Commissioned the President's Task Force on Victims of Crime under the direction of Assistant Attorney General Lois Haight Harrington.

[43]Njeri Mathis Rutledge, "Looking a Gift Horse in the Mouth-The Underutilization of Crime Victim Compensation Funds by Domestic Violence Victims" 19:223 DUKE JOURNAL OF GENDER LAW & POLICY, 230 (2011)

[44]In 1984, after a sustained campaign of nearly 200 years the congress enacted Victim of Crime Act, 1984 the purpose of this Act was to provide: a) Compensation to the crime victims b) To establish a Fund described as Crime Victims Fund within the US Treasury comprising of the collections from fine, penalties and forfeiture. The Fund to be administered and allocated by the Attorney General, half of the fund shall be strictly allocated for the state victim compensation programmes and the rest half goes for the payment of the victim assistance programme, victim service and his compensation, See generally154th Law Commission Report (1996) at p.58 para 5.1.

the Crime Victims Fund (CVF)[45]. It was 1986 when VOCA grants first went State Victim Compensation Programs. While victim compensation in America is definitely a State?Federal partnership, states pay for about two?thirds of the costs, and the federal government covers about 30%[46]. In 1975 as a national umbrella organization, National Organization for Victim Assistance (NOVA) was established. It dedicated to expanding current victim services, developing new programmes and supporting passage of victims' rights legislation. In addition to this, NOVA also serves as a conduit of information and technical assistance for local and regional victim assistance programme[47].

In April 2004, the U.S. Congress enacted the Crime Victims' Rights Act. The Act deals with the rights of crime victims[48] in federal proceedings that generally included, and even expanded the rights of the crime victims[49]. This federal Act was the basis for many states in U.S. to enact state legislation for the victims' protection[50]. The current encouragement is for victim integration in the system through the use of a Victim Impact Statement (VIS)[51], a statement made by the victim and addressed to the judge for consideration while sentencing. It usually includes a description of the harm done in

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[45]One of the Final Report's most significant recommendations proposed federal funding for existing state victim compensation programs. See generally Ad. Amit Bhaskar," Analysing Indian Criminal Justice Administration from Victims' Perspective", Bharati Law Review, Oct.-Dec., 2013, at page 172-173, The Fund is supported by money collected through criminal fines, forfeited bail bonds, penalties and special assessments. Victims can apply to this fund to cover crime related medical costs, funeral costs, mental health counselling, or lost wages that are beyond the insurance coverage. Generally, victims are required to report to crime within 3 days and file claim within 2 years. Maximum awards generally range from $10,000 to $25,000, See generally: 154th Law Commission Report (1996), p.58 para 5.2. Compensation is given to only innocent victims. If the Board finds evidences which suggests that the victim also had the role or played significantly in the commission of the crime the compensation amount shall be reduced or disallowed in its entirety moreover all the states programmes prohibit double recoveries, if any money is received from the insurance policy or other governmental agencies then the same shall be deducted from the Boards determination. A common feature of all these victim compensation schemes is that the compensation programme deals with only most serious crimes, those which result in either death or injury

[46]Victim Compensation in America: The State-Federal Partnership, A Special Report from The National Association of Crime Victim Compensation Boards, (21st August, 2024) https://assets.publishing.service.gov.uk /media/5a74c563e5274a3cb28670bd/2434.pdf, .

[47]Adv. Amit Bhaskar," Analysing Indian Criminal Justice Administration from Victims' Perspective", BHARATI LAW REVIEW, 172-173, (Oct.-Dec., 2013)

[48]This Act identifies the following rights of the victims:

a) To be reasonably protected from the accused.
b) To have reasonable, accurate and timely notice of proceedings.
c) To not to be excluded from any such public proceedings.
d) To be reasonably heard.
e) To confer with an attorney for the government in the case.
f) To full and timely restitution as provided by law.
g) To be free from unreasonable delay.

[49]Supra note 26 at pp. 301-302

[50]Supra note 47 at pp.172-173

[51]In Payne v. Tennessee, 501 U.S. 808 (1991), the United States Supreme Court had ruled that the Eighth Amendment allows the prosecution to introduce a victim impact statement at the sentencing phase of a capital case because it is "relevant evidence" to the determination whether to impose the death penalty or not. See generally Robert C. Davis & Carrie Mulford, "Victims' Rights and New Remedies: Finally Giving Victims Their Due", 24 J. CONTEMP. CRIM. L. 198 (May 2008).

terms of physical, psychological, social and financial consequences of the offence. In some jurisdictions, a VIS also includes a statement concerning the victim's feelings about the offence, the offender and a proposed sentence for infliction.

A Special Report from 'The National Association of Crime Victim Compensation Boards' outlines the American law on victim compensation. State Crime Victim Compensation Programs operate under detailed state statutory and regulatory frameworks. The State Crime Victim Compensation Program mandates the filing of the application seeking compensation within the time limit of 2 years[52]. Reporting and cooperation with law enforcement agencies[53]. Contributory conduct, requiring a look at criminal activity on the part of the victim[54] and to preserve scarce funds for victims not covered by Medicaid, insurance, etc., states must not pay benefits to a victim if a federal benefit program covers those costs[55].

V. VICTIM COMPENSATION REGIME IN INDIA

The concern for victims in Indian society indeed has deep historical roots, reflecting a complex interplay of justice and community support. There was an inbuilt mechanism for restoration and community support for them. The tradition of atonement and restitution existed. According to Manu, punishment by the State was of four kinds - the King was to punish first by gentle admonition, thereafter by a severe scolding, further by a fine and finally by corporal punishment[56]. This historical perspective highlights a tradition of valuing victims and promoting their rights within the community, suggesting that justice is not solely about punishment, but also about healing and

[52]See generally Victim Compensation in America: The State-Federal Partnership, A Special Report from The National Association of Crime Victim Compensation Boards, at p.3 Prima-facie it may appear that large numbers of claims are denied for failure to file within a specified limit of 2 years; or for not reporting to police and cooperating in an investigation of the crime; or for the victim committing criminal acts that cause the victim's injury or death but the statistics show that extremely small numbers of claims are denied for failure to meet basic eligibility requirements. Those statistics, gathered annually from the states, show the following:

- Less than 0.5% of applications are denied for late filing.
- Less than 1.5% of applications are denied for victims' responsibility for the crime.
- About 2% of applications are denied for non-reporting to police, and 2% are denied for failure to cooperate with law enforcement authorities.

[53]States must promote cooperation with law enforcement, with allowances for the physical and mental health of victims, their safety, and cultural/linguistic issues, with exceptions and waivers, especially for victims of sexual assault, domestic violence, human trafficking, and child abuse.

[54]criminal activity on the part of the victim that directly causes the injury or death, and reduction and/or denial of benefits if the victim is responsible for their own injury or death.

[55]Supra note 52 at p.3

[56]The fine imposed on the culprit was not to supplement the loss of the offender person, but in order to protect the man from criminality. There is a provision in Hindu Penal Policy to compensate the loss caused by another. Manu has discussed it in detail in Manusmriti. Also see, DAMAYANTHI DOONGAJI, "CRIME AND PUNISHMENT IN ANCIENT HINDU SOCIETY", (New Delhi: Ajentha Publications 154 1986) "If offender has no property, he must work for the victim. If he fails to do manual work, he will be sent to prison. A Brahmin is allowed to pay in instalments. The lowest fine 250 panas and higher 1000 panes."

restoration. In contemporary discussions about victim rights and compensation, these ancient principles continue to resonate, emphasizing the need for a more empathetic and restorative approach to justice.

The law relating to compensation in India can be traced in the law framed during the British regime which provided that courts may order "payment to any person of compensation for any loss or injury caused by the offence, when substantial compensation is, in the opinion of the court, recoverable by such person in a Civil Court."[57]

Section 545Code of Criminal Procedure (Cr.P.C.), 1898 had the phrase "substantial compensation". It restrained the person for recovering nominal damages only. The 41st Law Commission[58] discussed Section 545Cr.P.C.at length and submitted its report in 1969 whereby the commission observed that the significance of the requirement that compensation should be recoverable in a Civil Court is that the act which constitutes the offence in question should be tort. The word "substantial" appears to have been used to exclude cases where only nominal damages would be recoverable. The Commission recommended to omit the word "substantial" from the clause[59].

The recommendations made by the Law Commission paved the way for the introduction ofthe Code of Criminal Procedure Bill,1970 accordingly, Code of Criminal Procedure,1973 was enacted and 'Section 357' was introduced[60] but it may be fairly concluded that Section 357 has limited impact in the context of victim welfare in India, because for the application of the section certain prior conditions are required. Firstly, that the accused must be convicted. Secondly, the compensation is recovered in the form of a fine that is when it forms a part of the sentence or a Magistrate may order any amount to be paid to compensate for any loss or injury by reason of the act for which the accused has been sentenced. Lastly, in awarding the compensation, the capacity of the accused has to be taken into account by the Magistrate practically[61].

The biggest flaw of Section 357 is that it is triggered only upon successful conviction. It assumes that the accused must be identified, prosecuted and convicted. Moreover, Section 357(2) further states that no disbursement of compensation shall be made, if the order imposing the fine is subject to an appeal, until either the expiry of the period of limitation or when the appeal is finally disposed of[62]. The provision also does not contemplate a contingency where under emergency situations; interim compensation might be required by the victim. Further, the provision does not outline the timeline for payment of compensation.

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[57]Section 545(1)(b), Code of Criminal Procedure,1898

[58]Forty-First Law Commission Report, 1969 at page 356 para 46.12, (24thJuly, 2024) https://cdnbbsr.s3waas.gov.in/s3ca0daec69b5adc880fb464895726dbdf/uploads/2022/08/2022082436.pdf,

[59]Ibid

[60]Now, section 395-Order to pay compensation, The Bharatiya Nagarik Suraksha Sanhita, 2023

[61]Bharti Manglani, Judicial Magistrate, Haridwar, "Victim Compensation Scheme- Shortcomings & Recommendations", (24thJuly, 2024) https://ujala.uk.gov.in/files/11.pdf.

[62]Now, section 395 (2) of The Bharatiya Nagarik Suraksha Sanhita, 2023- If the fine is imposed in a case which is subject to appeal, no such payment shall be made before the period allowed for presenting the appeal has elapsed, or, if an appeal be presented, before the decision of the appeal.

[63]Supra note 16

Midway at the international level in the year 1985[63] the 'United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power,1985 'was adopted and it defines the term 'victim' in the widest possible sense categorising victims into two heads[64] .

Along with the development at international level, at the national level '154th Law Commission Report, 1996' and 'Malimath Committee Report, 2003 on 'reforms of Criminal Justice System in India' were submitted. The154th Law commission report recommended for the insertion of section 2(wa)[65] and Section 357A[66] in Cr.P.C.,1973while the Malimath committee recommended for the creation of Victim Compensation Fund (VCF).

The 154th Law Commission Report[67] devoted an entire chapter to "Victimology[68]" and observed that the scope for victim compensation afforded in Code of Criminal Procedure,1973under section 357 is limited. The Law Commission, in its report in 1996, stated that, The State should accept the principle of providing assistance to victims out of its own funds, in cases of acquittals; or where the offender is not traceable, but the victim is identified; and also, in cases when the offence is not proved[69] .

The Law Commission recommended to incorporate a new Section 357-A in the code to provide for a comprehensive scheme of payment of compensation for all victims fairly and adequately by the courts."[70]

The Malimath committee on reforms of Criminal Justice System in India, 2003[71] emphasized on the 'participation' of victims in criminal processes as an inseparable component of justice. Compensating victims of crime is a state obligation whether the offender is apprehended or not, convicted or acquitted. It proposed a 'victim compensation law' providing for the creation of a 'victim compensation fund' to be administered by the Legal Services Authorities created under the Legal Services Authority Act, 1987.

The recommendation of the 154th Law Commission for drafting the new Section 357-A was finally adopted via the Criminal Procedure Code (Amendment) Act, 2008 which came into force in 2009. The relevant insertions are section 2(wa)-victim[72] and section

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[64]'Victim of Crime' (Art 1& 2 of the Declaration) and 'Victim of Abuse of Power' (Art18 of the Declaration)

[65]The definition of the term 'victim' s. 2(wa) under Code of Criminal Procedure, 1973 now, S.2(y) under The Bharatiya Nagarik Suraksha Sanhita, 2023

[66]Section 357A- Victim compensation Scheme. Now, S. 396 The Bharatiya Nagarik Suraksha Sanhita, 2023

[67]154th Law Commission Report, 1996 was on the Code of Criminal Procedure, 1973

[68]Ibid Chapter XV, pp. 57-65.

[69]Supra note 67 at p.64 para 17

[70]"In view of the weakness of the existing provisions for compensation to crime victims in the criminal law, it is necessary to incorporate a new section 357-A in the Code", 154th Law Commission Report (1996), chapter XXII Conclusions and Recommendations at p.121 para 31.

[71]Committee on Reforms of Criminal Justice System Government of India, Ministry of Home Affairs, Report Volume I, March 2003, (18th August, 2024) https://www.mha.gov.in /sites/default /files/criminal_justice_system.pdf

[72]Supra note 65.

357A-Victim compensation scheme[73] .

Victim compensation schemes presently under Section 396, The Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS) is divided into various subsections: -

- sub-section (1) of Section 396 BNSS provides that every State Government shall prepare a scheme and provide funds for the compensation of victims for loss or injury as a result of a crime[74].
- Sub-section(2) of Section 396 BNSS states that whenever the court makes a recommendation for compensation to the District or State legal service Authority, it shall decide the quantum of compensation under the above scheme[75].
- in sub-section (3) of Section 396 BNSS, the trial Court has been empowered to make recommendation to the Legal service Authority for compensation where the quantum of compensation fixed by the Court under section 395 is found to be inadequate; or where the case ends in acquittal or discharge and the victim has to be rehabilitated[76].
- Sub-section (4) of Section 396 BNSS states that even where no trial takes place and the offender is not traced or identified but the victim is known, the victim or his dependents can apply to the State or District Legal Services Authority for award of compensation[77] .
- Sub-Section (5) of Section 396 BNSS says that on receipt of the application, the State or District Legal Services Authority shall award adequate compensation within two months. It is pertinent that a time frame of two months will ensure speedy disposal of application and justice to the victim by preventing dilatory measures[78].
- Further sub-section (6) of Section 396 BNSS states that in order to alleviate the suffering of the victim, the State or District Legal Service Authority may order immediate first-aid facility or medical benefits to be made available free of cost or any other interim relief[79].

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[73]Supra note 66

[74]S.396 (1) BNSS- Every State Government in co-ordination with the Central Government shall prepare a scheme for providing funds for the purpose of compensation to the victim or his dependents who have suffered loss or injury as a result of the crime and who require rehabilitation.

[75]S.396 (2) BNSS- Whenever a recommendation is made by the Court for compensation, the District Legal Service Authority or the State Legal Service Authority, as the case may be, shall decide the quantum of compensation to be awarded under the scheme referred to in sub-section (1).

[76]S.396 (3) BNSS- If the trial Court, at the conclusion of the trial, is satisfied, that the compensation awarded under section 395 is not adequate for such rehabilitation, or where the cases end in acquittal or discharge and the victim has to be rehabilitated, it may make recommendation for compensation.

[77]S.396 (4) BNSS- Where the offender is not traced or identified, but the victim is identified, and where no trial takes place, the victim or his dependents may make an application to the State or the District Legal Services Authority for award of compensation.

[78]S.396 (5) BNSS- On receipt of such recommendations or on the application under sub-section (4), the State or the District Legal Services Authority shall, after due enquiry award adequate compensation by completing the enquiry within two months.

[79]S.396 (6) BNSS- The State or the District Legal Services Authority, as the case may be, to alleviate the suffering of the victim, may order for immediate first-aid facility or medical benefits to be made available free of cost on the certificate of the police officer not below the rank of the officer in charge of the police station or a Magistrate of the area concerned, or any other interim relief as the appropriate authority deems fit.

- A new sub-section (7) to section 396 BNSS is introduced. Section 396(7) is further making it clear that the payment of fine to the victim under section 65[80], section 70[81] and sub-section (1) of section 124[82] of the Bharatiya Nyaya Sanhita, 2023 (45 of 2023) shall be in addition to the compensation payable by the State Government under this section[83].

As per the mandate of Section 396 BNSS, the States and UTs made their own victim compensation scheme, but there was huge disparity in the amount of compensation among states for the same offence. To reconcile this disparity the central government came out with the 'Central Victim Compensation Fund (CVCF) guidelines 2016' vide notification dated 14th October, 2015 from the Ministry of Home Affairs[84].

The CVCF aims to fulfil the objectives[85] led down in the notification by supporting and supplementing existing victim compensation schemes notified by states and union territories and reducing the disparity in the quantum of compensation notified thereof. It defines the scope for budgetary allocation[86] and provides for accounting and audit[87]. The notification also mentions the essential requirements to have access to funds from CVCF[88] and for that the States/UT Administrations must frame their Victim Compensation Scheme (as mandated by S.396 BNSS) as per the guidelines. The States/UT Administrations must give due regard to the fact that the quantum of

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[80]Section 65 Bharatiya Nyaya Sanhita, 2023 provides for 'Punishment for rape in certain cases', its proviso mandates that 'Provided further that any fine imposed under this sub-section shall be paid to the victim'

[81]Section 70 Bharatiya Nyaya Sanhita, 2023 provides for 'Gang Rape', its proviso mandates that 'Provided further that any fine imposed under this sub-section shall be paid to the victim'

[82]Section 124 Bharatiya Nyaya Sanhita, 2023 provides for 'Wrongful restraint'. S.124(2) provides 'Whoever wrongfully restrains any person shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to five thousand rupees, or with both'. This fine shall be paid to the victim as per S.396(7) BNSS.

[83]S.396 (7) BNSS- The compensation payable by the State Government under this section shall be in addition to the payment of fine to the victim under section 65, section 70 and sub-section (1) of section 124 of the Bharatiya Nyaya Sanhita, 2023 (45 of 2023).

[84]Central Victim Compensation Fund Scheme (CVCF) Guidelines, No.24013/94/Misc./2014-CSR.III Government of India/ Bharat Sarkar ministry of Home Affairs, Dated 14th October, 2015. Available at: https://www.mha.gov.in/sites/default/files/2024-09/cvcf_13092024.pdf (last visited 4th September, 2024)

[85]Objective of Setting up of the CVCF:

1. To support and supplement the existing Victim Compensation Schemes notified by States/UT Administrations.
2. To reduce disparity in quantum of compensation amount notified by different States/UTs for victims of similar crimes.
3. To encourage States/UTs to effectively implement the Victim Compensation Schemes (VCS) notified by them under the provisions of section 357A of Cr.P.C. and continue financial support to victims of various crimes especially sexual offences including rape, acid attacks, crime against children, human trafficking etc.

[86]The CVCF will be set up with an initial corpus of Rs.200 Crore to be sanctioned by the Ministry of Finance.

[87]To ensure financial accountability, internal Audit shall be carried out by the Chief Controller of Accounts, Ministry of Finance (Department of Economic Affairs) once in every six months. In addition, statutory Audit shall be carried out annually by an Independent Auditor from a Board of Auditors appointed by the CAG. The reports and observations will be brought to the notice of the Central Government. The Chief Controller of Accounts, Ministry of Home Affairs, will maintain the accounts, including Receipts and Payments Accounts.

[88]Essential Requirements to access funds from CVCF

a. The State/ UT must notify the Victim Compensation Scheme as per provisions of Section 357A of CrPC (now Section 396 BNSS)

compensation notified by them for the kinds of offences should not be less than the amount mentioned in Annexure I[89].

The Victim Compensation Scheme are not working to its fullest potential. The Victim Compensation Scheme faces significant challenges that hinder its effectiveness. A robust infrastructure and institutional support are essential for its success, including a dedicated national-level body to oversee and implement these initiatives.

Legislation is crucial to establish clear standards and protocols for victims' rights, protection, participation, and assistance. While the principle behind the scheme under the BNSS is commendable, the requirement for courts to mandate compensation creates blocks. This places an undue burden on the judicial system and can delay vital support for victims. To optimize the scheme, it's necessary to streamline processes, ensuring that victims can access compensation more swiftly and efficiently, perhaps through administrative bodies rather than solely relying on court orders. This would not only enhance the responsiveness of the system but also reinforce the commitment to supporting victims in their recovery and reintegration into society.

VI. COMPARATIVE ANALYSIS OF VICTIM COMPENSATION MODELS: USA, BRITAIN, AND INDIA

Each country has its own peculiar characteristics. A comparative study of victim compensation mechanisms in the USA, Britain, and India can be structured around the following key criteria:

1. Administration:

In Britain there are three forums for the administration of victim compensation. Firstly, Court-ordered compensation which provides that if the offender is convicted, the court may order the convict to pay the victim for losses like injury, property damage, or lost income. Secondly, compensation is available under Criminal Injuries Compensation Scheme and administered by Criminal Injuries Compensation Authority (CICA) established under the Criminal Injuries Compensation Scheme, 2012 and third is Civil Court damages (non-criminal compensation) where the injury is in the nature of tort[90]. In USA system varies from state to state, each state has its own victim compensation program, with different eligibility criteria, funding sources, and types of compensation

b. The quantum of compensation notified should not be less than the amount mentioned in Annexure I.
c. State/UT must first pay the compensation amount to the eligible victims of crime from its own Victim Compensation Fund and then seek reimbursement of funds from CVCF.
d. Any expenditure incurred from the State Victim Compensation Fund to assist the victims will be treated to be first spent from the non-budgetary resource available in the State Fund. Budgetary grant received from the state Government/UT Administration will be used only after consuming the non-budgetary resource.
e. Details of every victim compensated must be maintained electronically in 'Victim Compensation Module' in Citizen portal of CCTNS project.

[89]Acid attack- 3 Lakhs, Rape- 3 Lakhs, Physical abuse of Minor- 2 Lakhs, Rehabilitation of victim of Human Trafficking- 1 Lakh, Sexual assault (Excluding rape)- 50,000, Death- 2 Lakhs, Permanent Disability (80%or more)- 2 Lakhs, Partial Disability (40% to 80%)- 1 Lakhs, Burns affecting greater than 25% of the body (excluding Acid attack cases)- 2 Lakhs, Loss of foetus- 50,000, Loss of fertility- 1.5 Lakhs. It further lays down that if the victim is less than 14 years of age, the compensation shall be increased by 50% over the amount specified herein.

[90]Supra note 37 at pp 20-21

offered[91]. There is Federal Victims Compensation Fund[92] which exists alongside state programs[93]. It generally covers victims of violent crimes where the offender is federally prosecuted or falls under specific categories (e.g., terrorism). In India the Victim Compensation Scheme is at state level. Section 396 BNSS mandates State Governments to establish Victim Compensation Schemes[94].

Britain and India operate government-funded victim compensation schemes, while the USA primarily relies on offender-based compensation through court orders, supplemented by a federal program. Britain has a centralized system (CICA) while the USA has a decentralized system with individual state programs. India has a decentralized system with each state administering its own victim compensation scheme the fund, the amount may be reimbursed by CVCF.

2. Eligibility/Scope:

In Britain the scheme focuses on violent crimes only. Scheme applies to victims of violent crimes[95] who suffered physical or mental injury, or whose close relative died as a result of the crime. The scheme their awards compensation regardless of whether the offender is apprehended. In USA programs vary from state to state[96] and cover both violent and non-violent crimes, property crimes, and even crime victim assistance services[97]. In India compensation is offered for both violent and non-violent crimes. Britain has specific schemes for violent crimes, the U.S. scheme is broader and may include certain property crimes depending on the state.

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[91]Each state has a crime victim compensation program that allocates funds to survivors of sexual assault and other violent crimes. See generally RAINN (Rape, Abuse & Incest National Network). It is the largest organization in the United States that works to prevent sexual violence, help victims, and bring perpetrators to justice, (16th September, 2024) https://rainn.org/articles/crime-victim-compensation.

[92]Crime victim compensation is a direct reimbursement to or on behalf of a crime victim for a wide variety of crime-related expenses such as medical costs, mental health counselling, lost wages, and funeral and burial costs. Office for Victim of Crime (OVC) administers federal funds to support their crime victim compensation programs in all U.S. states, Washington, D.C., the U.S. Virgin Islands, Puerto Rico, and Guam. See generally victim compensation Office for Victim of Crime (OVC) (16th September, 2024) https://ovc.ojp.gov/topics/victim-compensation.

[93]Section 8 of Victims of Crime Act (VOCA), 1984 see generally Part III VOCA, 1984

[94]Supra note 74

[95]Supra note 32

[96]While each state operates under its own law, all compensation programs have the same basic criteria to determine eligibility for benefits. Generally, the victim must (a) report the crime promptly to law enforcement, and cooperate with police and prosecutors (many states allow exceptions to this requirement, particularly for child victims, and for victims of sexual assault and domestic violence); (b) submit a timely victim compensation application (again, some exceptions are available in nearly every state); (c) have a cost or loss not covered by insurance or another government benefit program (victim compensation programs pay only after other collateral sources are used); and (d) not have committed a criminal act or some substantially wrongful act that caused or contributed to the crime (the eligibility of family members generally depends on the behaviour of the victim when programs assess this requirement, but there are a few programs whose laws authorize eligibility for family members in homicides). Apprehension or conviction of the offender is not required. See generally Victim Compensation an Overview, (16th September, 2024) https://nacvcb.org/victim-compensation/#:~:text=Maximum%20benefits%20available%20from%20the,health%20counseling%2C%20or%20lost%20wages.

[97]In Fiscal Year 2023, a total of 7,808,408 crime victims received support from victim assistance programs throughout the Nation, provided by 6,430 subgrantees through 9,808 subawards; and state victim

3. Funding:

In Britain and USA, the victim compensation scheme is funded by the government. The Crime Victims Fund (CVF)provides financial resources to states for their victim compensation programs. Crime Victims Fund is also inclusive of fines, surcharges, and federal grants[98]. In India both Central and state government fund the scheme. Britain and USA have centralized funding mechanisms, while India involves both central and state governments. However, USA relies more on offender-based compensation through court orders, with a secondary federal program. In US a separate federal program, the Victims Compensation Fund, exists for specific crime categories (e.g., terrorism) where the offender is prosecuted federally.

4. Claim process:

In Britain applications for compensation are made to CICA, with a 2-year time limit after the crime[99]. In USA processes vary by state, but often involve applying to a state agency and the time limits may also differ[100]. While in India after the crime is reported application need to be made to District or State legal services authority[101]. All three require reporting the crime, but timeframes and specific requirements vary.

5. Compensation:

Compensation in Britain is based on the severity of the injury. Tariff based system is used for awarding compensation which covers medical expenses, lost earnings, pain and suffering[102]. In The USA, both amounts and types of compensation vary by state, but may include medical expenses, medical expenses, lost earnings, counselling and funeral

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compensation programs made payments to 202,830 claims throughout the Nation totalling $359,652,096. See generally OVC Releases VOCA Victim Assistance and Victim Compensation Data Dashboards, (16th September, 2024) https://ovc.ojp.gov/news/announcements/victim-assistance-and-victim-compensation-data-dashboards.

[98]The fund is funded by money collected from criminal fines, forfeited bail bonds, penalties, and special assessments. The money comes from offenders convicted of federal crimes, not taxpayers. All states, the District of Columbia, the U.S. Virgin Islands, and Puerto Rico receive a base victim assistance amount of $500,000 each. The territories of the Northern Mariana Islands, Guam, and American Samoa each receive a base amount of $200,000. Additional funds are distributed based on population. For FY 1986-2003, states received $3,062,972,335 in VOCA victim assistance grants from Office for Victims of Crime (OVC). See generally The U.S. Department of Justice's Office for Victims of Crime (OVC) Funding History, (16th September, 2024) https://ovc.ojp.gov/sites/g/files/xyckuh226/files/publications/factshts/compandassist/fs_000306.html#:~:text=Although%20each%20state%20compensation%20program,in%20V OCA%20compensation%20grant%20funds.&text=Crisis%20intervention.,Emergency%20transportation.

[99]If one is injured by a violent crime, they can apply for compensation from the Criminal Injuries Compensation Scheme. Usually have to claim within 2 years of the crime, and the crime must be reported to the police before applying. See generally Claim compensation if you were the victim of a violent crime, (16th September, 2024) https://www.gov.uk/claim-compensation-criminal-injury.

[100]Generally, victims are required to report to crime within 3 days and file claim within 2 years. See generally Adv. Amit Bhaskar," Analysing Indian Criminal Justice Administration from Victims' Perspective", BHARATI LAW REVIEW, 172 (Oct.-Dec., 2013).

[101]Supra note 77

[102]The CICA awards compensation for mental or physical injury following a crime of violence; sexual or physical abuse; loss of earnings - where no or limited capacity to work as the direct result of a criminal injury; special expenses payments - costs incurred as a direct result of an incident. special expenses are considered where unable to work or have been incapacitated to a similar extent for more than 28 weeks due to injury;a fatality

costs[103]. India on similar lines to Britain has tariff-based system for awarding compensation. All three countries offer compensation for various losses but the US system offers the most variation depending on the state. All three countries also allow courts to order compensation from convicted offenders.

VII. CONCLUSIONAND WAY FORWARD

The victim of a crime has historically and almost universally enjoyed the right to reparations[104] that is what Stephen Schafer calls it 'Golden Age' of victims. This right was confiscated by the state in the form of fines without due consideration for the victim. The term "*victim* "comprises the most significant or the most distressed body in criminal justice administration. Victims are generally believed not to have appropriate legal rights or safeguards and are thus perceived to be the largely overlooked group in the whole management of criminal justice. There is a common perception that unless victims' rights are prioritized in the criminal justice system, the system will eventually devolve into an institution that perpetuates injustice against victims. Victim is one of the greatest stakeholders in the system. It is therefore apparent that victim justice is an emerging ideology. This new perspective emphasizes the need for criminal justice agencies to be more sensitive and compassionate towards those who have suffered as a result of crime.

There are major drawbacks in the schemes of these countries. Britain excludes non-violent crimes in addition to that there is lengthy application process. In USA the availability and compensation amounts vary greatly by state. India has low compensation amounts, complex application process and reported underfunding. It can be fairly concluded that the US system can be more complex to navigate due to variations by state. India's scheme faces challenges with low compensation amounts and potential underfunding. All three schemes have limitations and navigating the application process can be challenging. The compensation mechanism in the jurisdiction of USA, Britain and India is not very satisfactory yet there are relevant points which could be borrowed in Indian model to enhance its outcome.

Way Forward

After conducting a comprehensive study of the legal regimes on victim compensation in Britain, the USA, and India, several policy recommendations can be made to enhance the victim compensation framework in an ideal world.

I. Mandatory Victim Impact Assessments and Statements: Victim Impact Assessments and Victim Impact Statements should be made mandatory in the judicial process to ensure that the emotional, psychological, and financial effects of the crime on the victim are formally recognized and considered during the compensation determinations.

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caused by a crime of violence including bereavement payments, payments for loss of parental services and financial dependency; and funeral payments. To qualify for an award, an injury must be described in the tariff of injuries at Annex E of the Scheme. Not all claims for compensation will be successful; you must be eligible under the rules of the Scheme.

[103] Supra note 92

[104] Retribution was prevalent among the individuals and their clan and eye for an eye amounted to reparation.

ii. Establish a Dispute Settlement Mechanism: It is desirable to have a strong dispute settlement mechanism within district police to effectively address potential criminal matters that currently in the form of minor civil disputes. This proactive approach can help prevent intensification and promote community resolution.

iii. Establishment of a Criminal Injuries Compensation Board: In the Delhi Domestic Working Women's Forum case, the Supreme Court of India emphasized the necessity for the government to establish a Criminal Injuries Compensation Board for rape victims within six months. The Court recommended that this board should provide compensation irrespective of conviction. The same board should be established for ensuring timely support and justice for victims.

iv. Enhancing Witness-Victim Protection: Witness and victim protection in India has historically been inadequate; however, the enactment of the new criminal laws in 2023 introduced important provisions to address this issue. This significant step toward the safety and security of victims and witnesses should be enforced by legal process.

v. Implementation of Victim-Offender Reconciliation Programs (VORPs): Victim-Offender Reconciliation Programs (VORPs),[105] recognized as a longstanding approach to facilitating dialogue between victims and offenders, should be actively implemented.

[105]VORPs is the restorative justice perspective that the crime that occurred has not only violated the law but has caused a violation of a relationship between two or more people. Accordingly, encounter and understanding can initiate the healing process not only for individuals and communities as victims, but for offenders as well

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