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Contents

Editor's Note

For the Journal of Law Teachers of India (JOLT-India), the 2019–2020 academic year was historic. It is for two reasons. One, the Journal managed to get endorsement and patronage of stalwarts from the legal fraternity, both from the legal industry/practice and academia. This resulted in a steady Advisory Board, with members from across the globe on it. The collaboration reflects the wide-ranging diversity of voices and opinions that are expected to take JOLT-India to the pinnacle of legal publications.

The second important development was the Journal's publication of its 8th volume, online. The COVID Pandemic generated difficulties, in getting the volume printed, manifested themselves as a boon and prompted us to think in terms of 'Going Green'. JOLT-India is likely to continue the trend for Volume 9 as well, in order to ensure regularity.

Since 2010, the Journal has held strong the bastion of original legal research amongst law teachers, students and research scholars. This year also, the volume brings to the readers a range of good writings in the form of articles, comments, notes and essays on topics that deserve recognition as areas of prominent legal scholarship.

Some of these issues are those that jolted our collective conscience during the Pandemic, like the plight of migration workers, mob-lynching, and encounter killings. It is evident in the way they compelled the contributors to write, in the hope of fostering in a positive impact.

Volume 9 of the Journal of Law Teachers of India begins by a thought-provoking speech, converted by the contributor into a small article, for publication in the Journal. It asks for acceptance of the '*Right to Livelihood*' as an economic right to get gainful employment and decent work conditions. Then there is one which analyses in a balanced manner the steps taken by the MOE towards the cause of education in India and how it has ended up *'Operating on Extremes*'. The next one, comprehensively covers the '*Legal Rights of the Victims of Disaster*'. It maintains that the COVID Pandemic highlighted the inadequacies of the Indian disaster management framework and makes suggestions towards the end.

There is one article that dwells on the '*Concept of Shared Household*' and analyses the meaning of 'aggrieved person' and 'domestic relationship'

tracing them to be the essential and basic ingredient/s for getting any relief under the Domestic Violence Act, 2005.

The next two focus on education, one from the '*Experiences of a Law Teacher* and the other from a more scholarly vantage of the '*Concept of Education under Constitution of India*'. Both are engaging reads.

The long article on '*Mental Health*' projects as a necessity, the need to develop a robust system of mental healthcare in India, to ensure sustainability of future generations.

And then, there is one that presents, through an empirical narrative, the heart wrenching plight of '*Children without Parental Care*'.

Two articles dwelling on different aspects of social impact and ideology cover 1) a remarkably interesting take on '*Online Gaming and Gambling*' and how they affect the society, and 2) on '*Encounter killings*' and why it is unhealthy for any society to take celebratory pride in them.

The last in the 'article' segment is a small piece on '*Non-Traditional Trademarks*' which calls out to the trademark regime to have a liberalised approach towards accepting them in the traditional TM fold.

Apart from the above, there are 4 small readings that fit the segment of Notes, Comments and Essays. They provide, in the contributors unique writing style, a take on the '*Justice System in India*', how the electorate has participated over the years in shaping our '*Democratic India*', the bane of '*Mob-lynching*' that has caught popular fancy as an easy mode towards quick justice, and a quite different submission about the '*Suitability of Civil and Criminal Remedies in the realm of IPR Violations'*.

The Journal is indebted to the esteemed peers for reviewing the manuscripts in time. It is also thankful to the Advisory Board members for devoting their precious time to the development of the Journal. Hope Volume 9 would receive appreciation of its readers.

Though all care has been taken to present the absolute best readership experience to you, we would be glad to consider all suggestions for improvement.

Dated: January 2021

Prof. Sarbjit Kaur
Prof-in-Charge, LC-I

The Constitution and the Right to Livelihood*

Kamala Sankaran[**]

I thank the Professor in Charge and other colleagues at Law Centre-I for this invitation to speak today. It is a privilege to be a part of this series of webinars being held on the 50th anniversary of the founding of Law Centre-I, Faculty of Law. It is also a special reason for me, personally. I started my career as a teacher with a brief stint at Law Centre-I when it was located at Mandir Marg, a long time ago.

This evening I propose to speak on '*The Constitution and the Right to Livelihood*'. The present Covid 19 times and the crisis that it has thrown up in the world of work has placed the matter of the right to livelihood as one of the central challenges confronting India today. The returning migrant, walking back hundreds or thousands of kilometres, or waiting endlessly in the brutal Indian summer heat to catch a train or bus to return home, has become the abiding image of the Covid pandemic– an image that is burnt onto collective public memory. This crisis has also helped shift the question of work and workers, centre-stage in public discourse after a long time. Is there right to livelihood in India, should there be one? What duty does it cast upon the state, society and employer? What is the kind of society we intend to build for future- these are questions that get raised today, and some aspects of these questions lie at the root of the petitions that are pending in the Supreme Court, awaiting a hearing and judgement.[1]

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* Revised text of talk delivered on the 50th anniversary of Law Centre-I on June 4, 2020, *available at* https://www.youtube.com/watch?v=Pu-3mh_IK30&feature=youtu.be, (last visited October 30, 2020).

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1 The Supreme Court in October 2020 has reiterated the protective role of labour law and held that Covid related notifications that deny humane working conditions and overtime wages, are '*an affront to the workers' right to life and right*

The Right to Livelihood as a Human Right

It is often stated that human rights are available to all persons by the sheer dint of their being human. What set of capacities or qualities constitute a human being has been a contested one, and this debate is well-reflected in the literature. The Kantian idea of 'will' and 'choice' that defines person-hood in the 'barest possible manner' is the basis for predicating the formal equality of all persons in a modern democracy. This idea of formal equality of all persons is often counterpoised against the Marxist idea of a 'real' person – a person with economic and social needs, and who alone, therefore, can be the bearer of rights.

Many years ago, Professor Upendra Baxi put forward the position, that the necessary condition before human beings can enjoy human rights, is that they need to first enjoy the right to be human. In other words, basic needs would have to be met before persons can exercise their human rights.[2] This approach is reflected in Article 25 of the Universal Declaration of Human Rights (UDHR) that 'e*veryone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control*'.

The right to subsistence has been termed as a basic right by other scholars too. The well-known philosopher Henry Shue talked of basic rights which would include the right to subsistence.[3] Can this right to subsistence be a legal right? Can such socio-economic rights be validly recognised by a legal system?

Political theorists such as Maurice Cranston have refuted the label of human rights being ascribed to positive rights. [4] The Universal Declaration of Human Rights, that was adopted in 1948, almost contemporaneously with the Indian Constitution, viewed human rights

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against forced labour that are secured by Articles 21 and 23 of the Constitution.' *Gujarat Mazdoor Sabha* v. *State of Gujarat* 2020 SCC OnLine SC 798.

2 Upendra Baxi, *From Human Rights to the Right to be Human: Some Heresies*, in S. Kothari and H. Sethi (eds.), RETHINKING HUMAN RIGHTS (Tripathi, 1989).

3 Henry Shue, BASIC RIGHTS (Princeton University Press, 1980).

4 Maurice Cranston, WHAT ARE HUMAN RIGHTS? (Basic Books, 1962).

as indivisible. The subsequent Cold War divide was to see the division of human rights and the adoption in 1966 of the two International Covenants (the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights). The position that civil and political rights are relatively 'costless' as compared to the social, economic, and cultural rights, has been debunked in the human rights discourse and shown to be quite inaccurate. [5] Notwithstanding this, the status of such social rights continues to be precarious in public discourse. The demand for increased allocations for social rights continues to meet with resistance, reinforcing the position taken by its critics that social rights lack legitimacy and cannot be rights claimed over budgetary allocations, and are merely benefits granted to the needy.

In India, the debate has taken a slightly different turn.

There was a remarkable consensus across the political spectrum that the yet-to-be drafted Indian Constitution should have a comprehensive set of rights that would include not only negative political liberties but also the social rights. The need to have both sets of rights was seen to be necessary to effect social transformation, and what was termed by Granville Austin as a 'social revolution' in the country.[6] This approach was visible in the Report of the Motilal Nehru Committee set up in 1928 and which submitted a broad draft constitution a year later. The consensus to have a broad range of rights incorporated determined the shape of the future Constitution.

The Constituent Assembly debated the nature of the rights to be included in the new constitution. The sub-committee on fundamental rights set up by the Assembly in 1947 proposed that rights be divided into justiciable fundamental rights and the rather more programmatic directive principles of state policy (DPSP), the latter were to be guides to the government, but which would not be cognizable in a court of law. The eventual Constitution as adopted approved this division with Part III of the Constitution enumerating negative civil and political rights, while the positive social rights were confined to Part IV of the

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[5] See for instance, Mark Tushnet, *Civil Rights and Social Rights: The Future of the Reconstruction Amendments*, 25 LOYOLA OF LOS ANGELES L. REV. 1207 (1992).

[6] Granville Austin, THE INDIAN CONSTITUTION: CORNERSTONE OF A NATION (Oxford University Press, 1966).

Constitution, reminiscent of the 'progressive realization' of the economic, social and cultural rights at the international level.[7] The justiciability of legal rights lie in the right that rights can be enforced by the Courts by identifying and enforcing the duty against the duty-bearer. The scope of these rights have been broadened gradually by a broad interpretation of our Constitution afforded by the Judiciary with fundamental rights being interpreted as keeping the DPSPs in mind.

Thus, the Supreme Court has interpreted Article 21 and the right to life and declared that there is right to livelihood in India and it is part of the right to life. Speaking for a five judge bench in *Olga Tellis* v. *Bombay Municipal Corporation*, in 1985 Chandrachud CJ declared: '*If the right to livelihood is not treated as a part of the constitutional right to life, the easiest way of depriving a person his right to life would be to deprive him of his means of livelihood to the point of abrogation. …Deprive a person of his right to livelihood and you shall have deprived him of his life. Indeed, that explains the massive migration of the rural population to big cities. They migrate because they have no means of livelihood in the villages. The motive force which people their desertion of their hearths and homes in the villages that struggle for survival, that is, the struggle for life. So unimpeachable is the evidence of the nexus between life and the means of livelihood. They must eat to live: Only a handful can afford the luxury of living to eat. That they can do, namely, eat, only if they have the means of livelihood. That is the context in which it was said by Douglas J. in Baksey that the right to work is the most precious liberty because, it sustains and enables a man to live and the right to life is a precious freedom. 'Life', as observed by Field, J. in Munn* v. *Illinois*, (1877) 94 U.S. 113, *means something more than mere animal existence and the inhibition against the deprivation of life extends to all those limits and faculties by which life is enjoyed*.'[8]

For arriving at this interpretation, the SC relied on various DPSPs. Article 39(a) of the Constitution provides that the State shall, in particular, direct its policy towards securing that the citizens, men and women equally, have the right to an adequate means of livelihood.

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[7] For a more detailed account and analysis between the Constitutional Assembly Debates and the cleavage of human rights in the UDHR, *see*, Kamala Sankaran, *Fundamental Principles and Rights at Work: India and the ILO*, ECONOMIC AND POLITICAL WEEKLY, vol XLVI no 10, pp 68-74 (2011).

[8] (1985) 3 SCC 545.

Article 41, which is another Directive Principle, provides, inter alia, that the State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work in cases of unemployment and of undeserved want. Article 37 provides that the Directive Principles, though not enforceable by any court, are nevertheless fundamental in the governance of the country.

Correlative Duty

Yet notwithstanding the general ratio that right to life includes the right to livelihood, the Supreme Court was cautious about the corresponding duty it entailed upon the State. The Court was guarded about whether the State was obliged to provide such livelihood or not. It stated: '*The State may not, by affirmative action, be compellable to provide adequate means of livelihood or work to the citizens. But, any person, who is deprived of his right to livelihood except according to just and fair procedure established by law, can challenge the deprivation as offending the right to life conferred by Article 21*.' In other words, the right is the right not to be deprived of livelihood, not the positive right to be given livelihood.

Yet, as I argue later, this duty cast upon the State has broadened in later years and includes the duty to provide work in certain circumstances and as well as the duty to provide a modicum of social security.

Let us examine this a little more closely. The 'right to work' is one of primary ways of ensuring a decent livelihood for a significant proportion of the labour force today.[9] The right to work, in terms of a claim against the state (or employers) to obtain employment was of course never recognised in countries outside of the socialist bloc. A more limited form of the right to work may be observed in the right to get employment in public works during famine and other emergencies, or in employment guarantee schemes as a form of poverty alleviation, or in the entitlement to some form of social insurance for those unable to obtain employment. The right to work may also be viewed as including the negative aspect of freedom, viz. the freedom *from* certain forms of work or labour.[10] The freedom from

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[9] Kamala Sankaran, *The Human Right to Livelihood: Recognizing the Right to be Human*, COMPARATIVE LABOUR LAW & POLICY JOURNAL, vol 34, no. 1, pp. 81-94, 2012.

[10] For various viewpoints regarding the distinction between work and labour see

forced labour is the most well-known articulation of this negative right. Forced labour whether due to physical coercion, economic coercion or social coercion (arising from customary practices) are the often-cited instances. This negative right, in the sense of freedom from certain forms of work, is however a gendered one, as the idea of work is usually confined to forms of paid work, while the *unpaid* labour performed by women within the household is not acknowledged as a form of forced labour.

Thus, the limited right to work and to livelihood, as a facet of the right to life coupled with the mandate to treat a person with dignity mandated by another facet of Article 21, requires that the minimum conditions of decent work be available to those in employment. That is, the right to life entails the right to livelihood, and where this takes the form of *employment*, decent work conditions in terms of minimum wages, decent working conditions and other minimum norms should be met.

Self-Employment

Yet, we must bear in mind that for the 450 million persons in India's labour force, regular employment or casual employment is not the norm. According to the Periodic Labour Force Survey, released in 2020, during the year 2018-19, about 51.7 percent of rural households had their major source of income from self-employment. The share of rural households with major source of income from casual labour during 2018-19 was 25.1 percent and that of regular wage/salary earning was 13.1 percent. In urban areas, the share of the household type self-employment during 2018-19 was 32.8 percent, the share of households with major source of income from regular wage/salary earning was 42.8 percent while that of casual labour was 11.0 percent.[11]

Hannah Arendt, THE HUMAN CONDITION (University of Chicago Press, 1958). *See also*, Guy Standing, *Modes of Control: A Labour-Status Approach to Decent Work* (ILO, 2000) *available at* http://www.ilo.int/public/english/protection/ses/download/docs/modes_of_control.pdf (last visited October 31, 2020).

[11] Government of India, Ministry of Statistics and Programme Implementation, *Periodic Annual Force Survey* (July 2018-June 2019) *available at* http://www.mospi.gov.in/sites/default/files/publication_reports/Annual_Report_PLFS_2018_19_HL.pdf (last visited on July 31, 2020).

A more realistic assessment of how to articulate the right to earn one's livelihood is needed for those people whose lives are vulnerable because they lack regular waged employment. Those in the informal economy are often in this position and are often impoverished further - due to policies that deprive them of land while often obtaining meagre compensation that is inadequate to ensure long term livelihoods, or in the case of the landless persons working on such lands, their lack of necessary skills and education or those who are victims of social discrimination or ill-health or disability or old age. Their vulnerabilities are often a result of structural inequalities rather than personal misfortune.

Right to Work

A more robust idea of the right to work as encompassing the right to pursue one's own livelihood and including the right to obtain state benefits in the form of subsidies or loans to set up one's own business, and the right to improve one's capabilities to achieve self-employment are normally not the subject-matter of 'rights-talk' but are treated as some form of welfare benefits. Many persons in the informal economy find themselves in precarious situations because of policy decisions taken by the State that can cause impoverishment, increase their vulnerability, or because of an unequal 'original position'. The power to make economic and social decisions, which have wide-ranging impacts and that can impinge the lives of so many persons, lies with the State. It is this responsibility that gives rise to the duty cast upon the State to provide for social assistance in cases of undeserved want. This duty is captured so well in Article 41 of the Constitution, which provides, *inter alia,* that the State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work in cases of unemployment and of undeserved want.

On the one hand, the duty upon the State to provide for livelihoods could take the form of ensuring some modicum of employment in times of crisis. The MNREGA and the much earlier EGS developed in Maharashtra in the 1960 to deal with the terrible drought create a statutory right in persons to obtain work in rural areas in order to offset hunger and vulnerability. This rights-centric approach is distinct from one that relied on food provided by well-meaning persons or government as an ex-grail or ad hoc measure.

Right to Social Security

Increasingly, the world is moving towards a recognition that social security is a basic human right. Social security is a human right which addresses the need for protection against certain contingencies and life risks, and to meet social needs. A system of social solidarity and social insurance which requires the State and members of society to contribute towards the well-being of others not so fortunate, is born of the understanding that we are all part of an undivided whole. **No individual person can hope to rise beyond a certain level unless others also prosper**. This learning has been borne home very tellingly during the present COVID-19 pandemic. You can have your own electricity generator, your own water system, your own enclosure within which you live - but the air and the virus understands no man-made walls or distinction between rich and poor. Thus, a system of social security for those unable to get employment or who are unable to obtain their own livelihood is required today for each person to obtain a minimum of subsistence. Even countries that are vocal supporters of the free-market enterprise such as developed countries in the West have unemployment insurance, which is nothing but a recognition that the State and society owes those, who are unable to obtain work or those who cannot work due to old age, disability or children, the minimum amount required to main a decent life.

As indicated by the ILO, social security systems guarantee income security and health protection, the prevention and reduction of poverty and inequality, and the promotion of social inclusion and human dignity. It was for this reason that the International Labour Conference adopted a new instrument in 2012, the Social Protection Floors Recommendation, No. 202.[12]

This approach guaranteeing a minimum of social protection is a fundamental right recognised by our Constitution. The Supreme Court in *C.E.S.C. Ltd.* v. *Subhash Chandra Bose*[13] held that, '*Our Constitution in the Preamble and Part IV reinforce them compendiously as socioeconomic*

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[12] ILO, Social Protection Floors Recommendation No. 202, *available at* https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:R202(last visited October 31, 2020.

[13] (1992) 1 SCC 441.

justice, a bed-rock to an egalitarian social order. The right to social and economic justice is thus fundamental right.'

The right to livelihood must not merely be recognised but enforced as a facet of the right to life, and as a key fundamental right, this entails:

a. That those who are in waged employment need conditions that ensure a basic minimum of decent working conditions. Any proposal that e denies or exempts the entire body of labour law and minimum conditions from applying to the world of work (as some advocate) would go against the right to life, dignity and livelihood embedded in our Constitution. In fact, any state assistance to industry or relief package must be predicated and made conditional that the basic laws such as minimum wages, safety norms in factory, non-discrimination etc are fulfilled by such industries about their workers.
b. The ability of those who seek to find their own means of livelihood get impacted in many ways by economic and fiscal policies that reduce access to markets or reduce their ability to claim state resources or increase impoverishment or inequality. **Since the State has the right to create policies that variously impact individuals, and sometimes impoverish them, there is a duty to provide meaningful employment to those who require it such as through MGNREGA (Mahatma Gandhi National Rural Employment Guarantee Act, 2005) or provide necessary support for those who are self-employed.**
c. For those unable to obtain either employment or self-employment (say as farmers, street vendors, small artisans) that earns them a minimum threshold, there is need to recognise their right to avail social security in the form of unemployment allowance and widespread access to public health, drinking water, and clean-living conditions.

Thus, the right to livelihood in these times translates as an economic right to obtain gainful employment with decent work conditions or a minimum of livelihood with the safety net provided by social security in the form of income security and health benefits. This conception has to be at the centre of the imagination of a legal framework in this COVID-19 and future, post-COVID era.

MOE Guidelines for the Organisation of Virtual International Events in India and NEP 2020: Two Extremes of One Education System

*V.K. Ahuja**

Introduction

The pandemic Covid-19 which started from Wuhan in China in late 2019 spread in almost all countries of the world in 2020 and affected all the human beings in one way or the other. More than 105 million people were infected, and more than 2.3 million people died throughout the world. In India alone, around 11 million people were infected, and 1,55,000 people died.[1] The pandemic is going to last for some more time even though inoculation has started in some of the countries. Covid-19 affected all sectors, brought unemployment, and destroyed economies among other things. Education was not an exception. The universities in their wisdom and in order to save the academic year started taking online classes. This happened for the very first time in most of the universities in India and all teachers whether computer savvy or not delivered online lectures. From nursery to higher education, students attended their classes online. For the first time academia realised that physical presence was not required for teaching and learning, and online platform can also be used in certain circumstances.

It is rightly said that challenges also bring opportunities. The same is true about pandemic Covid-19. The classes are still going online, and the academic year of students could be saved because of technology. Among other things, one thing which happened for the betterment of

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1 *See*, Covid-19 Coronavirus Pandemic, *available at* https://www.worldometers.info /coronavirus/ (last visited Feb.6, 2021).

academics was the organisation of large number of online seminars, conferences, workshops, training programs, lecture series etc. by almost every institution, big or small. There was a flood of webinars including international webinars as no cost or a marginal cost was involved in their organisation. In case of international events in physical formats, an expenditure to the tune of a few lakhs is to be incurred by the organisers as it involves the cost of air fare of resource persons, meals, accommodation, venue, stationery, mementos, honorarium, etc.

On 29 July 2020, when the pandemic was on its peak, the Ministry of Education (hereinafter referred to as MOE) adopted National Education Policy 2020 (hereinafter referred to as NEP). NEP is a broad vision document of the Government to make drastic changes in the education system. The NEP also recommended extensive use of technology in the education system and suggested for the hybrid method of conducting online and physical classes. The NEP has been discussed later in the article.

In less than six months from the adoption of NEP, however, the Ministry of Education in consultation with Ministry of External Affairs (MEA), Government of India issued revised guidelines for holding virtual/online international events including seminars, conferences, training, etc. on 15th January 2021.[2]By revised guidelines, the MOE has practically extended the rules applicable to physical international events to online/virtual international events. In the case of former, the foreign resource persons and participants travel to India to participate in the event, whereas in the case of later travelling to India is not required as the entire event takes place virtually. The revised guidelines have made it exceedingly difficult for the government/public funded universities to organise the virtual international programs. The article will make a critical analysis of the revised guidelines. The article will also refer to National Education Policy (NEP) 2020 and discuss how NEP and revised guidelines of MOE have become two extremes of the education system in India. It will also discuss how MOE guidelines affect academic freedom in the government and public funded universities? The article will also discuss the alternative to these

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[2] *See*, Revised Guidelines of the Ministry of Education, *available at* http://sliet.ac.in/wp-content/uploads/2021/01/Circular-13902-dated-21.01.2021.pdf (last visited Feb 6, 2021).

guidelines which will not only maintain academic freedom in the universities but also get the desired outcome for the Government.

National Education Policy 2020

The recently adopted National Education Policy (NEP) 2020 envisions 'an education system … that contributes directly to transforming India,… sustainably into an equitable and vibrant knowledge society, by providing high-quality education to all, and thereby making India a *global knowledge superpower*'.[3] The vision of NEP is quite impressive as it perceives an education system which contributes to the transformation of the country and makes it a 'vibrant knowledge society' which will ultimately make it a '*global knowledge superpower*'.

It is noteworthy that once upon a time, ancient Nalanda in India was considered as an 'undisputed seat of learning'[4], where scholars from various parts of the world used to come to learn and teach. It was knowledge hub, and the foreign scholars were always welcomed there. The educational institutions have always been considered a place to have free discussions and debates.

The NEP also while referring to ancient India's institutions of world class such as '*Takshashila*, *Nalanda*, *Vikramshila*, *Vallabhi*', stated that these institutions not only set the 'highest standards' of teaching and research, but also hosted students and scholars from different parts of world.[5] In view of requirements of the 21st Century, the NEP states that 'quality higher education must aim to develop good, thoughtful, well-rounded, and creative individuals'.[6] The NEP further states that 'Global Citizenship Education' is to be provided to learners to empower them to understand what the global issues are, so that they could become 'active promoters of more peaceful, tolerant, inclusive, secure, and sustainable societies'.[7]

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[3] *See*, National Education Policy (NEP) 2020, p.6, *available at* https://www.education.gov.in/sites/upload_files/mhrd/files/NEP_Final_English_0.pdf (last visited Feb. 2, 2021).

[4] *See,* History and Revival of Nalanda University, *available* at https://nalandauniv.edu.in/about-nalanda/history-and-revival/ (last visited Feb. 2, 2021).

[5] NEP 2020, p.6.

[6] *Id.*, para 9.1.1.

[7] *Id.*, para 11.8.

The NEP aims to promote India as a 'global study destination' which will provide affordable premium education so that it could restore its '*Vishwa Guru*' role. An 'International Students Office' is envisaged at every university to support and provide all helps to foreign students. The collaborations in the area of teaching and research as well as the student/faculty exchange programs with foreign institutions of repute are to be facilitated and for this purpose, MOUs with other countries are to be signed on the mutually beneficially terms and conditions. The Indian universities which are performing well are to be encouraged to have offshore campuses. Similarly, the topmost universities of the world will also be facilitated to have their campuses in India. This is a commendable step recommended in the NEP and the Indian students need not run to foreign universities once the foreign universities start operating in India. The Indian universities will also have an opportunity to perform well by setting up their campuses abroad. The opening of Indian universities' campuses abroad will also be useful to Indian diaspora. It is proposed to have a legislative framework for this purpose.[8]

The creation of knowledge and research are the two important factors not only for a vibrant economy, but also for the upliftment of society. India, Egypt, Mesopotamia and Greece happened to be some of the prosperous civilisations of the world which were recognised as 'strong knowledge societies'. Today, United States, Japan, Germany, South Korea and Israel have contributed to new knowledge in the realm of *inter alia* science and technology and uplifted their societies by attaining 'intellectual and material wealth'.[9]

In order to become a leader in the world in crucial areas such as artificial intelligence and machine learning, biotechnology, climate change, digital marketplace, etc., India requires a robust research system. In order to become a 'leading knowledge society', India has to achieve the potential of its 'talent pool 'which is very vast. The criticality of research is more today for the progress of a nation.[10] Regarding legal education, the NEP states that it is required to be globally competitive.[11] The NEP,

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[8] *Id.*, para 12.8.

[9] *Id.*, para 17.1.

[10] *Id.*, para 17.2.

[11] *Id.*, para 20.4.

thus contemplate an education system in India which is globally competitive, provides quality education to all at affordable cost, taps its talent pool, makes India a 'global study destination' and a 'global knowledge superpower'.

Having discussed the kind of education system the NEP 2020 envisages, it will be appropriate to discuss the guidelines issued by the MOE on the conduct of virtual/ online events by government or public funded universities.

Approval Procedure for Holding Virtual International Events

The revised guidelines require the Ministry/Department, PSUs, Central Education Institutions, universities which are public funded, or organisations which are either owned or controlled by the Central Government/State Government/Union Territories to take approval of its Administrative Secretary for the virtual international events to be so organised. Apart from that, the approval is also to be taken of the '*list of participants*'.

This causes a lot of inconvenience to the organisers of the international event as the approval of the Ministry does not come so fast. Further, getting the list of participants approved from the Ministry will be an extremely difficult task for virtual/online events. Normally a link is created and circulated, and people join the event out of their own interest. It becomes difficult to get the list approved as many organisers as possible in the universities do not open the registration for the participants and make the event open to all. Ordinarily, the approval is made mandatory only for the guests, panelists or resource persons and not for all the participants. Universities are the forums for open discussion, the guidelines will affect the academic discourses as the organisers will find it difficult to get the approval of the Ministry so easily.

The subject matter of online events should not relate to 'security of State, Border, North East States, Union Territories of Jammu & Kashmir, Ladakh or any other issues which are clearly/purely related to *India's internal matters*'. This must be ensured by the MOE at the time of giving permission for such online events.

It is understandable that security of State and border are sensitive matters. Further, subject matter related to North East States, Union Territories of Jammu & Kashmir, and Ladakh may be excluded from the themes of online events on the ground of insurgency or other political conditions, etc. But laying down a provision which states that permission is not to be given for any issue for discussion which clearly or purely relates to '*India's internal matters*' is likely to impact academic discourses in an adverse manner. 'Internal matters of India' is such a broad theme which may include almost anything under its scope. The term has not been defined in the revised guidelines. The term may include e.g. CAA, farmers' protest, handling of pandemic Covid-19 by government, demonetisation, triple talaq, universal civil code (UCC), banning of Chinese apps in India, *Atmanirbhar Bharat, Ram Janam-Bhoomi*, Indian food policy, Indian health policy, National Education Policy, etc. Therefore, conduct of online international events may be avoided by the organisers as the subject matter of the events may directly or indirectly connect to the internal matters of the country.

According to guidelines, compliance in totality of existing provisions of 'IT data security', 'personal data' and protection to 'other sensitive information 'should be ensured. Again, this guideline has been drafted in such a manner that the host of the international event would like to drop the idea of organising such an event rather than complying with these directions which are ambiguous. Further, the guidelines provide for the judicious selection of IT applications, platforms or medium for interaction. Without naming any app or country, it further states that preference should be given to 'apps having servers' not controlled, hosted or owned by countries or agencies which are *hostile to India*. The guidelines are indirectly referring *inter alia* to Zoom online platform as it is considered to have connection in China[12] which happens to be a hostile country for India now. In absence of any specific information, how would one know which countries and agencies are *hostile to India*? The Office Memorandum of Ministry of Home Affairs dated 16 August 2010 makes special provisions for conference visa in case of participants coming from Afghanistan, China, Iran, Pakistan, Iraq, Sudan, foreigners

[12] *See,* Universities Now Need Government Approval for Online International Events on India's 'Internal Matters', 30 January 2021, *available at* https://thewire.in/education/universities-now-need-govt-approval-for-online-international-events-on-indias-internal-matters (last visited Feb. 3, 2021).

of Pakistani origin and Stateless persons.[13] Today, other countries such as Turkey and Malaysia may also be considered as hostile towards India looking at their approach in the recent past. The relations with countries change and a country which was hostile to India may not be so after some time. Nepal has also shown hostile attitude in the recent past and still behave in a hostile manner. Does it mean that Nepal is hostile to India in terms of revised guidelines?

In addition to above, it will be mandatory for the Indian delegation to exercise 'appropriate level of scrutiny' to identify 'the nature and sensitivity' of data, presentations' contents, and information to be shared in the online international event. In normal course, the copy of presentation is not sent in advance. In many cases, the resource persons speak *ex tempore*. How will the organisers ensure the compliance of this guideline in these cases? The guideline thus imposes direct responsibility on the Indian delegation for any lapse.

Lastly, it should be ensured that map, flag, emblem, etc. of India are correct and displayed rightly. This is quite logical. Showing of wrong map, flag or emblem may result into humiliation for the country.

Clearance from Ministry of External Affairs in Certain Cases

The guidelines provide that clearance from the Ministry of External Affairs (MEA) will continue to be required for holding international events in certain cases. MEA clearance is required for every such international event which relates to 'security of State, Border, North East States, J&K or any other issues which are clearly/purely related to *India's internal matters*'. The clause has not been modified in view of abrogation of Article 370 and conversion of J&K in Union territory as well as formation of Ladakh. It seems it will continue to be applicable to Ladakh. Further, every international event which has 'foreign funding and sponsorship', can be organised only after getting clearance from the MEA. In addition to above, all events which involve *sensitive subjects* with provisions of 'sharing data in any form, presentations' etc. would require MEA clearance. The term *sensitive subject* has not been defined in the guidelines but may relate to the field of 'political, scientific,

[13] *See*, Office Memorandum of Ministry of Home Affairs, *available at* https://www.ir.iitb.ac.in/sites/www.ir.iitb.ac.in/themes/intrelation/file/MHA-Revised-Circular1.pdf (last visited Feb. 4, 2021).

technical, commercial or personal'. In absence of any definition of *sensitive subjects*, the term may be interpreted very broadly to bring many things under it. A subject matter which may not be *sensitive* according to organisers of the events may be considered *sensitive* by the Government. The guidelines also provide that the link to the online events should be shared by the organisers at the time of seeking approval or after the approval.

The aforesaid guidelines regarding MEA clearance do not mention online/virtual events or physical events, whereas the subject of Office Memorandum clearly refers to online/virtual events. Only the last clause states that the link to the online event should be shared with MEA. It seems that the requirement of MEA clearance for physical events have been extended to online/virtual events by these revised guidelines.

The condition of seeking clearance from MEA in case of physical international event is understandable as people from abroad travel to India and may visit different parts of the country with or without permission. They may meet people and discuss sensitive issues of the country with them or may indulge in some unwarranted activities. However, in online events, their physical presence is not required, and the events ends immediately with its conclusion. It is also not noticeably clear whether clearance from MEA is required by government universities only or also by private universities and private persons. As far as the approval of MOE is concerned, it is required only for government/public funded universities and not for private persons. It is difficult to understand as to why different rules have been made for government and private universities and why MOE guidelines are not made applicable to private universities and persons?

The guidelines also make it mandatory for the Union Ministers, State Ministers, Constitutional functionaries as well as Government officials, scientists, doctors, etc. of the Joint Secretary rank and above to get clearance from the MEA for the participation in online/virtual as well as physical international events.

The revised guidelines nowhere provide for the consequences in case of non-compliance of these guidelines by the government universities.

NEP 2020 and MOE Guidelines: Two Extremes

Having discussed the vision and objectives of NEP 2020 and the MOE revised guidelines regarding the conduct of online international events, it is now in the fitness of the things to discuss how they have become two extremes of the education system.

On the one hand, the Government dreams of making education in India qualitative and globally competitive and adopts a vision document in the form of NEP 2020, on the other hand, it issues guidelines where the interaction with the foreign academia in online international events is prohibited if the topic has something to do with India's internal matters or even indirectly connected to it. The term *India's internal matters* are too broad to include almost everything under it. Sometimes it becomes essential to put forth our viewpoint to counter any propaganda which may be going on against our country or the Government. A pertinent question arises as to how can we think of making our education globally competitive with such guidelines? The continuous interaction with foreign academia is extremely important for knowing the global trends. The online platforms have proved a boon for the academia as they tend to bring the world talent closer in the form of online international events at no cost or only marginal cost.

The NEP itself provides for MOU between Indian and foreign universities, apart from faculty and student exchange programs. In addition, there are many Professors from abroad who have been appointed as Visiting Professors, Professor Emeritus or Distinguished Professors in government or public funded universities. They used to visit India on a regular basis. However, after the issuance of these guidelines, approval will be required in terms of revised guidelines if they are resource persons in the international events.

The NEP also recommends opening of offshore campuses for Indian universities as well as facilitating foreign universities to operate in India. But approvals will be required for foreign experts to participate in International online events. The revised guidelines are not clear and in all probabilities are likely to hamper the academic culture in the country.

It is humbly submitted that in place of guidelines, the Government should issue an advisory in the forms of dos and don'ts and place

responsibility on the Program Director, Principal/ Head/ Dean and the Vice-Chancellor to ensure its strict compliance. This will create a pressure on them, and they will avoid inviting people who are known for their controversial speeches. The organisers may be required to send the details of the online international events and the names of all the guests and the resource persons well in advance so that the MOE could ensure that there is no controversial subject or person in the international event. If the MOE does not respond within a reasonable period, it should be presumed that there is no objection to MOE and the event may be conducted. This way the online international events may be conducted in a responsible manner and the autonomy of the universities will remain intact. In the present scenario, the public funded universities would like to avoid holding of international online events which will ultimately affect academics.

Conclusion

The MOE revised guidelines for the conduct of online events have come at a time when lot of propaganda is being made against the policies of Government of India. From the Government point of view, the guidelines will prevent certain vested interests to use the Indian academic institutions as a platform to spread their propaganda against the country. It is in the fitness of the things that educational institutions should not become a platform for spreading hatred against the Government or to defame the country in any manner. The recent campaign of the foreign vested interests against the three farm legislations and Citizenship (Amendment) Act, 2019 (CAA) is a glaring example. The Government must deal with any fake propaganda against the sovereignty and integrity of the country as well as against itself with an iron hand showing no leniency.

The intention of the Government is not to throttle academics in any way, but unfortunately, the adverse impact of guidelines may be realised on it. It is noteworthy that in all those cases where approval must be taken from the Ministry in accordance with the guidelines, there is no guarantee that a foreign participant will not remark on our internal matters or against the Government or governmental policies.

As already stated, the conduct of online international events is cost-effective. The online international events may be conducted for free to a

meagre amount whereas substantial amount is required for the conduct of physical international events. With the present guidelines of the MOE in place, the opportunity to conduct cost-effective international online events may not be availed of by the government/ public funded universities.

To sum up, the MOE has gone one step forward by adopting a promising vision document on education in the form of NEP 2020 but gone two steps backward by adopting these revised guidelines. The MOE must reconsider its decision of implementing the revised guidelines which are ambiguous with no consequences for non-compliance. It should rather issue advisory as aforesaid and expect the responsible behavior of the university officials. Intentional non-compliance of the advisory may be taken cognizance of and appropriate action should lie against the responsible officials. At the end of the day, it is promotion of education system in all possible manner with no fake propaganda against the country or the government. The advisory may serve this purpose.

Legal Rights of Victims of Disaster in India: Challenges and Future Prospects

*Awekta Verma**

Introduction

India is a disaster prone country due to its unique geographical location. According to the vulnerability atlas the Indian Subcontinent is one of the world's most disaster prone areas.[1] We frequently witness both natural and manmade disasters like earthquakes, floods, landslides, cyclones, tsunamis, avalanches, chemical and industrial disasters etc. Unplanned cities, urbanisation, development at the cost of green areas, unregulated and rampant industrialisation, deforestation, mining, climate change and overpopulation increase the risk factors and extent of damage when disaster strikes. There is large scale loss of property, human life and environment in India as compared to other countries because of these reasons. According to a study conducted by the UN office for Disaster Risk Reduction (UNISDR) during the period from 1998-2017 i.e., almost 20 years, India suffered economic losses of 79.5 billion US$.[2] The most vulnerable are women, children, elderly, differently-abled and poor people and the law needs to address the

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[1] *See,* Ministry of Housing and Poverty Alleviation, Government of India, *An Introduction to the Vulnerability Atlas of India First Revision* (Building Materials and Technology Promotion Council, 2006) *available at* https://www.bmtpc.org/admin/PublisherAttachement/An%20Introduction%20to%20the%20Vulnerability%20Atlas%20of%201. (last visited Oct. 30,2020) According to it, 59% of land is vulnerable to earthquakes, 8.5% of land is vulnerable to cyclones, 5% of land is vulnerable to floods and around one million houses are damaged annually.

[2] *See,* UNISDR, *Economic Losses, Poverty and Disasters* 2017, Centre for Research on the Epidemiology of Disasters CRED, p.4, *available at* https://www.unisdr.org/2016/iddr/IDDR2018_Economic%20Losses.pdf. India is ranked *amongst* world top five countries in terms of economic losses suffered due to disasters. (last visited Oct. 30, 2020).

problems faced by them specifically as the discriminations faced by them during normal times aggravate manifold when the disaster strikes. The ongoing COVID-19 pandemic, which is the first pan-India biological disaster has brought to the fore the lacunae and deficiencies of the Indian disaster management framework. Many issues and problems like availability of food, relief camps, shelter homes, right to livelihood, migration of workers, right to education of poor and marginalised, availability of testing kits, facilities for transportation, rising prices, health and medical help etc. continue to pose a challenge to the government at the centre and state level. The pandemic has affected almost everyone in India and the most affected are the poor and vulnerable sections of the society. Laws relating to disaster management and disaster risk reduction need to give special attention to their concerns and problems. In the light of these facts an attempt has been made in this paper to analyse the rights conferred on the victims of disasters in the Indian legal framework and the challenges faced by them in realising those rights as rights without remedies are useless and neither empower the victims nor ensure accountability of the officials. Such a scenario leads to further victimisation of the victims. The paper also discusses the existing measures in law, or which are needed to be incorporated and policy change that should be effected to give an equal and fair treatment to all the victims of disaster and also to make them partners in their rehabilitation and resettlement initiatives.

Impact of Disasters on Survivors

The Disaster Management Act 2005 defines disaster with a very wide perspective. It states that

> 'Disaster means a catastrophe, mishap, calamity or grave occurrence in any area, arising from natural or man-made causes, or by accident or negligence which results in substantial loss of life or human suffering or damage to, and destruction of, property, or damage to, or degradation of, environment, and is of such a nature or magnitude as to be beyond the coping capacity of the community of the affected area.'[3]

[3] The Disaster Management Act, 2005, s. 2(d).

The definition itself brings to the fore the catastrophic effects of the disaster on the lives of the people. The survivors or victims of disaster face adversities galore and experience blatant violation of their legal rights. The problem is further compounded by ignorance of the law, legal measures, knowledge of appropriate and effective forums for grievance redressal, agencies and authorities for emergency services and rehabilitation. Moreover, the inequities and evils already present in the society raise their ugly head unabashedly during disasters. Discrimination based on caste, class, gender, religion, disability, language and region is rampant in Indian society and during disasters these matters aggravate further. Post disaster victims are vulnerable to many wrongs and face many problems.

- *Non-fulfilment of Basic Needs:* Disasters strike at the basis of the human existence by taking away the daily necessities of life like food and shelter and clothing from the survivors. Prices of essential commodities rise manifold making them beyond the reach of people. All of this leads to loss of human dignity and the women, children and elderly are the worst affected. They are exposed to harsh weather, disease and vices prevalent in the society. According to WHO the COVID 19 pandemics has destroyed societies economically as well as socially as millions of people risk becoming extremely poor and the number of undernourished people is going to increase from current 690 million to 822 million by the end of the year 2020.[4] The Global Hunger Index for 2020 has ranked India at 94th position. Though India produces enough food, the problem is on two counts i.e., inability to access food economically as well as physically and the situation has worsened in the ongoing pandemic.[5] The sustainable development goal of zero hunger seems a distant reality unless corrective measures are taken on a priority basis.

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[4] *See*, *Impact of COVID-19 on People's Livelihoods, their Health and our Food Systems*, WHO (Oct. 2020) *available at* https://www.who.int/news/item/13-10-2020-impact-of-covid-19-on-people's-livelihoods-their-health-and-our-food-systems (last visited Oct. 30,2020).

[5] Chandrima Banerjee, *Access to Food is a Problem in India: WFP,* The Times of India (Delhi, 1st Nov. 2020).

- *Loss of Livelihood:* Loss of job or livelihood impacts the survivors severely. Most affected are the poor and vulnerable sections of the population. Displacement reduces the chances of going back to the same way of living and destroys the culture and customs of the displaced. During the ongoing pandemic about half of world's 3.3 billion global workforces are at risk of losing their livelihood.[6] About 40 million people in unorganised sector are losing their job in India.[7]
- *Crime:* The loss of job, livelihood, poverty, unemployment, increasing vulnerabilities etc. lead to more opportunities to commit crime or at leads one to commit crime. Thus, crime increases in the post disaster phase and further escalates the vulnerability of children and women, especially single or widowed. They are abused, kidnapped, sold off, married early, trafficked and raped. Children too especially orphaned children suffer immensely at the hands of the organised criminals. Crimes against property like theft and robbery etc increase during moderate to big disasters.[8] During the ongoing pandemic, an 86% increase in cyber-attacks has been reported in India between March and April 2020 and women have been victimised by online violence which affects their overall well-being.[9]
- *Lack of Medical Facilities:* Overall deterioration in the surrounding environment leads to the outbreak of diseases in the disaster affected areas. Lack of medical facilities and non-availability of medicines further aggravate the problem. The COVID-19 pandemic

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[6] *Supra* n. 4.

[7] *See*, Tanisha Mukherjee, Nilanjan Ray & Sudin Bag, *Opinion –Impact of COVID-19 on the Indian Economy*, Government Economic Times (Delhi, 20th Oct 2020) *available at* https://government.economictimes.indiatimes.com/news/economy/opinion-impact-of-covid-19-on-the-indian-economy/750217319 (last visited Oct. 30, 2020).

[8] Susmita Roy, *The Impact of Natural Disasters on Crime*, Working paper, (Sept. 14, 2010), Department of Economics and Finance, College of Business and Economics, University of Canterburry, New Zealand.

[9] ETCISO, *Cyber Crime Trends, Digital Safety Amidst COVID-19 Pandemic*, ETCISCO.in (24th May, 2020) *available at* https://ciso.economictimes.indiatimes.com/news/cyber-crime-trends-digital-safety-amidst-covid-19-pandemic/75934732 (last visited Oct. 30, 2020).

has put Indian health infrastructure under stress and lack of any public health law has further aggravated the problem. The Supreme Court had to step in and direct that COVID patients should be given proper treatment and dead bodies should be handled in a dignified manner in the hospitals.[10]

- *Mental Trauma:* The loss of family members, way of life, continuous deprivation and discriminatory practices in the overall rehabilitation and restorative initiatives causes mental trauma to many people. Non-availability of psychiatrists, counsellors and health professionals result in increase in depression related cases. Many survivors become alcoholic or drug addict. Some also develop suicidal tendencies because of abrupt changes in their life with which they fail to cope up with.
- *Loss of Documents:* It becomes difficult for people to claim relief because of loss of documents. In the absence of the same the legal status of the person is lost and eligibility for getting relief also becomes questionable.
- *Discrimination in Relief Operations:* Relief operations are marred by discriminatory practices towards backward castes, disabled, widows and single women and poor sections especially those living on the margins of the society. Inequitable and unfair distribution of relief supplies deprives many of the basic right to have food, shelter and clothing.
- *Miscellaneous:* The pandemic has created unprecedented human misery and crisis. In this humanitarian crisis the Supreme Court had to give directions for providing facilities for transportation for migrant labourers who were stranded at various places. The Apex Court directed withdrawal of cases against them for violating lockdown norms while trying to go back to their hometowns.[11] Children of migrant labourers have suffered immensely as they have lost on education. They are not able to continue their education and many are already trying to find menial jobs to support their families leading to increase in child labour in India.

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[10] *See, Proper Treatment of COVID-19 Patients and Dignified Handling of Dead bodies in the Hospitals etc* 2020 SCC Online SC 530.

[11] *Problems and Miseries of Migrant Labourers*, 2020 SCC OnLine SC 490, 492.

Legal Rights of Victims of Disaster

Law does not disappear when disasters strike; rather it shows the way in handling them and ensures security to vulnerable sections of the society. It plays a key role in effective management of disasters as it regulates and facilitates the role played by different stakeholders and agencies in the disaster response, relief and rehabilitation efforts. It gives a right based perspective to the whole relief and rehabilitation efforts. On the other hand, it is bad policies, poor planning, lack of preparedness, indifference and non-implementation of rules and regulations which leads to rights violations and denial of life with dignity. Proper resettlement and rehabilitation of victims post disaster require addressing these issues. It is the primary duty of the State to protect the rights of its citizens. India has also ratified major human rights treaties and is bound to follow the principles mentioned therein in its policies and approach towards disaster response and management. So law plays an important role in disaster management and to understand that properly we need to know the international initiatives as well as the legal framework in our country to manage and cope with disasters.

Legal Framework and Institutional Machinery

International Instruments

There is no international disaster law as a distinct branch of international law which binds the States to follow a certain course of action during and post disaster. This has an impact on the kind of rights available to the people during disasters as well as the extent to which the humanitarian aid can be provided by other countries and organisations to the victims or the affected country. However, a State remains bound to its obligations under various human rights treaties and conventions even at the time of disaster. They do not end with the onset of disaster.[12] On the other hand there are many laws which deal with different man made hazards and provide for fixing accountability for the same for example the 1986 Convention on Assistance in the case

[12] Article 51 of the Constitution of India binds it to respect international law and honour its international commitments.

of Nuclear Accident and Radiological Emergency, the 1990 International Convention on Oil Pollution Preparedness etc.

Over the years, there has been a shift in the approach from disaster response, relief and rehabilitation to disaster prevention, mitigation and risk reduction. At the global level major initiatives have been taken by the United Nations. Recognising that many disasters like, typhoons in the Philippines and floods in Bangladesh and Sudan etc had happened in 1988 in the world, the General Assembly (hereinafter referred as GA) emphasised on the need for reducing the impact of natural disasters. Consequently, beginning from 1st January 1990 proclaimed the International Decade for Natural Disaster Reduction(IDNDR) and selected second Wednesday of October International Day for Natural Disaster Reduction and adopted the International Framework of Action for the International Decade for Natural Disaster Reduction.[13] It established the guiding principles for prevention, humanitarian relief, preparedness and made a paradigm shift by shifting the focus from relief only towards rehabilitation and development. It endeavoured to lessen loss of human life, minimise social and economic disruption by disasters like earthquakes, floods, volcanic eruptions and droughts etc.[14]

To assess the work the done the UN convened World Conference on Natural Disaster Reduction at Yokohama, Japan from 23 to 27 May 1994 and the mid-term review of the progress made led to the adoption of Yokohama Strategy and Plan of Action for a Safer World.[15] It laid down an action plan for future to be adopted and implemented at international, regional, sub-regional, national and community level for natural disaster prevention, preparedness and mitigation. The main aim was to focus on saving human lives and protecting property by shifting focus from response oriented approach to prevention, preparation, mitigation for reducing vulnerabilities and losses. It encouraged the development of a global culture of prevention as an essential component for an integrated approach to disaster reduction. Enacting national legislations and effective administrative action was called

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[13] *See*, UNDRR, History, Res. 43/202, *available at*https://www.undrr.org/about-undrr/history (last visited Oct. 25, 2020).

[14] *Id.,* Res. 44/236.

[15] *Id*.

for.[16]Pursuant to this, United Nations GA Resolution in 1999 adopted the International Strategy for Disaster Reduction (ISDR) and for ensuring compliance established the Secretariat of the ISDR (UNISDR). The thrust of the measures has been on creating a global culture of prevention. From 2001 to 2004, the GA emphasised on the review of the Yokohama Strategy to assess gaps and improve means of implementation. In 2002, The World Summit on Sustainable Development (WSSD) was held in Johannesburg, South Africa and focusing on sustainable development it advocated integrating and mainstreaming of risk reduction into development policies and processes.[17] Later on, in 2005, a world conference on Disaster Reduction was held in Kobe, Japan to review the Yokohama Strategy and its Plan of Action and the Johannesburg Plan of Implementation of the World Summit on Sustainable Development. The review led to the adoption of Hyogo Framework for Action 2005-2015: Building the Resilience of Nation and Communities to Disasters (hereinafter referred as HFA) which was later endorsed by the UN General Assembly Res 60/195.[18] Around 168 Governments adopted this 10 year plan to make the world safer from natural hazards. It gave an impetus to global work in this direction by providing a blueprint for disaster risk reduction work for the next ten years.[19] The desired outcome being that by 2015 vulnerabilities should be reduced and disaster losses be minimised in terms of loss of human lives or property or the social, economic and environmental assets of communities and countries. To achieve the same it called on full commitment and involvement of all stakeholders'

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[16] *See*, IDNDR, *Yokohama Strategy and Plan of Action for a Safer World, available at* https://www.preventionweb.net/files/8241_doc6841contenido1.pdf (last visited Oct. 30, 2020).

[17] *Supra*n.13.

[18] *Id.*

[19] 'The review identified gaps and challenges in the following five main areas:
(a) Governance: organisational, legal and policy frameworks;
(b) Risk identification, assessment, monitoring and early warning;
(c) Knowledge management and education;
(d) Reduction underlying risk factors;
(e) Preparedness for effective response and recovery'.
See, United Nations, *Hyogo Framework for Action* 2005-2015, *available at* https://www.unisdr.org/files/1037_hyogoframeworkforactionenglish.pdf (last visited Oct. 20, 2020).

i.e. international and regional organisations, governments, civil society organisations, the scientific community and the private sector.[20] HFA encompasses all kinds of disasters i.e. natural disasters, environmental hazards and technological hazards and risks. So, it advocates 'an integrated and multi-hazard approach to disaster risk reduction to be factored into policies, planning and programming related to sustainable development, relief, rehabilitation and recovery activities.'[21] This can have significant impact on the economic, social, cultural and environment systems the world over especially in the disaster-prone countries. It emphasised adoption of pro-active measures to inform, educate, motivate and involve people and communities in all aspects of disaster reduction activities. It set three goals:

'1. The integration of disaster risk reduction into sustainable development policies and planning.
2. The development and strengthening of institutions, mechanisms and capacities to build resilience to hazards.
3. The systematic incorporation of risk reduction approaches into the implementation of emergency preparedness, response and recovery programmes.'[22]

It identified five priorities for action:[23]

1. Ensuring that disaster risk reduction is a national and a local priority with a strong institutional base for implementation.
2. Identify, assess and monitor disaster risks and enhance early warning.
3. Use knowledge, innovation and education to build a culture of safety and resilience at all levels.
4. Reduce the underlying risk factors.
5. Strengthen disaster preparedness for effective response at all levels.[24]

The HFA focused on legislation for disaster risk reduction and according to ISDR's Global Assessment Report on Disaster Risk Reduction, 2011, around 48 countries reported substantial achievements

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[20] *Id*., *See*, Expected Outcomes.

[21] *Id*., *See*, Priorities for action 2005-2015.

[22] *Id*., UNISDR, *Summary of the Hyogo Framework for Action* 2005-2015.

[23] *Id*.

[24] *Id*.

in developing a national policy and legislation on disaster management. Substantial progress has been made in reducing disaster risk at global, regional, national and local levels by countries and other stakeholders whereby mortality because of disasters has been reduced in case of some hazards. A global Platform for Disaster Risk Reduction with representations from member nations was established to see that the objectives of disaster risk reduction are integrated with national and local policies and people are made aware of disaster risk reduction. In fact, it was the first internationally accepted framework for disaster risk reduction and served as an important instrument for not only raising public and institutional awareness but succeeded in getting political commitment and inspired all stakeholders at levels to work for realising the goals set out in the framework.[25]

As HFA came to an end in 2015, it was succeeded by the Sendai Framework (hereinafter written as SF) which was approved by the member states of the United Nations Organisation at the Third World Conference on Disaster risk Reduction held in Sendai, Japan on 18th March 2015. It has a time frame of 15 years i.e., 2015-2030. Post 2015 development agenda, it is the first UN agreement and ensures continuity with the work done by States under HFA and addresses the inadequacies and gaps in policies and measures for disaster risk reduction. It is non-binding instrument and voluntary in nature. UNISDR has the responsibility of follow up, implementation, support and review of the SF. India has signed this agreement and is voluntarily complying with its mandate. As stated in SF itself, it will be applicable to, '*the risk of small-scale and large-scale, frequent and infrequent, sudden and slow-onset disasters, caused by natural or man-made hazards, as well as related environmental, technological and biological hazards and risks*.'[26]

The Sendai Framework gives a '*concise, focused, forward looking and action oriented approach for disaster reduction*.'[27] It intends to build resilience to disasters by incorporating the concept of sustainable development and poverty eradication while integrating as far as possible a culture of

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[25] *See*, UNISDR, *Sendai Framework for Disaster Risk Reduction* 2015-2030, *available at* https://www.preventionweb.net/files/43291_sendaiframeworkfordrren.pdf (last visited June 28,2017).

[26] *Id*., *See* Preamble para 15.

[27] *Id*.

disaster risk reduction and resilience into programmes, policies, plans, and budgets at all stages as well as within and across sectors.[28] A much broader and people-centered preventive approach to disaster risk reduction is the hallmark of SF. To make disaster risk reduction practices efficient and effective it envisages them to be multi-hazard and multi-sectoral, inclusive and accessible.

The expected outcome and goal of SF in the next 15 years is to substantially reduce disaster risk and losses in lives, livelihoods and health and in the economic, physical, social, cultural and environmental assets of persons, businesses, communities and countries. For realising the same, it is important to pursue the goal of '*preventing new and reducing existing disaster risk through the implementation of integrated and inclusive economic, structural, legal, social, health, cultural, educational, environmental, technological, political and institutional measures that prevent and reduce hazard exposure and vulnerability to disaster, increase preparedness for response and recovery, and thus strengthen resilience*.[29]

To achieve the outcome and the goals the SF has set seven global targets and four priorities for DRR. The Seven global targets focus on reducing by 2030 the global mortality in disasters, number of affected people, direct disaster economic loss and damage to critical infrastructure and disruption of critical services like education and health services. They aim to increase incorporation of disaster risk reduction strategies at national and local level, implementation of SF by 2030, access and availability of Early Warning Systems and disaster risk information.[30]

Considering the outcomes and goals charted out in SF, focused action by States at local, national, regional and global levels is needed in four priority areas i.e., 'understanding disaster risk; strengthening disaster risk governance to manage disaster risk; investing in disaster risk reduction for resilience and enhancing disaster preparedness for effective response and to 'Build Back Better' in recovery, rehabilitation and reconstruction.'[31]

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[28] *Id.*

[29] *Id.*, Expected Outcome and Goal, para 17.

[30] *Id.,* para 18.

[31] *Id.,* para 20.

A set of thirteen guiding principles giving due consideration to the national circumstances, and consistent with domestic laws as well as international obligations and commitments have been laid down for guiding the implementation of the present framework globally. Primary responsibility has been fixed on States for implementing the SF by engaging all sections of society and institutions.[32]

International law relating to disaster risk reduction cuts across different aspects and sectors of development. Disaster risk reduction as a core development strategy is reflected in 25 targets set in 10 of the 17 sustainable development goals.[33]

The SF empowers international community to enhance coherence across policies, institutions, goals etc., to read and implement it in the light of 2030 Agenda for Sustainable Development, the Paris Agreement, the New Urban Agenda (NUA), the Addis Ababa Action Agenda (AAAA)

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[32] *Id.*, para19.

[33] The goals reflecting disaster risk reduction approach are:
Goal 1. End poverty in all its forms everywhere.
Goal 2. End hunger, achieve food security and improved nutrition and promote sustainable agriculture.
Goal 3. Ensure healthy lives and promote well-being of all at all ages.
Goal 4. Ensure inclusive and equitable quality education and promote lifelong learning opportunities for all.
Goal 6. Ensure availability and sustainable management of water and sanitation for all.
Goal 9. Build resilient infrastructure, promote inclusive and sustainable industrialisation and foster innovation.
Goal 11. Make cities and human settlements inclusive, safe, resilient and sustainable.
Goal 13. Take urgent action to combat climate change and its impact.
Goal 14. Conserve and sustainably use the oceans, seas and marine resources for sustainable development
Goal 15. Protect, restore and promote sustainable use of terrestrial ecosystems, sustainably manage forests, combat desertification, and halt and reserve land degradation and halt biodiversity loss.
See, United Nations, *Transforming our World: the 2030 Agenda for Sustainable Development, available at* https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainable%20Development%20web.pdf (last visited Oct. 29, 2020).

and the Agenda for Humanity. All of them too have features of DRR and resilience in their framework.[34]

Though Sendai framework strives for accountability to be ensured in legal mechanisms and promoting and protecting of human rights of people, these are not mandatory but only guiding principles which a State may or may not follow.

National legal Framework

Initiatives at global level like declaring 1990s as an International Decade for Natural Disaster Reduction (IDNDR), 1994 Yokohama Strategy and Plan of Action for a Safer World, adoption of International Strategy for Disaster Reduction (ISDR) and creation of Secretariat of the ISDR (UNISDR) in the year 1999, adoption of Hyogo Framework for Action 205-2015 and national events like 1999 Odisha super cyclone, 2001 Gujarat earthquake, 2004 Asian Tsunami; all of these subsequently led to the enactment of the Disaster Management Act,2005 (hereinafter referred as DM Act) on December 23, 2005.[35] It's the first central legislation which deals with disaster management comprehensively. So, international initiatives, interactions, national and local experiences gave an impetus to development of disaster management law in India.

Disaster Management Act, 2005 (DM Act)

The Government of India enacted DM Act for undertaking '*a holistic, coordinated and prompt response to any disaster situation'*[36] to effectively manage disasters and related matters.[37] The DM Act emphasises on

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[34] *See*, UNDRR, *Global Assessment Report on Disaster Risk Reduction* 2019, *available at* https://gar.undrr.org/sites/default/files/reports/2019-06/full_report.pdf (last visited Oct. 29, 2020).

[35] Prior to it some states had enacted their own disaster management legislation, like The Gujarat State Disaster Management Act, 2003; the Bihar Disaster Management Act, 2004; the Uttar Pradesh Disaster Management Act, 2005; and the Uttaranchal Disaster Management and Prevention Act, 2005.

[36] *See*, The Disaster Management Act, 2005, Introduction.

[37] Different sections of The Disaster management Act, 2005 came into force on different dates starting from 28-07-2006.

prevention, preparedness[38] and mitigation[39] in disaster management. It provides for requisite institutional mechanisms for framing up co-ordinating and monitoring the implementation of the disaster management plans, policies and guidelines as well as ensuring that these measures are incorporated by different ministries or departments of the Government of India in their development plans and projects.[40] Thus, it provides for institutional, legal, financial co-ordination mechanisms at four levels i.e., the Centre, state, district and local levels. At the level of Government of India, Ministry of Home Affairs is the nodal ministry for disaster management since 2002 and has to co-ordinate the actions of various Ministries/Departments of Government of India, State Governments, the NDMA, SDMAs, governmental and non-governmental organisations.

At the institutional level, the DM Act envisages a three tier structure whereby National Disaster Management Authority, State Disaster Management Authority and District Disaster Management Authority have been set up at national, state and district level under the Chairmanship of the Prime Minister, Chief Ministers and District Magistrates, respectively. All three authorities must work in co-ordination to give relief to victims of disasters. At the national level it establishes four important entities and lays down their structure, role, powers and functions:[41]

- *The National Disaster Management Authority (NDMA):* It has the responsibility for laying down policies, plans and guidelines for disaster management to ensure timely and effective response to disasters.[42]

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[38] The Disaster Management Act, 2005, s. 2(m) defines preparedness as the state of readiness to deal with a threatening disaster situation or disaster and the effects thereof.

[39] According to The Disaster Management Act, 2005, s. 2(i) 'mitigation' means measures aimed at reducing risk, impact or effects of a disaster or threatening disaster situation.

[40] *See,* The Disaster Management Act, 2005, *ss. 3&6;* Statement of Objects and Reasons.

[41] *See generally,* The Disaster Management Act, 2005.

[42] DM Act 2005, ss. 3-6.

- *The National Executive Committee (NEC):* It must assist the National Authority in the performance of its functions under the Act and is constituted of secretary level officers of the Government of India.[43]
- *The National Institute of Disaster Management (NIDM):* As per the mandate of s.42 DM Act, the Government of India has constituted the NIDM. It is to function as primary institute of capacity development in the field of disaster management for all the stakeholders in India. It must function within the broad policies and guidelines laid down by NDMA.[44]
- *The National Disaster Response Force (NDRF):* s. 44 DM Act 2005, provides for the establishment of NDRF for the purpose of specialist response to a threatening disaster situation or disaster. It consists of trained professionals' units and is under general superintendence, direction and control of NDMA. The objective is to have a force with specialised skills and capabilities for rescue operations in case of disasters. The Central Government appoints the Director General of NDRF.

In fact, the DM Act mandates that every Ministry or the Department of the Government of India has the responsibility to take measures for disaster management.[45] Financing is an important element in disaster management and the DM Act envisages financing arrangements for both response and mitigation activities. So at national level, two funds are provided for: The National Disaster Response Fund (NDRF) and The National Disaster Mitigation Fund (NDMF). Similar funds are provided for at the state and district levels.[46]

Disaster Management has been defined in a comprehensive manner in Section 2(e), though it needs to be amended post-Sendai to make resilience also a part of it. Presently, disaster management means 'a continuous and integrated process of planning, organising, co-coordinating and implementing measures which are necessary or expedient for-

(i) Prevention of danger or threat of any danger;

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[43] *Id.,* ss. 8-9.

[44] Id., s. 42. The functions of NIDM are enumerated in detail under s. 42(9).

[45] *Id.,* ss. 35-37.

[46] *Id.,* ss. 46-48.

(ii) Mitigation or reduction of risk of any disaster or its severity or consequences;
(iii) Capacity-building;
(iv) Preparedness to deal with any disaster;
(v) Prompt response to any threatening disaster situation or disaster;
(vi) Evacuation, rescue and relief;
(vii) Rehabilitation and reconstruction.'[47]

All the above measures focusing on prevention, mitigation or reduction of risk, capacity building, preparedness, prompt response, evacuation, rescue and relief, rehabilitation and reconstruction show a victim centric approach. But, if the institutions or concerned authorities do not follow the mandate of these sections or show poor performance and lack of interest in implementing, there is no provision in the DM Act under which accountability is fixed on any one if victims suffer because of bad policies or decisions. There is no clear demarcation of responsibilities as to who will be held responsible in case these measures are not taken.

A noteworthy feature of the DM Act is that it provides for the development of National Policy which shall be guiding the framing of National Plan for Disaster Management for the whole country.[48] As per the DM Act, it is mandatory for NEC to make a National Plan. The annual review and update of the plan is also provided for in the DM Act. However, no mechanism has been provided for whereby consistency of all the plans could be ensured.

The National Policy on Disaster Management was framed in 2009. It envisioned, '*to build a safe and disaster resilient India by developing a holistic, proactive, multi-disaster oriented and technology driven strategy through a culture of prevention, mitigation, preparedness and response*.'[49] The

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[47] *Id.,* s.2(e).

[48] *Id*., ss. 10 and 11. Making of plans is envisaged at the national, state and district level. The Act also provides for the making of plans by Central Ministries/Departments, State Government Departments as well as the district level offices of the Central Government and State Governments.

[49] *See*, Ministry of Home Affairs, *National Policy on Disaster Management 2009*, National Disaster Management Authority, Government of India, Chapter 2, p. 7, *available at* https://ndma.gov.in/images/guidelines/national-dm-policy2009.pdf visited on 19th June, 2017 (last seen Oct. 29, 2020).

objectives being to focus on prevention, preparedness and resilience at all levels, adopting mitigation measures, early warning, linking disaster management and development, and ensuring efficient response and relief. However, it's only after over ten years from the enactment of the DM Act that National Plan was made. It was done so after the Supreme Court directed the Government of India to frame it at the earliest and with immediate concern.[50]

On 1st June2016 Prime Minister Shri Narendra Modi released the National Disaster Management Plan. It's the first ever such plan for the country and aims to make India disaster resilient and significantly reduce the loss of lives and assets. The plan was based on the four main themes of the 'Sendai Framework', i.e., understanding disaster risk, strengthening disaster risk governance, investing in disaster risk reduction (through structural and non-structural measures) and disaster preparedness, early warning and building back better in the aftermath of a disaster.[51] Keeping up with the new development the National Plan was again revised in the year 2019 whereby it was improved upon and given a new dimension in the light of adoption of three landmark international instruments by the GOI in the year 2015 which greatly impact the global approach towards disaster management. They are: '*Sendai Framework for Disaster Reduction (SFDRR), Sustainable Development Goals (SDGs) and Paris Agreement on Climate Change at the 21st Conference of Parties (COP21) under the United Nations Framework Convention on Climate Change in December 2015*.'[52] The new plan seeks to establish coherence between the three international agreements with special emphasis on Ten Point Agenda on DRR pronounced by the Prime Minister Shri Narendra Modi in his inaugural speech at Asian Ministerial Conference on DRR (hereinafter referred as AMCDRR) in November 2016 in New Delhi. It also makes social inclusion and mainstreaming of DRR as its integral features. With

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[50] *Swaraj Abhiyan* v. *Union of India*, writ petition (civil) No. 857 of 2015, para 101, *available at* Indiankanoon.com.

[51] *See,* http://pib.nic.in/newsite/PrintRelease.aspx?relid=145840 (last visited June19, 2017).

[52] *See*, *National Disaster Management Plan,* 2019, National Disaster Management Authority, Government of India (November 2019, New Delhi) *available at* https://ndma.gov.in/images/policyplan/dmplan/ndmp-2019.pdf (last visited Oct. 29, 2020).

respect to the goal of social inclusion the plan considers gender based vulnerabilities, scheduled castes and scheduled tribes, children, elderly and persons with disabilities. The purpose is to help all stakeholders in achieving national goals.

The plan envisages three time frames – short, medium and long term ending by 2022, 2027 and 2030 for different activities to be undertaken under it. The long term period is like the ending year of all post-15 global frameworks. However, there is no mention of fixing accountability for the lapses in implementation of the plan. In its absence the victims of disaster remain at the mercy of the officials who may or may not act according to the laudable policies and plans laid down by the government.

A landmark development in DRR has been the adoption of Ten-point agenda on DRR at AMCDRR in New Delhi in November 2016. It has also been incorporated in the NDMP. The ten key features of AMCDRR are as follows:

'1. All development sectors must imbibe the principles of disaster risk management
2. Risk coverage must include all, starting from poor households to SMEs to multi-national corporations to nation states
3. Women's leadership and greater involvement should be central to disaster risk management
4. Invest in risk mapping globally to improve global understanding of Nature and disaster risks
5. Leverage technology to enhance the efficiency of disaster risk management efforts
6. Develop a network of universities to work on disaster-related issues
7. Utilise the opportunities provided by social media and mobile technologies for disaster risk reduction
8. Build on local capacity and initiatives to enhance disaster risk reduction
9. Make use of every opportunity to learn from disasters and, to achieve that, there must be studies on the lessons after every disaster

10. Bring about greater cohesion in international response to disasters'[53]

The AMCDRR is action oriented and many initiatives like *Jan Dhan Yojna, Suraksha Bima Yojana* and *Fasal BimaYojana* have been launched to benefit millions of people in India. It aims to make DRR all-pervasive in disaster management. Community participation, inclusion and use of technology for better planning, response and reconstruction has been emphasised. But, the lack of accountability for ensuring that these guidelines are followed in letter and spirit takes the steam out of the whole initiative. Infrastructure projects have been marred by low quality and bad designing in India which results in huge economic losses. To ensure that they are disaster resilient is easier said than done because of lack of accountability mechanisms.

Victim Centric Provisions

The National Plan for disaster management 2016 provided for eighteen broad activities to serve as a checklist while responding to the disasters and the same continues in the 2019 plan. It prioritises and takes care of the basic needs and requirements of the survivors. The checklist mentions the following victim centric measures:

- Early Warning, Maps, Satellite inputs, Information Dissemination
- Search, Rescue and Evacuation of People and Animals
- Medical Care
- Drinking Water/Dewatering Pumps/Sanitation Facilities/Public Health
- Food & Essential Supplies
- Communication
- Housing and Temporary Shelters
- Power and Fuel
- Transportation Relief Logistics and Supply Chain Management
- Disposal of Animal Carcasses
- Fodder for livestock in scarcity-hit areas
- Rehabilitation
- Ensuring Safety of Livestock and Veterinary Care
- Relief Employment

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[53] *Id*.

These response and recovery activities are also supported by the statutory measure provided under Section 12 of the DM Act which mandates the National Disaster Management Authority to lay down guidelines for the minimum standards of relief to be provided to persons affected by disaster. It gives a very wide power to the National Authority (NDMA) to include whatever it thinks necessary to be provided to the survivors, though some things have been specifically mentioned like shelter, food, drinking water, medical cover, sanitation, special provision for widows and orphans, ex gratia payment for loss of life and assistance because of damage to houses. Accordingly, the National Disaster Management Authority has laid down guidelines for minimum standard of relief to be provided to victims of disaster.[54]The States too under Section 19 are mandated to frame the guidelines for providing relief to persons affected by disaster in the State and these guidelines must be in sync with the guidelines laid down by the national authority and in no case less than the minimum standards specified therein.[55]

So as per the mandate of DM Act and the DMP the Government needs to provide, and a victim can ask for following reliefs:

- *Temporary Shelter*: Survivors too have a right to live with dignity and disasters do not vanquish this fundamental right. It is especially important to have a safe and secure shelter for survival in the beginning or aftermath of the disaster. For enduring the disaster as well as for a disease free, healthy, safe and secure life availability of temporary shelters is a necessity which must be provided by the Government under the DMP. The DMP mandates that temporary relief camps and shelters be established with provision for necessities like enough toilets, water supply, generators with fuel for power back up. Hygiene must be maintained at community and camp kitchen. It commands that 3liters per day per person of drinking water should be made available. The drinking water supply has not been more than 500 meters from the camp. Also, one toilet per 30 persons, with separate facilities for women and children is to be provided. A minimum 3.5 sq.m. of covered area per person

[54] *See,* https://ndma.gov.in/images/guidelines/guideline-on-minimum-standard-of-relief.pdf (last visited Oct. 30, 2020).

[55] *See*, The Disaster Management Act, 2005, s.19.

is to be provided. Safety and security of inmates especially women, widows and children. Special arrangements should be made for old people, differently-abled and those with serious medical condition.

The livestock of farmers need shelter too, but this has not been provided for the guidelines. It has an important bearing on the reconstruction and rebuilding the lives of the villagers.

- *Essential Items:* Survivors need items of daily needs to live a life of dignity. Food, clothes, blankets, bed sheets, basic kitchen items, hygienic products etc., need to be supplied and should be culturally appropriate. DMP provides for giving dignity kits to women which should have sanitary napkins and disposable bags. It mandates that children and lactating mothers should be given milk and dairy products. Minimum 2,400 Kcal per day of food product should be given to men and women. Children should be provided 1,700 Kcal per day.
- *Medical Facilities*: As per the guidelines mobile medical teams must visit camps. Necessary basic arrangements are to be made for safe delivery. Those needing urgent medical attention and hospitalisation need to be provided with transportation to hospitals. Steps are to be taken to prevent spread of communicable diseases.
- *Search, Rescue and Reunion:* Disasters lead to separation of family members and it is a very traumatic experience for the family members. The guidelines mandate keeping a separate record of all widows and orphaned children. Women who have lost their husband are to be provided the certificate within 15 days by the concerned authorities. All necessary measures in connection with widows and children need to be completed within a period of 45 days of the disaster. Though it is not specifically laid down in the guideline but the DMP mentions earnest efforts be made in the direction of search, recue and later reunion of the survivors to their respective families. It's taken up as a matter of great humanitarian concern.
- *Psychosocial Support, Ex-Gratia Payment:* The guidelines provide for giving psychosocial support to the needy in the aftermath of the disasters. The victims need empathy and compassion from the professionals as well as society to heal their wounds and be able to

> rebuild their lives. The shock and pain that the disasters bring lead to psychological problems in the survivors and psychological counselling helps them in facing the reality and taking control of their lives in a positive manner. The ex-gratia payment for loss of life, damage to house and rebuilding one's life is to be made according to the norms set by the Ministry of Home Affairs for assistance from SDRF.

The States may not be able to provide all the things listed therein and the national authority provides for the course to be followed in such a scenario. So during the first three days they may focus on providing the basic norms, from fourth day onwards till 10th day efforts should be made to follow majority of the norms prescribed by NDMA and after 11 days all the norms prescribed by NDMA should be followed.[56] These guidelines have not been incorporated in the statute so as to make them justiciable. As they are minimum guidelines so authorities are not accountable, and the victims can't demand the relief mentioned therein as a matter of right. Neglect and deliberate inaction on the part of authorities in this regard cannot be called into question in the court of law. There is no provision for grievance redressal and victims get further victimised due to state apathy in many circumstances. Rights without remedies remain meaningless and the same is the scenario with the minimum standard of relief provided in the guidelines.

Legal Services for Victims of Disaster

It is difficult for disaster victims to take recourse to legal measures to seek redressal of their grievances. Access to justice is ensured by the Legal Services Authority Act, 1987 (hereinafter called the Act) to disaster victims. Section 12(e) of the Act enables a person under circumstances of undeserved want such as being a victim of a mass disaster, ethnic violence, caste atrocity, flood, drought, earthquake or industrial disaster eligible for taking free legal aid. As per the mandate of the Act the National Legal Services Authority has framed a scheme for legal services to disaster victims through its panel of lawyers. It envisages its intervention to coordinate the integrated, strategic, and sustainable development measures taken by the Government and Disaster Management Authority for reducing the gravity of crisis and

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[56] *Supra* n.54.

for building back better.[57] It aims to not only provide legal aid to the victims but also strengthen the capacity of victims for managing the disasters at all levels and to co-ordinate with the Government departments and non-governmental organisations. It provides for the following interventions:

- Ensuring that victims get immediate help from governmental and Non-Governmental Agencies.
- Coordinating the activities of different Governmental departments and the NGOs for bringing quick relief.
- Supervising relief materials distribution.
- Supervising the construction of temporary shelter or transporting the victims to a safer place.
- Supervising the reunion of families.
- Supervising the health care and sanitation of the victims and preventing the spread of epidemics.
- Supervising the needs of women and children.
- Ensuring the availability of food, medicine and drinking water.
- Supervising the reconstruction of damaged dwelling houses.
- Supervising the restoration of cattle and chattel.
- Legal Awareness Programmes in the relief camps on the legal rights of the victims.
- Organising Legal Aid Clinics in the affected areas for assisting in reconstruction of valuable documents.
- Assisting the victims to get the benefits of the promises and assurances announced by the Government and Ministers.
- Assisting in the rehabilitation, care and future education of orphaned children.
- Taking steps for appropriate debt relief measures for the victims.
- Assisting in the rehabilitation of the old and disabled who lost their supporting families.
- Assisting in the problems relating to Insurance Policies.
- Arranging Bank Loans for restarting the lost business and avocations.

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[57] *See,* National Legal Services Authority, *Scheme for Legal Services for Disaster Victims through legal Services Authority,* a*vailable at* https://nalsa.gov.in/acts-rules/preventive-strategic-legal-services-schemes/schemes-for-legal-services-to-disaster-victims-through-legal-services-aut(last visited Oct. 29, 2020).

- Arranging for psychiatrist's help/counselling to the victims who are subjected to physiological shock and depression on account of the disaster.[58]

The legal Services Society has incorporated human rights approach in its initiatives. Restoration and rehabilitation of survivors is inevitably linked to satisfaction of certain legal norms, rules and regulations and the legal aid to victims of disasters can take care of the fulfilment of legal formalities. Considering the literacy level, poverty and impact of disasters on the low socio-economic group and marginalised sections of the society this is a very laudable initiative taken by the Legal Services Authority. It will go a long way in making people avail the promises, offers, schemes and compensation announced by the Government and rebuild their lives.

As per the Scheme a Core Group must be established by the State Legal Services Authority in all districts under the District Legal Services Authority to respond immediately whenever disasters strike. The core group must have a varied representation in terms of its members. The Scheme provides for inclusion of senior judicial officer, young lawyers including lady lawyers selected in consultation with the local bar association, medical doctors nominated by the local branch of the Indian Medical Association and the NGOs accredited by the State Legal Services Authority. The Secretary of the District Legal Services Authority is bound to maintain a Register containing the Telephone numbers and the cell numbers of the members of the Core group.

District Legal Services Authority has to collect daily reports from the Core group working at the location of the disaster and then send copies of the same to the State Legal Services Authority. The State Legal Services Authority must consolidate the reports and send a comprehensive report to the National Legal Services Authority and copies thereof are also to be sent to the District Management Authorities of the State and District. Copies of the report have to be placed before the Patron-in-Chief of the State Authorities and also in the meeting of the State Authority. All this is to have a realistic picture of the work done on the ground and for making positive interventions whenever

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[58] *Id.,* pp. 2-3.

needed to help in providing relief and rehabilitation of the victims of disasters.

The DM Act mandates that no discrimination is to be made based on sex, caste, community, descent or origin while providing compensation and relief to the victims of disaster.[59] However, the redressal mechanism in case of violation has not been provided for in the Act. On the other hand, the DM Act bars the jurisdiction of any court except the Supreme Court or the High Court to entertain any suit or proceedings in connection with anything done by the designated authorities under the Act.[60]

Offences and Penalties

Chapter X of the DM Act, 2005 makes causing of obstruction to any official engaged in discharging his functions under the Act or refusing to comply with directions of such official an offence. Making false claim or misappropriating the money or material meant for disaster relief is also an offense. But no prosecution can be initiated against the government official without the prior sanction of the government and no court can take cognisance of an offence under this Act, except on a complaint made by the authorities or officers recognised under section 60 of DM Act or unless any person has given prior notice of 30 days to the authorities designated under the DM Act.[61] So no quick remedial action or redressal of grievance is provided for in the DM Act for the victims of disasters. Everything is dependent on the goodwill and discretion of the concerned officials. This is effectively demonstrated in *Swaraj Abhiyan* v. *Union of India*[62]wherein the Supreme Court had to give directions to the States i.e., Bihar, Gujarat and Haryana to consider whether conditions for declaring drought exist in their States as the farmers were a distressed lot and were denied basic humanitarian assistance because of non-declaration of drought.

India has voluntarily signed the international instruments for disaster risk reduction and framed the national plan by keeping in mind the sustainable goals and everything is remarkable, in fact the best in the

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[59] S*ee*, s. 61 s*upra* n.55.

[60] *Id*., s. 71.

[61] *Id*., ss. 59-60.

[62] *Supra* n.50.

world on paper. We need to work to realise those laudable goals and for that the first and foremost thing is to ensure Rule of Law in the country in normal times whereby violations of law whether civil or criminal are promptly and adequately addressed. Incorporating accountability mechanisms in law will ensure that the respective departments will follow and implement the laws earnestly.

As prime Minister of India Shri Narendra Modi emphasised in his speech on Constitution Day that now its time to focus on one's duty, it is absolutely true with respect to everyone-whether official or non-official. A culture of following and implementing the law, fixing responsibility and ensuring accountability must be developed in the country. It is only then that building laws, fire safety laws, and other laws having a bearing on infrastructure will be followed and a disaster risk reduction culture can be developed.

In the civil sphere, tort law plays an especially important part in ensuring accountability. But its implementation is not strong in India. We need to strengthen tort law in India as well as disaster related laws and institutions and ensure compliance and implementation.

We have succeeded in reducing causalities in case of cyclones and floods by early warning and rescue and quick response but there is a need to address the root causes. Loss of life and property in Uttarakhand floods amply demonstrated our lack of preparedness and foresight.

Disaster risk reduction is mainly a governance issue but is also a development issue. We need to focus on good governance for sustainable development.

The gains of development are marred by our ever-growing big population which overstretches the resources. We need to involve people in realising the goals of the population policy in India.

Lack of preparedness has also been demonstrated by the ongoing COVID-19 pandemic. The Supreme Court had to give a series of directions to ensure the dignity and humane treatment of the migrant labourers, making available free testing for patients in Government hospitals, proper treatment of COVID patients in hospitals and decent handling of dead bodies etc. All these are governance issues and it's unfortunate that for almost everything courts must intervene in India.

Conclusion

The problems plaguing the disaster management in India and lack of quick and efficient redressal mechanisms available for victims of disasters is aptly stated by Justice Madan Lokur when he quoted Lokmanya Tilak, —'The problem is not the lack of resources or capabilities, but lack of will' in *Swaraj Abhiyan* v. *Union of India*.[63]We have succeeded in preventing disasters by improving our early warning, evacuation and response mechanism. The zero casualty approach adopted by the Central and State Governments has resulted in less casualties across India. There was zero casualty in cyclone Amphan in Odisha in May 2020, though many houses and property was damaged. Almost two lakh people were shifted from vulnerable and low lying areas.[64] But the same cannot be said about the number of COVID-19 related deaths in India, though the death rate compared to the population of India is not extremely high as compared to that in other countries of the world. Moreover, the pandemic has caused large scale displacement, economic loss, job loss, educational loss etc. The poor have almost no mechanism available to secure their basic rights viz., food, livelihood, water and health facilities etc. to live a dignified life.

India has adopted a right based approach towards providing relief to victims of disasters in its policy documents and legal instruments. But there are gaps in theory and practice. The common man still is unaware of his rights and how to claim them. NGO's and legal services authorities can play a major role in this area. Legal awareness campaigns in the community and schools will make a major difference in capacity building and strengthening the victims to claim their rights. Moreover, we need to strengthen our laws by providing stricter penalties for violations and by having a holistic and inclusive approach towards victims of disasters. Presently, there is no mention of the specific rights of internally displaced people in the disaster management related laws and they face discrimination at every level.

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[63] *Supra* n.50.

[64] PTI, *No loss of Life due to Cyclone Amphan in Odisha, claims State Government*, The New Indian Express, (22nd May, 2020) *available at* https://www.newindianexpress.com/states/odisha/2020/may/22/no-loss-of-life-due-to-cyclone-amphan-in-odisha-claims-state-government-2146663.html (last visited Oct. 30, 2020).

To remove discrimination towards already vulnerable sections of the society and for their empowerment we still need to incorporate strict accountability mechanisms in our laws. Empowerment and accountability go hand in hand and for that to happen the human rights based approach needs to permeate all laws and institutional mechanisms as it is then only that human dignity in difficult circumstances can be protected and restored. At theoretical level a lot has been laid down, but it needs to be seen as to how far these laudable principles are being applied in a practical scenario. Till now the case studies point to a gap between theory and practice. A strong political will is needed to give a thrust to implementation of the policies already adopted and implementation of the law in its true spirit. A people centric approach with proper accountability mechanisms will surely help achieve the goals of sustainable development.

The Concept of Shared Household:
Essentiality for Relief under Domestic Violence Act, 2005

Alok Sharma[*]

Introduction

What is the position of women in Indian society? Are they equal? Whether they feel safe and secure in public places and even in homes? These are the million-dollar questions even in 21st century. The irony of Indian society is that women are still subjected to various kinds of violence even in their homes which are temples where they are believed to be the deities. Unfortunately, till now Indian society has an influence of patriarchy where women must suffer on various counts resulting in domestic violence, yet there was no such law relating to prevention of domestic violence against women before 2005. Many women organisations in India have raised their voice in order to have such a law. It became a great movement and there was such great pressure even on the political parties that one of the parties have included a promise to enact such law in their election manifesto. In addition to this, there was pressure from the International community to enact such a law. In the backdrop of these developments, India has enacted a special law for prevention of domestic violence, *viz.*, the Protection of Women from Domestic Violence Act, 2005 (hereinafter referred to as 'the Act').

The Act has been enacted by Parliament by virtue of Article 15(3) of the Constitution which empowers Parliament to enact laws in favour of women and children. The Act is very comprehensive which provides for various reliefs[1] in addition to the already existing ones for women who are subjected to domestic violence by their family members, *viz.*,

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[1] The Domestic Violence Act, 2005, s. 18-23 provide many avenues for an aggrieved person to get relief from the court by applying under s. 12(1).

protection orders, residence order, monetary reliefs, custody orders, compensation etc. However, in order to get any reliefs under the Act, the affected woman must satisfy certain conditions laid down in the Act and her living or has lived in a shared household with the respondent is one such essential condition. If the affected woman does not fulfil this condition then she is unable to get any relief under the Act and in such situations, she must look for reliefs under any other law for the time being in operation. In the present paper, the emphasis has been laid down on the concept of shared household as defined in the Act and how judiciary has considered its essentiality for granting any relief to affected women under the Act.

Conditions for Granting Relief

As the Act is primarily a civil legislation so the available reliefs are not punitive in nature; though, an aggrieved person can simultaneously file a case under Section 498-A if she wants thereby, she can invoke both civil as well as criminal remedies. The main thrust of the Act is protecting the victim from any additional domestic violence and compensating her for the abuse already inflicted. Nevertheless, it emphasises also on restoring peace, stability and harmony in the household thus, all the provisions under the Act have been drafted to achieve this dual purpose. Moreover, the Act is not exhaustive in nature and is only complementary i.e., it supplements the existing legislations.[2] Moreover, the relief available under the Act can be sought in other legal proceedings before civil court, family court, or criminal court irrespective of whether those proceedings were initiated before/after commencement of the Act and the relief under it would be in addition to that relief.[3] Furthermore, the Act can be applied retrospectively.[4]

The procedure for obtaining orders of reliefs by filing an application to the magistrate under Section 12[5] is provided under the Act. It requires that an aggrieved person or a Protection Officer or any other person on behalf of the aggrieved person may present an application to the

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[2] *Id*., s. 36.

[3] *Id*., s. 26.

[4] *Id*., s. 26(1).

[5] *Id*., s. 12.

Magistrate seeking one or more reliefs under this Act.[6] It is, therefore, clear that relief under the Act can be obtained only for an aggrieved person which is defined under Section 2(a) of the Act.

Aggrieved Person

Under the Act, a complaint can be filed by the 'aggrieved person' who has been defined as 'any woman who is, or has been, in a domestic relationship with the respondent and who alleges to have been subjected to any act of domestic violence by the respondent.'[7] However, this definition has been criticised on many courts; firstly, under the Act the status of a child is hazy as Section 2(b)[8] defines a child, but it does not make it clear whether or not a child can be the aggrieved party. Even, Section 2(a) talk about woman only thereby suggests that children would not be included within its ambit, but Section 18(c)[9] suggests that a child can be an 'aggrieved person.' Children, especially orphans are the most vulnerable targets of domestic violence and the Act does not sufficiently recognise their requirements as it insists on living in the shared household.

Earlier, no female relative of the husband or the male partner can be an aggrieved person and file a complaint against the wife or female partner, e.g. the mother-in-law cannot file an application against a daughter-in-law. So, if in a case daughter-in-law is torturing any female in-laws then they have no remedy against her. Additionally, domestic violence by female family member and minor is kept out of the purview of the Act. Both these defects have been cured by the Hon'ble Supreme Court by deleting two words, 'adult male' from the definition of 'respondent'[10] by its powers of judicial review in *Hiral P. Harsora* v.

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[6] *Id*., s. 12(1).

[7] *Id*., s. 2(a).

[8] *Id*., s. 2(b): 'child' means any person below the age of eighteen years and includes any adopted, step or foster child.'

[9] *Id*., s. 18(c): '…entering the place of employment of the aggrieved person or, if the person aggrieved is a child, its school or any other place frequented by the aggrieved person.'

[10] *Id*., s. 2(q) 'respondent' means any adult male person who is, or has been, in a domestic relationship with the aggrieved person and against whom the aggrieved person has sought any relief under this Act: Provided that an

Kusum N. Harsora.[11]Now by virtue of this decision, the reliefs under the Act can be resorted to by any women living in a domestic relationship who is suffering from any kind of domestic violence in whatever form and at whosoever's hands.[12]

What is 'Domestic Relationship'

An application can be filed only by an 'aggrieved person' who can be any woman who is or has been living in a domestic relationship with the respondent who commits any act of domestic violence against her. Therefore, the other condition of getting any relief under the Act is the existence of 'domestic relationship' between aggrieved person and respondent. It has been defined in Section 2(f) of the Act.[13] It covers those women who are or have been in a relationship with the abuser where both parties have lived together in a shared household and are related by consanguinity, marriage or through a relationship in marriage or adoption. In addition, relationships with family members living together as a joint family are also included. Therefore, those women who are sisters, widows, mothers, single women, or living with the abuser are entitled to legal protection under the Act.[14]This definition of domestic relationship has brought about many crucial changes. The Act destabilises static concept of the family by encircling a wide range of female claimants and specifically recognises abuses prevalent in the natal families of their daughters or sisters ranging from actual violence to inadequate education, lack of economic independence and property rights as well as restriction of her right to take decisions including of her marriage.

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aggrieved wife or female living in a relationship in the nature of a marriage may also file a complaint against a relative of the husband or the male partner;

[11] AIR 2016 SC 4774.

[12] The author has written two articles on these topics, *viz.,' Judicial Power to Alter the Dicta of the Protection of Women from Domestic Violence Act, 2005',* 2019 (6) SCJ 17 and '*Judicial Approach for Justice: Redefining 'Aggrieved Person' under Domestic Violence Act, 2005,'* 8 JOLT- I 1 (2018-2019).

[13] *Supra* n.1, s. 2(f): 'domestic relationship' means a relationship between two persons who live or have, at any point of time, lived together in a shared household, when they are related by consanguinity, marriage, or through a relationship in the nature of marriage, adoption or are family members living together as a joint family.'

[14] *Id.*, s. 4(i).

Another commendable feature is that, for the first time in India, relationship in the nature of marriage is recognised and thereby extended protection to many vulnerable women who were otherwise not protected under any law[15] thus the Act has overcome a major lacuna in the law.[16] Moreover, relief can also be claimed by females against males with whom they have shared a relationship earlier. The Act covers a broader terrain of non-marital affairs thereby broadened the scope of legally acknowledged domestic relationships between men and women.[17] Therefore, it covers only those women who are or have been in a relationship with the abuser where both parties have lived together in a shared household making the requirement of living in shared household compulsory for getting any relief under the Act.

Concept of Shared Household

Concept of shared household has been defined in Section 2(s) of the Act.[18] A household where aggrieved person lives/lived in domestic relationship, either singly or along with respondent is a shared household. This applies irrespective of the household is owned/tenanted, either jointly by aggrieved person and respondent or by either of them, where either the person aggrieved or the respondent

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[15] 'However, in 2008, the Maharashtra government attempted to amend Section 125 of the CrPC to broaden the definition of the term 'wife' in this Section to include a woman who was living with a man 'like his wife' for a reasonably long period by following the recommendations of the Malimath Committee in 2003 to amend Section 125 of the CrPC to extend the definition of 'wife' therein (Report of 2003 at p.189), but it failed.' See, *infra* n.17.

[16] Karanjawala, Tahira And Chugh, Shivani, *The Legal Battle against Domestic Violence in India: Evolution and Analysis*, *International* 23 (3) JOURNAL OF LAW, POLICY AND THE FAMILY 289-308 (2009) at p. 294.

[17] See, Agrawal, Anuja, *Law and 'Live-in' Relationships in India*, Vol (39) ECONOMIC & POLITICAL WEEKLY, (2012).

[18] *Supra* n.1 s. 2(s): 'shared household' means a household where the person aggrieved lives or at any stage has lived in a domestic relationship either singly or along with the respondent and includes such a household whether owned or tenanted either jointly by the aggrieved person and the respondent, or owned or tenanted by either of them in respect of which either the aggrieved person or the respondent or both jointly or singly have any right, title, interest or equity and includes such a household which may belong to the joint family of which the respondent is a member, irrespective of whether the respondent or the aggrieved person has any right, title or interest in the shared household.'

or both jointly or singly have any right, title, interest or equity. Shared household also includes a household which may belong to the joint family of which respondent is a member even if respondent or aggrieved person has any right/title/interest in the shared household. Nevertheless, the ownership rights of the household cannot be affected by the Act meaning thereby if a woman lives in a home that is legally owned by her husband, it does not alter the legality of ownership and it will remain with the husband.

Interestingly, Advocate Indira Jaising equated the concept of shared household with traditional concept of coparcenary that clearly vested the ownership right of property and the right to use it by multiplicity of users who were permitted to use it being in the domestic relationship. She says, '*While ownership was vested with three generations of males, the women of the coparcenary married into the family, in their capacity of mothers and daughters-in-law, had the undisputed right to reside in it. The coparcenary was quite literally the 'shared household'; a joint family was defined as being 'joint in food and worship'. The PWDVA built on these notions and secularised this concept, thus making the right to reside available to women of all religious communities. The broad definition of the 'shared household' in the PWDVA is in keeping with the family patterns in India, where married couples continue to live with their parents in homes owned by the parents*.'[19]

It can be clearly inferred that one of the most outstanding aspects of the Act is its enunciation of a woman's right to a residence which was not provided by any personal or civil laws in the country. The right to residence is made available to aggrieved person when a magistrate passes such an order upon the determination that domestic violence has taken place against aggrieved person. As domestic violence takes place in privacy of the home so there is a strong relationship between it and the shared household irrespective of ownership or title in the shared household. It aims to ensure that women can reside in the household without fear of being violated or thrown out and provides for removing perpetrator of violence from there to ensure that women can continue to reside in a violence-free home.

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[19] Jaising, Indira, *Bringing Rights Home: Review of the Campaign for a Law on Domestic Violence*, XLIV (44) ECONOMIC & POLITICAL WEEKLY 51 (2009).

The very first case on this aspect was the Supreme Court's decision in *S.R. Batra* v. *Taruna Batra*[20] even if the case had not been filed under the Act, but as the counsel for the respondent mentioned that she was entitled to the shared household, the court discussed the relevant provisions of the Act and delivered this controversial judgment. Smt. Taruna Batra was married to Amit Batra, son of the appellants, and started living with him in the house of the mother-in-law. Amit Batra filed a divorce petition against his wife, and she filed an F.I.R. under Section 406/498A/506/34 IPC and got them all arrested by police and they were granted bail after three days. She had shifted to her parent's residence though, she stated that she tried to enter that house, but found main entrance locked therefore, she filed a suit for mandatory injunction to enter the house. The appellants stated that she along with her parents forcibly broke open locks of their house and they had been terrorised by her and they had to stay in their office. Amit Batra had shifted to his own flat at Ghaziabad before litigation between them had started.

Both the courts below gave contradictory judgments. The High Court of Delhi gave judgment in her favour that second floor of property was her matrimonial home even if her husband had shifted to Ghaziabad as mere change of the residence by husband would not shift matrimonial home. Thus, the court held her entitled to reside there. The Supreme Court differed from the High Court completely and observed that '*there is no such law in India, like the British Matrimonial Homes Act, 1967, and in any case, the rights which may be available under any law can only be as against the husband and not against the father-in-law or mother- in-law.*'[21] As the house in question belongs to her mother-in-law and not to her husband so she could not claim any right to live there. Moreover, that house could not be regarded as a shared household under the Act.

The contention was that she had lived there in the past, consequently it was her shared household which was rejected by the Court. It stated that '*the aforesaid submission is accepted then it will mean that wherever the husband and wife lived together in the past that property becomes a shared household. It is quite possible that the husband and wife may have lived together in dozens of places e.g. with the husband's father, husband's paternal grandparents, his maternal parents, uncles, aunts, brothers, sisters, nephews,*

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[20] (2007) 3 SCC 169.

[21] *Id.,* para 17 at p. 173.

nieces etc. If the interpretation canvassed by the learned counsel for the respondent is accepted, all these houses of the husband's relatives will be shared households and the wife can well insist in living in the all these houses of her husband's relatives merely because she had stayed with her husband for some time in those houses in the past. Such a view would lead to chaos and would be absurd.'[22]

It also stated that the claim for alternative accommodation could only be made against husband and not against his parents or other relatives. A wife was only entitled to claim right to residence in shared household that would only mean house belonging to or taken on rent by husband, or house which belonged to joint family of which husband was a member. The present property neither belonged to Amit Batra nor he took it on rent nor was it joint family property of which Amit Batra was a member. It was the exclusive property of mother of Amit Batra thus could not be called as a shared household. It further commented that '*no doubt, the definition of 'shared household' in Section 2(s) of the Act is not very happily worded, and appears to be the result of clumsy drafting, but we have to give it an interpretation which is sensible, and which does not lead to chaos in society.*'[23]

Therefore, the court has excluded all self-owned property of in-laws from purview of shared household. In doing so, it has contradicted Section 2(s) of the Act itself and drastically reduced the scope of the Act according to which ownership of property had been immaterial and irrelevant to decide the right to residence. To protect women from homelessness the Act created a legal fiction in which question of ownership becomes irrelevant and two things must be proved viz., domestic relationship between the contesting parties and infliction of domestic violence.[24] After this judgment, the question of deciding ownership becomes essential which was not the intent of the legislature at all. It must be stated that the principles laid down by this decision have curtailed the rights of married women and widows.

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[22] *Id.,* para 26 at pp. 174-175.

[23] *Id.,* para 30 at p. 175.

[24] Badarinath, Pooja, *The Challenge of Subjectivity within Courts: Interpreting the Domestic Violence Act*, XLVI (12) ECONOMIC & POLITICAL WEEKLY 16 (2011).

It is interesting to note that in the landmark judgment of *B.P. Achala Anand* v. *Appi Reddy,*[25] the Supreme Court had clearly upheld the wife's right of residence in the matrimonial home as part of her right of maintenance. Therefore, the observation made in *Batra* that a wife's right to residence is only permissive in nature is narrow and *per incuriam*. Moreover, the Supreme Court again in the case of *Vimalben Ajitbhai Patel* v. *Vatslabeen Ashokbhai Patel*[26] is recognizing that 'the Domestic Violence Act provides for a higher right in favour of a wife. She not only acquires a right to be maintained, but also thereunder acquires a right of residence. The right of residence is a higher right. The said right as per the legislation extends to joint properties in which the husband has a share.'[27]

The definition of shared household is extensive, but prone to wrong interpretation and potential distortion. Therefore, the scope of this definition has to be re-clarified, but in order to prevent potential misuse of the provision the Supreme Court has narrowly interpreted it[28] that may lead to denial of this right to many genuinely aggrieved persons. Fortunately, the Hon'ble Supreme Court has recently in October, 2020 has overruled the decision of Batra's case[29] in *Satish Chander Ahuja* v. *Sneha Ahuja*[30] by interpreting the definition of shared household in true spirit to uphold the right of aggrieved persons to have rights of residence in domestic violence case. It is the commendable and long-awaited judgment by the apex court.

Essentiality of Shared Household for Relief

To get relief under the Domestic Violence Act2005, an application must be filed under Section 12 of the Act which does not specifically mentions the term 'shared household', but it says that an aggrieved person herself can file a complaint or a complaint can be filed on her behalf. The wordings of Section 12 leads to the definition of aggrieved person to find out as to who can file the application under the Act. The analysis of the definition of aggrieved person makes it clear that the aggrieved

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[25] AIR 2005 SC 986.

[26] (2008) 4 SCC 649.

[27] *Id.,* Para 27 at p. 662.

[28] *Supra* n. 20.

[29] *Id*.

[30] Civil Appeal No. 2483 of 2020 (Arising out of SLP(c) No. 1048 of 2020).

person is that woman who is living or has been living with the respondent in the domestic relationship. This further requires analysing the definition of domestic relationship to find out that which woman can be aggrieved person who can file a case under the Act. It leads to the analysis of the definition of domestic relationship which clearly shows that the woman who is subjected to domestic violence must be living or has been living with the respondent who has subjected this woman to domestic violence in a *shared household*.[31] Thus, in the definition of domestic relationship, the concept of shared household occurs for the first time making it aptly clear that to get any relief under the Act, the aggrieved woman must be living or has be living with the respondent in the shared household.

It is very much clear from the language of the provisions in the Act itself that the shared household is the basic essential requirement for getting any relief under the Act. However, the courts have come across such cases where the victim woman is not residing in the shared household, but she files a complaint under the Act. One such case is *K. Narasimhan* v. *Rohini Devanathan*[32] where the petitioner, brother-in-law had sought for quashing the proceedings of domestic violence case filed against him by respondent under Section 12 to attract the provisions of Section 3 of the Act.

The facts of the case are that on 23-2-2004 the marriage took place and after marriage, the husband left for Canada during March 2004 and on 1st August, 2004, the wife joined him. Thereafter, differences arose between them and they started residing separately since May 2007. The petitioner's (brother-in-law) contentions were that he was staying autonomously in Canada and he has been falsely implicated in the case. Even in the complaint itself, there was no mention of their living together in shared household. According to Section 2(f) or Section 2(s), when they never stayed together in the same household as the petitioner was residing in Canada and in India, he stayed at Chennai, the question of inflicting emotional violence against her would not arise.

The Karnataka High Court decided that there was no proof of petitioner and the respondent having lived together or were living together at any point of time, therefore, making some allegations against the

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[31] Emphasis supplied.

[32] 2009 Indlaw KAR 545; 2010 (5) KARLJ 305; 2010 (3) R.C.R.(Criminal) 72.

respondent by itself would not amount to domestic violence in the absence of essential ingredient of shared household.

Another case is *Kamlesh Devi* v. *Jaipal and others,*[33] which is decided by the Supreme Court last year. The facts of the case are that Smt. Kamlesh Devi filed a complaint against Jaipal and others under various Sections of the DV Act, 2005 before the Ld. Judicial Magistrate. It is contended that the petitioner and the respondents are the family members of the same family living in the same premises. The husband of the petitioner had retired from BSF and she had three daughters, one married and two unmarried. The respondents had made a gang and are quarrelsome persons. Husband of the petitioner also made complaints to Sarpanch of Village Gaud against the respondents many a times. The Ld. Judicial Magistrate after discussing the provisions of the DV Act found that the respondents and the petitioner have not been living in a shared household resulting in causing of domestic violence upon them. Merely because accused Jaipal, Krishan Kumar and Sandeep are nephews will not itself bring the case under the Act and he dismissed the complaint under the DV Act. She filed an appeal before the Ld. Sessions Judge who also dismissed it by giving the reasoning as per law that the petitioner Kamlesh Devi and the respondents were not living together in shared household rather as per proofs they reside separately in separate houses. Therefore, it was held that Kamlesh Devi is not an aggrieved person under Section 2(a) of the Act and thus not entitled to any relief under the Act. Then a criminal revision petition was filed under Section 401 of Code of Criminal Procedure in the High Court against the judgment passed by Ld. Sessions Judge. The High Court held that the judgments delivered by the Courts below had been passed as per evidence and law and the same was upheld and thereafter dismissed the criminal revision petition.[34]

The petitioner approached the Supreme Court which also declined to give any relief observing:

> 'The High Court has rightly found in effect that the ingredients of domestic violence are wholly absent in this case. The petitioner and the respondents are not persons living together in a shared household. There is a vague allegation that the

[33] SPECIAL LEAVE PETITION (CRIMINAL)… Diary No(s).34053/2019.

[34] *Id*.

> respondents are family members. There is not a whisper of the respondents with the petitioner. They appear to be neighbours. The special leave petition is dismissed'.

It can be inferred from the above judgments that it is a clear mandate of the Act that shared household is the essential requirement for granting any relief under the Act. After this order of the Hon'ble Supreme Court now the matter has been settled regarding the maintainability of an application by an aggrieved person under the Act.

Conclusion

The cumulative impact of the definitions of 'aggrieved person' and 'domestic relationship' is that the concept of 'shared household' is the essential and basic ingredient for getting any relief under the Domestic Violence Act, 2005. It is compulsory to get relief under the Act as the aggrieved person can allege the commission of domestic violence only against a person with whom she is or has been living in the shared household. If the aggrieved person cannot prove that she is or has been residing with this person in a shared household at the time when domestic violence was inflicted against her then her application will be dismissed. The magistrate must satisfy him/her about their residing in the shared household at that particular time when infliction of domestic violence has been alleged and, unless it is proved that the woman lived in shared household along with the respondent either jointly or individually, the question of granting any relief under the Act does not arise. This proposition has also been upheld by the higher judiciary to settle the issue till such time when the Hon'ble Supreme Court will broaden the grounds for relief under the Act.

On Being a Law Teacher in India:
Some Reflections and Takeaways[*]

Ajay Kumar Sharma[**]

Introduction

Legal education in India at the Bachelor of Laws (LL.B.) level is imparted either through a three-year postgraduate degree program, or an integrated undergraduate five-year degree program, and it is primarily meant to educate and train future legal practitioners. [1] Professor P.K. Tripathi duly emphasised on the tremendous responsibilities of the' legal educator' in a democracy, where there is a 'constant need' to strike and maintain 'a nice and none too easy balance between the claims of indispensable regulation and inviolable freedom'.[2]The institutional landscape for imparting legal education in India is heterogeneous, as it is offered by the law faculties and departments in traditional universities, the National Law Universities, and the Private Law Colleges. Within each category of law school also, the institutional culture and priorities vary *inter se*; and much depends upon the individual leadership of each institution also. These varied institutional frameworks present peculiar challenges to the law teachers in these institutions, but also proffer them unique opportunities. Even

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[1] *See,* F. Mustafa *et. al.*, SUGGESTIONS FOR REFORMS AT THE NATIONAL LAW UNIVERSITIES SET UP THROUGH STATE LEGISLATIONS 5 (Government of India: NALSAR University of Law, 2018).

[2] P.K. Tripathi, *In the Quest for Better Legal Education*, 10 JOURNAL OF INDIAN LAW INSTITUTE 469, 469 (1968).

the promise of the more progressive National Law Universities (NLUs) remains elusive so far, and these institutions of legal learning—more recently created in comparison to the law departments in various traditional Universities—continue to confront numerous challenges.[3] The autonomy of the law schools in India is also curtailed by the Bar Council of India (BCI), which *inter alia* is mandated to lay down the standards of legal education, and thus made the BCI Rules of Legal Education, 2008—which are to be mandatorily followed, as the BCI statutorily accords periodic accreditation to the legal educational institutions. Within each category of law school also, the institutional culture and priorities vary *inter se*; and much depends upon the individual leadership of each institution also..[4] These regulatory contours on the autonomy of the law schools, despite their lofty ideals for maintaining certain minimum-uniform standards, may also consequentially impact and limit their ability to institutionally chalk out their policy framework, goals, choices, priorities, and respond to certain institutional challenges. Learning as a law teacher and researcher happens from various sources and at different stages of professional life. We continuously learn from our students and peers also. The learning outcomes as a law teacher vary at the different levels of classes taught, viz., at the Undergraduate, Postgraduate, and Doctoral levels. The legal knowledge applied by a law teacher in India, in her teaching and research, is painstakingly acquired over a long period of time. First, as a student of LL.B., then, in the mandatory Master of Laws (LL.M.) program, which is an essential entry level qualification for appointment as an Assistant Professor in India, and later, as a doctoral researcher in law, which is a necessary qualification for career progression, apart from the experiential learning as a law teacher. Thus, successive maturation as a scholar of law, along with acquisition of advance degrees in law, are all expected to improve one's legal mind, cognitive

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[3] *See,* Yogesh Pai & Prabhash Ranjan, *Legal Education at Crossroads*, The Hindu Business Line, 15th May 2013, *available at* https://www.thehindubusinessline.com /opinion/legal-education-at-crossroads/article22994948.ece (last visited Oct. 19, 2020).

[4] *See,* Rules of Legal Education-2008 (Bar Council of India), *available at* http://www.barcouncilofindia.org/wp-content/uploads/2010/05/BCIRulesPartIV.pdf (last visited Oct. 19, 2020).
See also, Shuvro Prosun Sarker, Anirban Chakraborty & Shounak Chatterjee, *Visualising Third Generation Reform of Indian Legal Education*, *in* Shuvro Prosun Sarker (ed.) LEGAL EDUCATION IN ASIA 257, 270–73 (2014).

faculty, and grasp over various law subjects—which should all lead to an effective dissemination of knowledge based on comprehensive and holistic understanding of law. Despite these formal academic requirements, the deliverance of world-class law teaching, and the production of quality legal research have eluded the legal academe in India so far.

The humungous demand due to high population, overall lack of adequate infrastructure, demographic and linguistic differences, socio-economic disparities and inequalities, unemployment issues, unavailability and inadequacy of financial and human resource due to a persistent resource crunch, all present huge individual and institutional challenges, and put severe systemic stress on the higher education system in India. Various eminent Professors both in India and abroad have pointed out to the above challenges, which are also of concern to a College or a University teacher in India generally, irrespective of the discipline to which she belongs. Two important works contextualising various systemic issues in higher education in India are 'On Being a Teacher',[5] which inspired this article's title, and 'Essays in Dissent: Remaking Higher Education',[6] which also provide valuable guidance for improving one's skills as a teacher, despite these limitations. Historically, the 1960s and 70s were very important decades for the study and radical reformation of the Indian legal education as a whole; when beginning with 1964, the Report of the Committee on the Re-organisation of Legal Education in the University of Delhi (*Gajendragadkar Committee*)—which also had the germ of the idea for setting up the NLUs in India—presented a systematic study of the legal education scenario and related problems.[7] All India Law Teachers Congress (AILTC) in its 1999 Congress also conducted an extensive brainstorming on the various aspects relating to 'Legal Education in

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[5] Amrik Singh (ed.) ON BEING A TEACHER, (Konark, 1991).

[6] Amrik Singh, ESSAYS IN DISSENT: REMAKING HIGHER EDUCATION (HarperCollins, 2009).

[7] *See,* Russell B. Sunshine & Arthur L. Berney, *Basic Legal Education in India: An Empirical Study of the Student Perspective at Three Law Colleges*, 12 JOURNAL OF INDIAN LAW INSTITUTE 39 (1970); Arthur Taylor von Mehren, *Law and Legal Education in India: Some Observations*, 78 HARVARD LAW REVIEW 1180 (1965); and Julius G. Getman, *The Development of Indian Legal Education: The Impact of the Language Problem*, 21 JOURNAL OF LEGAL EDUCATION 513 (1969).

India in 21st Century', culminating in its publication of over fifty papers of various law-teacher delegates.[8]This article attempts to re-look and chart out various general as well as unique challenges faced by a law teacher in India in various roles played and multifarious responsibilities undertaken by her. It is expected to be of considerable utility for all the law teachers generally, regardless of where they work, who can learn in a comparative manner with the help of the literature discussed herein—and then, reflect on their own common and unique professional experiences. It attempts to delineate various aspects that relate to one's existence and identity as a law teacher. This paper offers extensive constructive suggestions for the law teachers, its primary audience, and at places, for the law school administrators and policy makers, for qualitatively improving imparting of the legal education.

The next part of this article is extensively devoted to the main function of a law teacher *viz*., to teach law, but does not restrict itself to classroom teaching. It also deals with various facets of curriculum development and assessment of students, which are integral to teaching. This part is followed by an extensive discussion on the importance of legal research by a law teacher and addresses several issues that usually bother young law teachers. It also analyses the significance of legal writing and publishing for the law teachers and provides them valuable guidance in this regard. This part especially assumes significance for young law teachers in India, who sometimes neglect legal writing due to various reasons. The subsequent part fleshes out other academic-administration roles and responsibilities undertaken by a law teacher both inside and outside the academy, towards the law school stakeholders, and the society at large. Some inspirational Indian law teachers who furnish motivating exemplars from the Indian legal academia, and who have inspired generations of law teachers in India are briefly talked about here. The concluding part follows up on all the previous parts and contains concluding remarks with some supplemental suggestions and observations.

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[8] A.K. Koul (ed.) LEGAL EDUCATION IN INDIA IN 21ST CENTURY, (Faculty of Law, University of Delhi, 1999).

Teaching Law

Classroom Teaching

This section is devoted to exploring various ways to improve the classroom teaching of law. Professor Upendra Baxi inspires the law teachers to teach provocatively.[9] He also rightly terms teaching as a *confessional activity*, whereby every time as a teacher one bites at the fruit of knowledge, the teacher realises core of her ignorance.[10]A teacher is evaluated by her class every day. Even where an institution does not seek a formal feedback from the students about their teachers, they must not hesitate to constantly seek informal feedback from their class about the teaching and learning in their subjects, and must do course corrections from time to time, as and when required. Student feedback is now periodically obtained formally in many Indian Law Schools to assess the faculty performance, but the administration must professionally and scientifically design the feedback survey, systematically collate the data, and scientifically evaluate it to rule out any biases and prejudices. The inferences drawn from such periodic feedback exercises should also be corroborated from other reliable sources of information before taking a final call on judging the teaching performance of an individual faculty. A constant challenge faced as a law teacher nowadays is to find a balance between liberal education on the one hand, and pragmatic professional education, to meet the requirements of law job market, on the other.[11] Thus, the ideal aim of imparting socially relevant legal education, somewhat conflicts with the needs of the job market, and remain elusive.[12] So, even Professor N.R. Madhava Menon, who is considered to be a key architect of the NLU system, expressed his disillusionment with the NLU model, so far as its

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[9] *See,* Upendra Baxi, *Teaching as Provocation*, in Amrik Singh (ed.) ON BEING A TEACHER 150 (Konark, 1990).

[10] *Id.*, p. 154.

[11] *See,* Mansi Sood, *Legal Education and Its Outcomes: Digging Deeper into the Successes and Failures of India's National Law Schools* (2017) *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3062519 (last visited Oct. 20, 2020).

[12] Upendra Baxi, *Notes Towards A Socially Relevant Legal Education*, 5 JOURNAL OF BAR COUNCIL OF INDIA 1 (1976), *available at* http://upendrabaxi.in/documents%5CNotes%20towards%20a%20socially%20relevant%20legal%20education.pdf (last visited Oct. 19, 2020).

ability to deliver social justice oriented education is concerned.[13] The huge aspirations of the law students in India are also not easily met, and the bulk of law colleges, as previously mentioned, 'suffer from lack of full time teachers, virtual absence of libraries, staggering enrolments, absentee students, mass copying at examinations and inadequate physical and financial resource'.[14] Despite these systemic problems, some common imperative attributes of a good law teacher that are shared by the teachers across the disciplines are dedication, academic integrity, punctuality, maturity, and objectivity. All law teachers must endeavour to impart good values and ethics to their students, so as to enable them to assess the fairness, equality, and justice considerations of the means as well as of the end objectives sought to be accomplished by them in their different professional assignments.[15] Also, they must cater to the diverse needs of their students including, of their differently abled students.[16] In 1870, Dean Christopher Columbus Langdell revolutionised the method of instruction at the Harvard Law School by shifting from the 'lecture/textbook' method, used in all the Law Schools in the United States till then, to the 'case method';[17] which almost a century later was adopted by the Delhi University, Law Faculty too. Adapting the case method to the Indian scenario to make it efficaciously work requires prior intensive study of the prescribed case law by the class and teacher, proper segmentation, flexible and imaginative evaluation, and classroom discussion and argumentation on the basis of critical reading.[18] Even in the US, the Langdellian case method is

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[13] *See,* Sarker, Chakraborty, and Chatterjee, *supra* n. 4, p. 257.

[14] Gurjeet Singh, *Revamping Professional Legal Education: Some Observations on Revised LL.B. Curriculum of Bar Council of India*, 41 JOURNAL OF INDIAN LAW INSTITUTE 237, 239 (1999).

[15] *See,* Carrie J. Menkel-Meadow, *Can a Law Teacher Avoid Teaching Legal Ethics?* 41 JOURNAL OF LEGAL EDUCATION 3, 10 (1991).

[16] Jennifer Jolly-Ryan, *Disabilities to Exceptional Abilities: Law Students with Disabilities, Non-traditional Learners, and the Law Teacher as a Learner*, 6 NEV. LAW J. 116 (2005).

[17] Myron Moskovitz, *Beyond the Case Method: It's Time to Teach with Problems*, 42 JOURNAL OF LEGAL EDUCATION 241, 242 (1992).

[18] *See,* Baxi, *supra* n. 12, pp. 15–17; and Lovely Dasgupta, *Reforming Indian Legal Education: Linking Research and Teaching*, 59 JOURNAL OF LEGAL EDUCATION 432, 440–41 (2010).
See also, A.K. Koul, *Legal Education in India in 21st Century: Problems & Prospects*, in A.K. Koul (ed.) LEGAL EDUCATION IN INDIA IN 21ST CENTURY 1, 4 (Faculty of Law,

ineffectively used by many Law Professors who simply use it to teach the rules of law rather than, by careful observation, reading, and discussion, how to think and argue like good lawyers, write good judgments, and dissect arguments and judgments.[19]There has also been an exhortation to move from the sole use of the case method to the incorporation of the problem-based learning as well, which requires framing and administering hypothetical problems for both classroom exercises and take-home assignments, in context of litigation, negotiations, planning, and drafting, with the follow up class discussion.[20] Problem method is not supposed to substitute the case method, but is expected to supplement it — as after learning the rule and analysing relevant case law, an adequately complex-pragmatic hypothetical problem can help the students to evaluate and apply their knowledge and skills to a new fact situation, thereby making them learn in a better way.[21]A law teacher should not seek deference by arousing fear in her students, and must guard against creating a classroom which is 'hierarchical with a vengeance', as portrayed by Professor Duncan Kennedy.[22] Professor Kennedy's contribution in pointing out the shortcomings in the Legal Education and the Law Schools starts with his polemic as a student of the Yale Law School that importantly narrates students' viewpoints about their law professors, viewing them as smug, and hostile towards the students.[23] He presents a valuable student perspective and goes on to criticise the classroom behaviour of a usual group of students who berate one of their own when she is at the receiving end in a classroom interrogation by a teacher, who usually addresses just the 'intellectual' side of students—and then, after classifying law students into various categories, the author proposes an academic model for the law school for creating 'intellectual tension' which comes from confrontation of ideas.[24] It is very important for a law teacher to guard against the abuse and corrupt misuse of her role-based

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University of Delhi, 1999).

[19] *Supra* n. 17, pp. 244-45.

[20] *Id.*, pp. 249–50.

[21] *Id.*, pp. 253–58.

[22] Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy*, 32 JOURNAL OF LEGAL EDUCATION 591, 593 (1982).

[23] Duncan Kennedy, *How the Law School Fails: A Polemic*, 1 YALE REV. LAW SOC. ACTION 71, 72–74 (1971).

[24] *Id.*, pp. 75–85.

power and hierarchical authority, consciously or otherwise, either for the fulfilment of personal needs or protecting private vulnerabilities in the classroom.[25]The Code of Professional Ethics, which is part of the University Grants Commission (UGC) Regulations of 2018 which codifies *inter alia* 'measures for the maintenance of standards in higher education' now prescribes numerous responsibilities for a teacher vis-à-vis the society, profession, institution, students and their guardians, colleagues both, teaching and non-teaching.[26] Since the students are the end consumers of knowledge generated in the legal education, the codified duties imposed upon a teacher in her relations and conducts with students are of utmost importance. They include the teacher's responsibility to 'respect the right and dignity of the student in expressing his/her opinion'; 'to recognise the difference in aptitude and capabilities among students and strive to meet their individual needs'; and, to 'deal justly and impartially with students regardless of their religion, caste, political, economic, social and physical characteristics'. Even in absence of the said Code, every conscientious teacher is expected to be ethically exemplary in her conduct and follow these dictates. One of the concerns in modern law schools presently is also about humanizing legal education, by moving away from a commonly followed 'inauthentic' repetitive and ritualistic approach in classroom teaching, like the one portrayed by the John Jay Osburn's character of Professor Charles Kingsfield, a 'coldly demanding but brilliant law professor' in his famous novel 'The Paper Chase', to a more genuine and 'authentic' approach towards the students—by maintaining one's individuality and separate identity as a teacher, and remaining true to one's values.[27] Kingsfield's approach has been subtly distinguished from the actual Socratic method, and the former's approach has been criticised for being similar to the eristic argumentation of Sophists, in

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[25] Toni Pickard, *Experience as Teacher: Discovering the Politics of Law Teaching*, 33 UNIV. TOR. LAW J. 279, 281–83 (1983).

[26] *See,* UGC Regulations on Minimum Qualifications for Appointment of Teachers and Other Academic Staff in Universities and Colleges and Measures for the Maintenance of Standards in Higher Education, 2018 (University Grants Commission, Notification No. F.1-2/2017(EC/PS), Jul. 18, 2018, India) *available at* https://www.ugc.ac.in/pdfnews/4033931_UGC-Regulation_min_Qualification_Jul2018.pdf (last visited Oct. 19, 2020).

[27] Melissa J. Marlow, *Does Kingsfield Live? Teaching with Authenticity in Today's Law Schools*, 65 JOURNAL OF LEGAL EDUCATION 229, 230–32, 241 (2015).

which questioning and inquiry from the teacher ends once the student has been reduced to an ignorant status, and the sting of ignorance is felt by her—whereas, in contrast, in the Socratic method the Socratic inquiry begins at this very juncture, when the teacher shares the student's bewilderment and then joins the student 'in a mutual search for a satisfying truth'.[28] This proper understanding of the celebrated Socratic method is necessary for all teachers. A law teacher, in her initial career, must also learn to engage her class with theory and practical instantiations, without ego, but with solemnness, creating a good impression on the class, gradually building her reputation as a good teacher; which is then passed across generation of students through the oral tradition in the academy.[29] Good law teachers also constantly innovate their teaching methods to motivate their students, and engage them with the help of their diverse life experiences; just as one teacher brought his experience of teaching pre-schoolers by gaming and role-playing to his law school class with success in achieving educational objectives, and thereby helped the students to appreciate the lawyering process, inclusively learn group work, and improve their professional skills and values.[30] The generalist study of law must concomitantly treat both the conceptual as well as practical aspects of law; and the law faculty must accept 'the premise that legal education is a unity of analytical and applied skills', and attempt to integrate theoretical skills into an operational context.[31] It has also been argued, that the central goal of legal education is to impart legal education in public interest, making the law students professionally responsible; and not merely train them to be technically proficient or, enable them to merely 'think like lawyers', by cultivating just their analytical rigor, logical reasoning, and ability to persuasively argue.[32]Online teaching, to which virtually

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[28] J.T. Dillon, *Paper Chase and the Socratic Method of Teaching Law*, 30 JOURNAL OF LEGAL EDUCATION 529, 532–33 (1980).

[29] Susan J. Becker, *Advice for the New Law Professor: A View from the Trenches*, 42 JOURNAL OF LEGAL EDUCATION 432, 432–35 (1992).

[30] Jennifer L. Rosato, *All I Ever Needed to Know About Teaching Law School I Learned Teaching Kindergarten: Introducing Gaming Techniques into the Law School Classroom*, 45 JOURNAL OF LEGAL EDUCATION 568, 568–73, 581 (1995).

[31] Eric Mills Holmes, *Education for Competent Lawyering--Case Method in a Functional Context*, 76 COLUMBIA LAW REV. 535, 565–77 (1976).

[32] Stephen Wizner, *Is Learning to 'Think like a Lawyer' Enough?* 17 YALE LAW POLICY REV. 583, 587–91 (1998).

all the Indian law teachers got exposed to, for imparting instruction during the long lockdown period in the 2020 session due to the COVID-19 pandemic, poses its own concerns and challenges; though the Government of India and the UGC were promoting higher education through MOOCs even previously, particularly through its 'Swayam' platform through which even an online refresher course for law teachers was being offered. [33] It is during the COVID-19 crisis that the familiarisation and use of the online tools and platforms—despite the accessibility, costs, safety, and privacy issues and concerns—became prevalent in the law teachers' community in India, for conducting their online classes and webinars.[34] Despite these concerns and challenges, online teaching and learning is a new teaching medium which the Indian Law Schools may have to soon migrate to as an adjunct to the regular campus classes, and the experience of all those involved in making and managing MOOCs in law would be useful in this regard. Such online courses in law are now routinely offered by various European and American law schools on platforms like *Coursera* and *edX*, apart from the law schools elsewhere, which can also offer valuable guidance to the policy-makers and administrators in India to chalk out their own courses, apart from planning and allocating resources for the development of the necessary infrastructure and training of human resource.[35]One of the challenges for the law teachers of the 21st century

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[33] *See,* Swayam Central, *available at* https://swayam.gov.in/ (last visited Oct. 10, 2020).

[34] *See also,* C.P. Gopinathan & K. Ramachandran, *Comment | Higher Education post-COVID-19*, The Hindu (14thApril, 2020) *available at* https://www.thehindu.com/education/comment-higher-education-post-covid-19/article31341564.ece (last visited Oct. 19, 2020);
Press Trust of India, *COVID-19: Internet Speed, Connectivity Emerging as Challenges in Holding Online Classes, says DU professors*, Hindustan Times, (31stMarch, 2020), *available at* https://www.hindustantimes.com/education/covid-19-internet-speed-connectivity-emerging-as-challenges-in-holding-online-classes-says-du-professors/story-E0pek2Bg9eGEMww9OJBioM.html (last visited Oct. 19, 2020);
and Lee Mathews, *500,000 Hacked Zoom Accounts Given Away For Free On The Dark Web*, Forbes, *available at* https://www.forbes.com/sites/leemathews/2020/04/13/500000-hacked-zoom-accounts-given-away-for-free-on-the-dark-web/ (last visited Oct. 19, 2020).

[35] *For example see,* Bashar Malkawi, *Law in Jordan Gets Wired: Developing and Teaching Law Courses Online*, 21 ARAB LAW Q. 364–378 (2007); Law Courses, Coursera, *available at* https://www.coursera.org/search?query=law& (last visited Oct. 19,

will also be to impart global law education in this era of globalisation—having components of transnational, international, comparative, and foreign laws—to make their 'students to think like *global* lawyers'.[36] Since the teachers educated and trained in domestic law may not be adequately equipped to teach foreign law, extensive assistance of foreign research assistants, and guest lectures may be required at least initially; and induction of faculty members with foreign law expertise may also help later on for running full-fledged courses in these areas — for which the law schools need to have proper orientation, policies, and programs.[37] Thus, a modern law teacher is required to abandon the notion of law as an exclusively *territorial* phenomenon, and explain in this globalisation era the significance of the supra-territorial legal rules in her area of law; thus contemplating upon the significance of state, non-state, supranational, and multilateral law creating entities in this era of global legal pluralism.[38] Though the public law schools in India follow the State recruitment policy of affirmative action, which maintains inclusiveness and diversity within the faculty, which is laudatory, only a few private Indian law schools like, the Jindal Global Law School seem to be consciously recruiting foreign educated faculty members at present, which may give them an advantage in administration of foreign law courses.[39] Legal education is also expected to impart and hone several diverse lawyerly skills and competencies including, the cognitive skills, legal information and knowledge, legal dialectic, legal operational skills, fact management skills, oral and written competencies, practice management competency, professional responsibility, and problem solving competency.[40] The needs and expectations of the law students from their law school also tend to change overtime as they advance from one year to another; and so, the

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2020); Courses, Ed X, *available at* https://www.edx.org/course/ ?subject=Law (last visited Oct. 19, 2020).

[36] Catherine Valcke, *Global Law Teaching*, 54 JOURNAL OF LEGAL EDUCATION 160, 161, 169 (2004).

[37] *Id.*, pp. 176–77.

[38] Peter Thomas Muchlinski, *Globalisation and Legal Research*, 37 INT. LAWYER 221, 236–40 (2003).

[39] *See,* Jindal Global Law School: *Faculty & Research*, *available at* http://www.jgls.edu.in/faculty-research/ (last visited Oct. 20, 2020).

[40] John O. Mudd, *Beyond Rationalism: Performance-Referenced Legal Education*, 36 JOURNAL OF LEGAL EDUCATION 189, 198–99 (1986).

administration and teachers must factor it in their policy, and teaching-learning methods. A dated survey in the United States showed, that the first-year law students' satisfaction increased by factors like, 'more feedback on academic progress'; 'opportunities for more student participation on law review'; 'clearer communication from teachers on what is expected'; 'more classes taught by Socratic method rather than lecture style'; 'more moot court'; and 'more opportunities to meet with faculty outside the class' whereas, the advanced students' satisfaction was likely to be increased by factors like: 'more classes taught by lecture rather than Socratic style' (which as seen above is the exact opposite of what the first-year students wanted);'more faculty with substantial practical experience' (so, isn't it time for the BCI, Government of India, and the Universities to rethink on their embargo of not allowing the full time law teachers to practice?);[41] and 'more student input in faculty personnel decisions' (which is quite a radical expectation, though in some law schools in India the hiring decision involves demo teaching to a class of students, and so, involves the student participation in hiring decisions).[42] Some other problems in the content and delivery of instruction which an individual teacher must guard against in her classroom teaching are: monotone speech and behaviour, speaking too slow or too fast, unnecessary repetition, lack of questioning during the lesson, presenting the material at too abstract a level, problems in lessons organisation, and lack of pedagogical knowledge.[43] Effective teamwork is a key factor in legal practice today, and thus, these skills also need to be taught to the law students, apart from the traditional

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[41] *See, Anees Ahmed* v. *University of Delhi* AIR 2002 Del. 440 (prohibiting the full time law teachers of Delhi University, in light of provisions applicable, from seeking registration with the state bar council, and then subsequently practicing as Advocates generally); and Press Trust of India, *Law teachers seek permission to practise in courts*, Business Standard India (21st Feb, 2019) *available at* https://www.business-standard.com/article/pti-stories/law-teachers-seek-permission-to-practise-in-courts-119022100700_1.html (last visited Oct. 20, 2020).

[42] Ronald M Pipkin, *Legal Education: The Consumers' Perspective*, 1 AM. BAR FOUND. RES. J. 1161, 1186 (1976).

[43] Nira Hativa, *Becoming a Better Teacher: A Case of Changing the Pedagogical Knowledge and Beliefs of Law Professors*, 28 INSTR. SCI. 491, 507–12 (2000). *See also.* S.K. Singh, *Legal Education in India: Some Suggestions*, in A.K. Koul (ed.) LEGAL EDUCATION IN INDIA IN 21ST CENTURY 58, 63–64 (Faculty of Law, University of Delhi, 1999).

'emphasis on individual work and achievement' in the law school education.[44] Though full time tenured teachers play an important role in maintaining the quality of legal education, there are some benefits of appointing part-time teachers who are practicing advocates, and specialists in their fields, in the law school; as they are expected to illustrate to the class the intertwining and overlapping of the laws, in the manner it is involved in the real problems faced by the clients.[45] Similarly, as argued above, there could be greater benefits to students by allowing full time law teachers in India to practice law, with some necessary restrictions, to enrich the quality of discourse, and bring a more realist outlook with pragmatic perspectives to their classroom.

Curriculum Development

A law teacher also needs to periodically revisit her curricula and do the necessary revisions to incorporate the latest developments, update the learning outcomes, and prescribed readings, both primary and secondary, for the benefit of her students. As previously discussed, the entire law, whether statutory or not, is itself dynamic and ever-changing, and its domain is ever-expanding with the rapidly evolving legal developments getting added to the body of law contemporaneously along-with the new fields, thereby making them increasingly enmeshing and overlapping. The Bar Council of India broadly prescribes the compulsory LL.B. courses curriculum including, the subjects for clinical legal education, and revises it from time to time.[46] Further, depending on the autonomy of the individual teachers in a law school, and whether it is a traditional college or a National Law School, the role and scope for updation of the curriculum of the courses taught by a teacher(s), apart from the pace of change, usually varies. In the NLUs, where each course is usually taught by a single teacher, routine peer review and curricula presentations before the external experts also aids in ensuring effective outcomes of this routine academic exercise.While learning from the leading law schools in the other jurisdictions is also very helpful, one must be also mindful of the

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[44] Janet Weinstein et al., *Teaching Teamwork to Law Students*, 63 JOURNAL OF LEGAL EDUCATION 36, 40–41 (2013).

[45] Hugh W Silverman, *The Practitioner As A Law Teacher*, 23 JOURNAL OF LEGAL EDUCATION 424, 428–30 (1971).

[46] Singh, *supra* n. 14; *see also*, *supra* n. 4.

substantial differences in the legal education imparted in different countries.[47] Despite the proliferation of Comparative Law Courses in the curricula of various law schools in India, it is doubtful how many of these courses go beyond the bare positivist comparisons, and truly expose students to the nuances and technicalities of the comparative law methods and literature.[48] In developing their course outlines, individual teachers can also take initiative in seeking help and guidance from their more experienced colleagues, both within their law schools as well as those who teach in the other institutions in India and abroad. Lastly, despite the mandatorily prescribed in-house use of certain reading materials prepared or compiled by their own faculty members in some Indian law schools, for example, like the Delhi University Law Faculty's 'course materials' (or, 'case materials', as they are also called), apart from the standard primary and secondary materials used across the law schools in India, there is—unlike, as in the US—an utter lack of decent casebooks designed for the law students in India; this space in certain institutions is then filled with guidebooks of dubious quality.[49] Certainly, motivated law teachers in India should contemplate authoring casebooks and hornbooks for the Indian law students as well, as the demand for good quality reading material perennially exists for the Indian law students. But, perhaps the law professors in India are not motivated enough, lack necessary time, or are not incentivised adequately to create such educational resources.

Student Assessment

A law teacher must formally or informally continuously test her students through various individual and team exercises to assess the achievement of the desired learning outcomes.[50] The continuous

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[47] *For example, see,* John Henry Merryman, *Legal Education There and Here: A Comparison*, 27 STANFORD LAW REV. 859 (1975).

[48] *See,* P. Ishwara Bhat, *Comparative Method of Legal Research: Nature, Process, and Potentiality*, 57 JOURNAL OF INDIAN LAW INSTITUTE147, 171–73 (2015); Mauro Bussani & Ugo Mattei (eds.) THE CAMBRIDGE COMPANION TO COMPARATIVE LAW, (Cambridge, 2012); Mathias Reimann & Reinhard Zimmermann (eds.) THE OXFORD HANDBOOK OF COMPARATIVE LAW, (Oxford, 1 edn., 2008); and A. E. Orucu & David Nelken (eds.) COMPARATIVE LAW: A HANDBOOK, (Hart, 2007).

[49] *See,* Baxi, *supra* n. 12, pp. 23–24.

[50] *See,* Sophie M. Sparrow & Margaret Sova Mccabe, *Team-Based Learning in Law* (2012), *available at* https://papers.ssrn.com/abstract=1986230 (last visited Oct. 20,

assessment exercises—which can be varied according to the unique peculiarities of each law subject and topic—must be carefully designed and administered in form of assignments, tutorials, moot courts, group discussions, and class tests. It goes without saying that the assessment must be objectively done with complete dedication; and a proper feedback is also desirable.Professor Binford draws attention to various studies on continuous assessment which emphasize on the merits of administering distributed, early, and low risk practice tests throughout the session to the students to enable them to improve their retention, learning, and grades.[51] Sending the students to the lectern to do peer tutoring by involving them in teaching assistantships may also be a good idea to improve long-term retention.[52]Paper setting for the end term examination, though somewhat circumscribed by the institutional rules and conventions, can be made a quite creative and intellectually challenging exercise. Exhibition of analytical learning should be preferred to rote learning in the questions put forth in the question papers, and thus problem-based questions should be included in the question papers. But are these application-based questions in the Indian LL.B. examination generally of sufficient complexity to pose real challenges to the examinees, to equip them adequately for the upcoming professional challenges? This is a difficult question and is perhaps sceptically answered at present. In the present COVID-19 crisis, adoption of online open book semester examination by some Indian universities for the final year students, as a one-time extraordinary measure, though a creative fire-fighting technological solution, presented its own unique concerns and challenges for the masses of students, teachers, and the administration alike—though, in spite of these unprecedented challenges, it could be quite successfully implemented by the Delhi University overall, in due course.[53]

2020).

[51] Warren Binford, *How to Be the World's Best Law Professor*, 64 JOURNAL OF LEGAL EDUCATION 542, 544–48 (2015).

[52] *Id.*, pp. 552–53; Leon E Trakman, *Law Student Teachers: An Untapped Resource*, 30 JOURNAL OF LEGAL EDUCATION 331 (1979).

[53] For example, *see* India Today Web Desk, *DU Open Book Exam 2020: Admit card for PG Students to be Out Today*, India Today(2020), *available at* https://www.indiatoday.in/education-today/news/story/du-open-book-exam-2020-admit-card-for-pg-students-to-be-out-today-1688516-2020-06-13 (last

Law Teacher as a Legal Researcher

Legal Research

Legal Research and Law Teaching are complementary to each other, as quality research enriches the content and presentation of classroom discourse also. Theoretical dimensions of Research Methodology, which are formally taught in the LL.M. and Ph.D. programs in India, are to be painstakingly learnt. [54] Writing research papers for law reviews, pursuing advance degrees in law, guiding dissertations, and writing the conference and seminar papers all hone a law teacher's legal research skills and knowledge; though, a thorough preparation for daily classes also entails legal research to an extent. Professor S.N. Jain describes legal research as 'systematic fact-finding' and 'advancement of the science of law'.[55] The fact-finding involves laborious and careful study of statutory provisions and case law, and the advancement of the science of law requires enquiries aimed at appreciating the underlying reasons or principles of the law, with the subsequent suggestions for improvements.[56]According to Professor P.M. Bakshi, there are different categories of legal research for carrying out law reforms viz., *analytical*,

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visited Oct. 19, 2020); Nandini, *Aligarh Muslim University to Conduct Online Open Book Exams for Final Semester*, Hindustan Times (9th June, 2020)*available at* https://www.hindustantimes.com/education/aligarh-muslim-university-to-conduct-online-open-book-exams-for-final-semester/story-Gw8HxcLxufVKXzE0LEZlhK.html (last visited Oct. 19, 2020); and Bishal Kalita (ed.) *DU Open Book Exam 2020: University Statement Says Students Attempting Exams Successfully*(14th August, 2020) *available at* https://www.ndtv.com/education/du-open-book-exam-2020-university-statement-says-students-attempting-exams-successfully (last visited Oct. 20, 2020).

[54] For example, *see*, S.K. Verma & Afzal Wani (eds.) LEGAL RESEARCH AND METHODOLOGY, (ILI, 2nd ed., 2001) (containing standard material used for teaching legal research methodology to the LL.M. students in India); Manoj Kumar Sinha & Deepa Kharb (eds.) LEGAL RESEARCH METHODOLOGY, (LexisNexis: ILI, 2016) (supplementing the previous ILI publication, edited by Profs. Verma and Wani, with the newer material); and Mark Van Hoecke (ed.) METHODOLOGIES OF LEGAL RESEARCH: WHICH KIND OF METHOD FOR WHAT KIND OF DISCIPLINE? (Hart, 2013).

[55] S.N. Jain, *Legal Research and Methodology*, 14 JOURNAL OF INDIAN LAW INSTITUTE 487, 490 (1972).

[56] *Id*.

historical, comparative, statistical, and *critical*.[57] Comparative Legal Research (CLR) is greatly beneficial to learn and do in academics, and in the Indian context is reflected in various Law Commission of India Reports and Judgments of the Higher Courts, apart from some legal treatises, and law review articles.[58] Learning multidisciplinary, and interdisciplinary legal research, of which 'Law and Economics' assumes a great importance, is also valuable for a law teacher, and should form part of one's learning.[59] Decades ago, Professor Ronald Dworkin proposed for having a *state-of-art learning, collaboration* between lawyers and social scientists, and also emphasised on the need of *ambidexterity* for lawyers, which translated into recruitment of lawyers with PhDs in other fields into the US law schools' faculty.[60]He also proposed selective graduate seminars in selective areas led by a team of lawyer, a philosopher, and a social or natural scientist, which 'should attempt to work out and criticise the moral, economic, social and psychological principles or hypotheses on which some complex legal doctrine or set of doctrines might be justified'.[61] Such a collaborative research model is worth consideration by the law schools in India too.Both doctrinal and empirical methods must be learnt and properly applied by a legal researcher. The lack of popularity of empirical legal research among the Indian legal scholars and teachers, who often appear to be reluctant to indulge in it, may be a major reason for the proliferation of doctrinal legal research even at the postgraduate, doctoral, and post-doc levels in India. The underlying reason for this in many cases may be due to an apparent neglect of the empirical legal research in the formal pedagogy including, learning of the necessary tools, methods, techniques, and software used in quantitative and qualitative legal research. Much of the success in empirical legal research by an Indian law teacher and

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[57] P M Bakshi, *Legal Research and Law Reform*, 24 JOURNAL OF INDIAN LAW INSTITUTE 391, 393 (1982).

[58] Bhat, *supra* n. 48, pp. 155–56; s*ee also,* Max Rheinstein, *Teaching Comparative Law*, 5 UNIV. CHIC. LAW REV. 615 (1938).

[59] For example, *see*, Richard A. Posner, FRONTIERS OF LEGAL THEORY (Harvard, 2004); and Richard A. Posner, ECONOMIC ANALYSIS OF LAW (Wolters Kluwer, 9th ed., 2014).

[60] Ronald Dworkin, *Legal Research*, 102 DAEDALUS 53, 60–62 (1973).

[61] *Id.*, pp. 62–63. *See also,* Mathias M. Siems & Daithí Mac Síthigh, *Mapping Legal Research*, 71 CAMB. LAW J. 651 (2012).

researcher is then left to the laborious self-learning.[62]Professor Upendra Baxi in early 1980s noticed the plight of legal education and law colleges in India, which 'led to an overall decline of the status of law teaching and law teachers within the university community and the wider society'.[63] To remedy the state of 'retarded legal research' in India despite vast vistas for socio-legal research, he contended the necessity of the following conditions, which remain valid even today, if Indian Law Schools have to foster an environment of quality legal research rather than just focus on teaching: first, is the *'Time' Factor* and other incentives to pursue socio-legal research (the UGC mandates a classroom teaching workload of sixteen hours per week for an Assistant Professor, which decreases to fourteen hours for an Associate Professor and a full Professor); second, is what he calls *The Problem of Intellectual Equipment*, primarily due to the lack of sufficient grounding in jurisprudence; third, is problem of *The Role Perception* under which the law teachers in India rank themselves lowest in the 'hierarchy of esteem comprising of judges, retired judges, law ministers and secretaries, senior lawyers and practitioners', which appears to be quite realistic even today; fourth, is the deficiency in the *Research Facilities;* fifth, is the *Lack of Infra-structure* for *Scholarly* Research; and sixth, is the ignorance of law teachers about social science materials relevant to law which require exploration of the *Prospects for Interdisciplinary Collaboration*.[64] Learning the efficacious use of the Law Library is also essential to be a good law teacher and researcher.[65] Though the maintenance and upkeep of a Law Library is primarily the task of the Librarian and her staff, the meticulous and time-consuming task of building a rich Law Library, which also serves as one of the primary indicators of a great Law School, is an onerous responsibility that is basically upon the Law Faculty; so that a rich repository of knowledge

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[62] *See,* Rajkumari Agrawala, *Experiments of a Law Teacher in Empirical Research*, 24 JOURNAL OF INDIAN LAW INSTITUTE 863 (1982). *See also,* Lee Epstein & Andrew D. Martin, AN INTRODUCTION TO EMPIRICAL LEGAL RESEARCH (Oxford, 2014); and Peter Cane & Herbert Kritzer (eds.) THE OXFORD HANDBOOK OF EMPIRICAL LEGAL RESEARCH (Oxford, 2010).

[63] Upendra Baxi, *Socio-Legal Research in India—A Programschrift*, 24 JOURNAL OF INDIAN LAW INSTITUTE 416, 416 (1982).

[64] *Id.*, pp. 417–21.

[65] *See,* H. C. Jain, *Using a Law Library*, 24 JOURNAL OF INDIAN LAW INSTITUTE 575 (1982).

is built for the generations of students, researchers, and teachers. The evolving information technology is also impacting legal research in a big way, with proliferation of more portable tablets rather than laptops; use of cloud computing like, Google Drive for data storage; and Legal eBooks and case law citators in form of Apps for reading and reference.[66] Use of E-libraries and Legal Databases has also become an essential and integral part of contemporary quality legal teaching and research in India.[67]

Legal Writing and Publishing

Teaching Law is an extremely challenging endeavour. Younger colleagues, despite their heavy workloads, must take out time to produce good publishable legal writings.[68] But, legal writing is a punctiliously learnt art, which gradually improves over the time. Legal Research usually culminates in form of a law review article, a conference paper, a monograph, or a treatise. But it takes time to remove the writer's block, and learn the essential skills and attributes of a good legal writing.[69] Even completing one's Ph.D. thesis, in spite of the research supervisor's guidance, as per the initial plan and time schedules presents a huge challenge for many young law teachers in India, who primarily pursue this research degree for career advancement. So, it is not uncommon for a thesis to remain unfinished for years due to the other on-going commitments, professional and personal, particularly so, when the research scholar also continues to teach full time in that very institution in which he researches, as the present norms permit. Still, often the reasons for delay—which need a deeper introspection—are: the never-ending quest for perfection,

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[66] Dan Giancaterino, *Legal Research Revolutionised*, 31 GPSolo 28 (2014).

[67] *See also,* Ranbir Singh et al. (eds.) DIGITAL LIBRARY—LEGAL EDUCATION AND RESEARCH, (NLU Press, 2010) *available at* https://nludelhi.ac.in/download/publication/2015/Digital%20Library-Legal%20Educaiton%20and%20Research.pdf (last visited Oct. 19, 2020).

[68] *See,* Frank T. Read & M.C. Mirow, *So Now You're a Law Professor: A Letter From The Dean*, CARDOZO LAW REV. DENOVO 55 (2009).

[69] For example, *see,* Eugene Volokh, ACADEMIC LEGAL WRITING: LAW REVIEW ARTICLES, STUDENT NOTES, SEMINAR PAPERS AND GETTING ON LAW REVIEW (Foundation Press, 3rd edn., 2007); and Elizabeth Fajans & Mary R. Falk, SCHOLARLY WRITING FOR LAW STUDENTS: SEMINAR PAPERS, LAW REVIEW NOTES AND LAW REVIEW COMPETITION PAPERS (Foundation Press, 5th edn., 2017).

procrastination, imperfect time management, or simply a writing block.[70] 'Publish or Perish' (POP) is a prevalent aphorism for the legal academics worldwide, which has its own perceived benefits despite some unintended adverse effects.[71] Unfortunately, some law teachers gradually become disillusioned with the very idea of writing the law review articles,[72] though this is neither beneficial for the individual concerned nor for the academe at large, which will anticipatively remain bereft of intellectual contributions in form of academic legal writings. A law teacher, however, needs to be careful in publishing her research work in only reputed law reviews, and with the renowned publishers. An author-law teacher must be careful not to publish in the dubious and predatory journals just for the sake of claiming the Academic Performance Indicators (APIs), as prescribed in India for career progression and promotion. The filter in form of the 'Reference List of Quality Journals' maintained by the UGC's Consortium for Academic and Research Ethics (UGC-CARE List)[73] now lends some assurance in respect of the quality of the published work. In spite of somewhat mandatory emphasis given by the UGC at present for the academics in India to publish in its UGC-CARE list indexed journals, for their career related considerations, its limited coverage of the peer-reviewed and refereed law journals is quite apparent.[74] So, keeping in

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[70] *See,* Michael Salter & Julie Mason, WRITING LAW DISSERTATIONS: AN INTRODUCTION AND GUIDE TO THE CONDUCT OF LEGAL RESEARCH (Longman, 2007); and Umberto Eco et al., HOW TO WRITE A THESIS (MIT Press, Translation ed., 2015). *See also* Robert Boice, PROFESSORS AS WRITERS (New Forums Press, 1990).

[71] *See,* Imad A. Moosa, PUBLISH OR PERISH: ORIGIN AND PERCEIVED BENEFITS: PERCEIVED BENEFITS VERSUS UNINTENDED CONSEQUENCES 1–17 (Edward Elgar, 2018).

[72] *See,* Fred Rodell, *Goodbye to Law Reviews,* 23 VA. LAW REV. 38 (1936) *available at* https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=3794&context=fss_papers (last visited Oct. 20, 2020).

[73] *See,* UGC-CARE Website, *available at* https://ugccare.unipune.ac.in/apps1/home/index (last visited Oct. 20, 2020).

[74] *See,* Kritika Sharma, *UGC says Publishing Paper in De-Recognised Journals will Affect Promotion & Appointment*, The Print (18th Sept, 2019) *available at* https://theprint.in/india/education/ugc-says-publishing-paper-in-de-recognised-journals-will-affect-promotion-appointment/293108/ (last visited Oct 20, 2020).

See also, Secretary, UGC, *Public Notice on Academic Integrity* (June 14, 2019)

mind the appointment and promotion policies followed by their respective law schools and Universities, the law teachers apart from the UGC-CARE List, may also explore other credible repositories like, 'Scopus' and 'W&L Law Journal Rankings', to judge the quality of the law reviews, national and international, while seeking worthy avenues for publication of their legal research.[75]As a law teacher, one may also be involved in the editorial committees of the law journal(s) including, of one's own institution. Editing entails teamwork, which requires the active support and assistance of various other colleagues; and valuable learning outcomes also ensues through this work that improves one's own shortcomings as a researcher and writer. Similar benefits also accrue by doing peer-review of articles submitted to reputed law reviews. Though faculty-edited refereed and peer-reviewed law journals will continue to have their own importance, this paper does not undermine the role and importance of another efficacious law review model actively pursued by the law schools nowadays in India viz., of the student-edited journals, where a law teacher merely plays a supervisory role. A Law School must create a space for both student-edited and faculty-edited journals. Active student participation is both crucial and indispensable in the editing activities of quality student-run law reviews, and one generation of students trains the next to undertake these responsibilities effectively.

Plagiarism presents another serious concern in the academics and needs to be addressed. Though it is expected that law teachers in India have adequate academic integrity so as to not indulge in plagiarism, even unintentional plagiarism is an equally serious academic offence, apart from amounting to copyright violation in many cases —and, allegations of plagiarism have been raised against senior Indian academics in the

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available at https://www.ugc.ac.in/pdfnews/6315352_UGC-Public-Notice-CARE.pdf (last visited Oct. 20, 2020). The search of journals in the 'Law' subject in the UGC-CARE List, after logging into the user account, merely yields a measly list of 60 Journals at present, *available at* https://ugccare.unipune.ac.in /Apps1/Home/Index (last visited Oct. 20, 2020).

[75] *See, What is Scopus Preview? available at* https://service.elsevier.com/ app/ answers/detail/a_id/15534/supporthub/scopus/#tips(last visited Oct. 20, 2020); W&L Law Journal Rankings, *available at* https://managementtools4.wlu.edu /LawJournals/ (last visited Oct. 20, 2020).

recent past.[76] Not only a law teacher must be alert about an element of plagiarism seeping in her own writing, she must scrutinise the work of the students and research scholars supervised by her in this regard. Though it has caught serious attention of the Indian academia only in the last few years, this issue has always been of considerable importance and treated seriously in the US.[77] Now, of course, software like *Turnitin* are being used by the research supervisors to check plagiarism in accordance with the UGC Regulations of 2018 on 'promotion of academic integrity and prevention of plagiarism in higher educational institutions', before approving the work for institutional submission; though these norms appear to confound originality with plagiarism.[78]Citation counts have also become an important parameter to judge the contribution made by a law review article to its field, and ultimately reflects the quality of a law review. Research however shows, that a meritorious article even in a middle-tier or low-tier law review will be cited, though a poor one even in a high-tier law review will be ignored.[79]As discussed above, huge UGC mandated teaching load, and involvement in other academic and administrative responsibilities including, evaluation of large classes can also hamper the quality and quantity of the research output.[80] Despite these challenges, by being

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[76] *See, Plagiarism in research papers will be punished: AICTE Chairman reminds us about recent UGC rules*, India Today, 2018, https://www.indiatoday.in/ education-today/news/story/plagiarim-in-research-papers-will-be-punished-ugc-rules-html-1225507-2018-05-03 (last visited Oct. 19, 2020).

[77] For example, *see*, Robin F. Hansen & Alexandra Anderson, *Law Student Plagiarism_ Contemporary Challenges and Responses.pdf*, 64 JOURNAL OF LEGAL EDUCATION. 416 (2015); Manjari Katju, *Plagiarism and Social Sciences*, 46 Economic and Political Weekly 45 (2011); and Debbie Papay-Carder, *Plagiarism in Legal Scholarship Comment*, 15 UNIV. TOLEDO LAW REV. 233–272 (1983).

[78] *See,* University Grants Commission (Promotion of Academic Integrity and Prevention of Plagiarism in Higher Educational Institutions) Regulations, 2018,*available at* https://www.ugc.ac.in/pdfnews/7771545_academic-integrity-Regulation2018.pdf(last visited Oct. 19, 2020); and University Grants Commission, Self-Plagiarism, *available at* https://www.ugc.ac.in/pdfnews /2284767_self-plagiarism001.pdf (last visited Oct. 19, 2020).
See also, Turnitin - *The Plagiarism Spectrum*, http://go.turnitin.com/plagiarism-spectrum (last visited Oct. 20, 2020).

[79] Dennis J. Callahan & Neal Devins, *Law Review Article Placement: Benefit or Beauty Prize?* 56 JOURNAL OF LEGAL EDUCATION 374, 375 (2006).

[80] *See,* Report of the UGC Workshops on Socially Relevant Legal Education,

disciplined, an Indian law teacher can continue with quality and meaningful legal research and writing; and the pursuit of formal academic research assignments like, the Ph.D., commissioned research projects, monographs, and conference papers all can be helpful in keeping oneself focused and motivated in this regard.

Certain Other Responsibilities of Law Teacher

Apart from the above work, a law teacher is also expected to discharge various other responsibilities towards her employer institution, and also towards the society at large, some of which are now discussed here. For imparting holistic education and overall development of the law students, a law teacher needs to get engaged in various other endeavours of the Law School. One of these is to participate in the activities of various research centres and academic societies in her law school. Engagement of law teachers in India with legal practitioners also happens in the Continuing Legal Education Programs, and through the other academic events in the law school like: the guest lectures by advocates, law enforcement officials, the judges, and other domain experts; conducting the Moot Courts; running the Legal Aid Clinics for the needy—in the true spirit of Article 39-A of the Constitution of India, in the Indian context—organising seminars, conferences, and workshops for furthering learning of their peers and the students, all of which make legal education more holistic, and socially meaningful.[81] These endeavours also seek to fill the theory-practice divide. Practical Training and Clinical Legal Education (CLE) are essential parts of legal education today, and thus law teachers need to collaborate with the student learners in teaching these CLE subjects, and conduct related activities, which must also focus on providing social-justice to the underprivileged groups.[82]Working in the Legal Aid Clinics provides

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available at https://www.ugc.ac.in/oldpdf/pub/report/1.pdf; and Dasgupta, *supra* n. 18, p. 443.

[81] *See also,* V.R.C. Krishnaiah & Rayadurgam Narayana, *Legal Education in India in 21st Century: Problems and Prospects*, in A.K. Koul (ed.) LEGAL EDUCATION IN INDIA IN 21ST CENTURY 24, 31–32 (Faculty of Law, University of Delhi, 1999).

[82] *See,* Shuvro Prosun Sarker, *Empowering the Underprivileged: The Social Justice Mission for Clinical Legal Education in India*, in Shuvro Prosun Sarker (ed.) CLINICAL LEGAL EDUCATION IN ASIA: ACCESSING JUSTICE FOR THE UNDERPRIVILEGED 177 (Palgrave Macmillan, 1 ed., 2015). *See also,* Gurjeet Singh & Pooja Dhir, *Clinical Legal Education in India: Some Lessons from the National Law*

practical experience to the law students— who witness law in action— and also gives them a satisfaction of doing socio-legal work by creating rights awareness, and empowering the disadvantaged sections of the society. For example, the Legal Aid Society of the Campus Law Centre (Faculty of Law), University of Delhi runs a Legal Services Clinic in the campus premises, in collaboration with the Delhi State Legal Services Authority, and conducts various awareness drives, programs, and initiatives.[83] The Moot Court Societies mentor students, who are avid mooters, for participation in various prestigious national and international moot court competitions.[84]Debates and Discussions, Moot Courts, Extempore Competitions, Class presentations all improve the oral communication skills of the law students also, which are essential and integral to advocacy.[85]Apart from actively supervising the above activities, the law teachers are also involved in the facilitation of internships and placements of the students; and in formation of the alumni networks, which acts as an institutional support and guidance base for the present and future generations of law students. Student bodies and unions can also potentially play a constructive role in democratically bringing student voices and demands to fore before the

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School, Bangalore, in A.K. Koul (ed.) LEGAL EDUCATION IN INDIA IN 21ST CENTURY 426 (Faculty of Law, University of Delhi, 1999).

[83] *See,* Legal Aid Society (Campus Law Centre [CLC], Faculty of Law, University of Delhi), *available at* http://clc.du.ac.in/committees/legal-aid-society/ (last visited Oct. 19, 2020) (providing extensive information about the CLC's legal aid society with details of the activities undertaken). *See also,* Assistance in Availing E-Coupon for Ration: Legal Aid Clinic, CLC Initiative – Campus Law Centre, (2020) *available at* http://clc.du.ac.in/2020/04/24/assistance-in-availing-e-coupon-for-ration/ (last visited Oct. 20, 2020); and
Karan Tripathi, *Delhi HC Issues Notice in Plea Seeking Issuance of E-Coupons For Ration To The Destitute Families of Delhi's Northeast District* (2020)*available at* https://www.livelaw.in/news-updates/delhi-hc-issues-notice-in-plea-seeking-issuance-of-e-coupons-for-ration-to-the-destitute-families-of-delhis-northeast-district-158003 (last visited Oct. 20, 2020); and Priya S. Gupta et al., *How Clinical Education Builds Bridges with Villages for a Global Law School in India*, 63 JOURNAL OF LEGAL EDUCATION 512 (2014).

[84] For example, *see*, Moot Court Society (Campus Law Centre, Faculty of Law, University of Delhi) *available at* http://clc.du.ac.in/committees/moot-court-society/ (last visited Oct. 20, 2020).

[85] *See also,* Jane Korn, *Teaching Talking: Oral Communication Skills in a Law Course*, 54 JOURNAL OF LEGAL EDUCATION 588 (2004).

law school management for improving their law schools, and the legal education overall—as the law students are the recipients and consumers of legal education. A time investing duty assigned to the law teachers in India, which consumes a lot of time every semester, is the invigilation duty. As the teaching for a semester comes to an end, a college or university teacher finds in her inbox an email from the examination department with the subject 'invigilation duty chart'. Indubitably, the invigilation work is an important and integral part of any examination process that preserves its integrity and sanctity, and consequentially the prestige of the higher educational institutions and the degrees awarded by them. Perhaps, instances of mass copying, partly attributable to the failure of the efficacious invigilation, have consequentially led to loss of prestige of many reputed Indian colleges and universities of yesteryears.[86] Thus, clean and fair examination due to honest and vigilant invigilation is the stepping-stone towards reliable public examination. This section however contemplates on the two important questions viz., who should be the persons who should physically conduct the invigilation work? And, are the regular faculty members indispensable for conducting an effective invigilation? The unquestioned assumption in India is, that the in-house faculty members are *supposed* to conduct the 'invigilation duty' as part of their job. Indeed, being a whole-time teacher means engaged in the service of the employer-university or college on a whole-time basis. The author does not challenge the legitimacy of imposing invigilation duty on the faculty members. Instead, this paper proposes that rather than involving the in-house faculty members in such 'invigilation duty', on a regular basis, for their entire service, some other alternatives can be explored by the administrators and policy makers. This duty, which is a physically tiring one, consumes around twenty to thirty working days of a faculty member each year, which could be otherwise used for research and

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[86] For example, *see*, Ankit Yadav, *Mass Copying in LL.B. Exam, 30 Nabbed by Squad*, The Times of India (January 24, 2016) *available at* https://timesofindia.indiatimes.com/city/bareilly/Mass-copying-in-LLB-exam-30-nabbed-by-squad/articleshow/50709330.cms (last visited Oct. 19, 2020); and
Mass Cheating in LL.B. Exam in Two Agra University Colleges: Teachers Found Helping Students, Exam Cancelled, India Today (2019) *available at* https://www.indiatoday.in/education-today/news/story/mass-cheating-in-llb-exam-in-two-agra-university-colleges-teachers-found-helping-students-exam-cancelled-1556606-2019-06-26 (last visited Oct. 20, 2020).

writing, if this work is properly outsourced to external invigilators as done by various Universities in the United Kingdom.[87] This will in total save around *two years* of valuable time from the entire career of about thirty-five years of an average Indian law teacher—a knowledge worker, whose time should be efficaciously used—which can then be *alternatively* used to advance purposeful research and writing, the dearth of which is lamented by all.

There appears to be an underlying presumption in India that *own* teacher-invigilators have more sincerity and diligence than *outside* invigilators. But, even if such a perception really prevails among the administrators and policymakers, is there a sufficient basis for retaining the current in-house institutional invigilation policy, to the extent that it adequately deters the policy makers and administrators from taking the risk of even attempting to change it? The institutions may indulge in a cost-benefit analysis to assess whether the benefits outweigh the risks and costs of bringing a change in this regard. To mitigate any perceived risks, they can make and publicise elaborate norms for the external invigilators, as done by the institutions in the U.K. who adopt this policy, as submitted above; and may contractually bind the external invigilators by making them sign agreements; apart from having supervision over these external invigilators by a few senior internal faculty members, who are appointed by rotation as the examination superintendents and deputy superintendents. Also, if the institutions are sceptical about the purposeful and responsible utilisation of this examination period, which spans nearly a month every semester, by the faculty members—as outsourcing will necessarily create further financial burden on the already cash-strapped Public Universities in India—they can keep a check on the academic progress made by their teachers and seek periodic research progress reports from them. To compensate for the costs of outsourcing, the educational institutions, as

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[87] For example, *see*, *Information for Invigilators* (University of York, U.K.) *available at*https://www.york.ac.uk/about/departments/support-and-admin/student-services/exams/invigilators/ (last visited Oct. 20, 2020); *Invigilation* (University of Reading, U.K.) *available at* http://www.reading.ac.uk/exams/staff/exa-invigilation.aspx (last visited Oct. 20, 2020); and *Invigilation* (Northumbria University, U.K.) *available at* https://www.northumbria.ac.uk/about-us/university-services/academic-registry/registry-records-and-returns/exams/invigilation/ (last visited Oct. 20, 2020).

employers, may also make rules prescribing for a sort of right of first refusal to publish in-house the research works produced by their teachers during the examination period, possibly also entering into tenable royalty agreements with them.

The formal responsibilities of law teachers in India do not end with the above duties. They may be involved in the workings of other crucial institutional committees and welfare work like, the statutorily mandated Anti-Ragging Committee to deal with the menace of ragging on campus, and the Internal Complaints Committee, to deal with sexual harassment complaints; apart from the Proctorial Board, Sports Committee, Library Committee, as Wardens and members of Mess committees on the residential campuses and student hostels, and similar other such committees formed for the welfare of students. Experience in these administrative areas is also desirable for a law teacher to enable her to assume higher academic leadership positions in the future.

Though there are humongous expectations from a law teacher, the other stakeholders in legal education, and the society as a whole should not forget that a law teacher is also a human being who faces trials and tribulations of professional and personal lives daily, and must duly empathise in the difficult phases of a teacher's career.[88] Further, the time expended by an individual teacher indulging in these necessary academic-administration activities, should complement and balance with her classroom teaching and research; and should not affect the output and quality of the latter. So, the law school administrators need to consciously apportion the committee work equitably, proportionately, and judiciously among all the law teachers in the faculty.

Many law professors have done considerable work towards social and legal transformation and reforms in India, and they have inspired generations of law teachers. For example, expressing outrage against the Supreme Court of India's judgment in the *Mathura rape case*[89] Professors Upendra Baxi, Raghunath Kelkar, and Lotika Sarkar from the Delhi University's Law Faculty played an important role by authoring

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[88] *See,* James T. R. Jones, *Walking the Tightrope of Bipolar Disorder: The Secret Life of a Law Professor*, 57 JOURNAL OF LEGAL EDUCATION 349–374 (2007).

[89] *Tukaram* v. *State of Maharashtra* (1979) 2 SCC 143.

their famous hard-hitting Open Letter to the Chief Justice of India, co-authored with Professor Vasudha Dhagamwar of University of Pune, which also paved way—with other such efforts by many activists, including by Professor Lotika Sarkar herself—for the Criminal Law Amendment Act of 1983, a significant (substantive and procedural) criminal law reform in India.[90] Professor N.R. Madhava Menon, who always stressed upon the social justice oriented education, introduced the law and poverty course in the University of Delhi's Law Faculty.[91] But, he will always be remembered as a visionary who envisaged and introduced the five-year legal education system in India.[92] Professor Menon also served as a member of the Law Commission of India—which principally works for the law reforms in the country—for two terms, and was a member of the Committee on Criminal Justice Reform of the Government of India.[93] Professor B.B. Pande, when teaching at the Delhi University, played an instrumental role in the Legal Service Project at the Beggars' Court in Delhi, and the Pilot Project for Law Students' Voluntary Prison Services at Tihar Prison in Delhi.[94] Professor Shamnad Basheer, a well-known young IPR laws expert—who tragically passed away at a young age recently—had in 2012 filed and argued an academic intervention application in the famous Patents Case of *Novartis AG* v. *Union of India* before the Supreme

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[90] *See,* Upendra Baxi et al., *An Open Letter to the Chief Justice of India* (1979) *available at* https://pldindia.org/wp-content/uploads/2013/03/Open-Letter-to-CJI-in-the-Mathura-Rape-Case.pdf. (last visited Oct. 20, 2020). *See also,* Gerald Fetner, *The Law Teacher as Legal Reformer : 1900-1945*, 28 JOURNAL OF LEGAL EDUCATION 508.

[91] *See,* B.B. Pande, *Commemoration: Achieving Highest Legal Academic Target with Grace and Dignity in the Memory of Late Dr. N.R. Madhava Menon*, VII J. CAMPUS LAW CENT. 125, 126 (2019) (Advance Online Issue) *available at*http://13.235.220.186/wp-content/uploads/2020/03/JCLC-Vol-VII-Advanced-Online-Issue.pdf (last visited Oct. 20, 2020); and Menon, *supra* n.16.

[92] *See,* Sarker, Chakraborty, and Chatterjee, *supra* n. 4, p. 257.

[93] K.C. Gopakumar, *N.R. Madhava Menon: A Pioneer of Legal Education*, The Hindu (8th May, 2019) *available at* https://www.thehindu.com/news/national/kerala/a-pioneer-of-legal-education/article27073198.ece (last visited Oct. 20, 2020). The Committee on Criminal Justice Reform, popularly called the Malimath Committee, gave its report in 2003.

[94] *See,* Prof. B.B. Pande (Honorary Faculty, Symbiosis Law School, Noida) *available at* https://www.symlaw.edu.in/our-people/honorary-faculty/181 (last visited Oct. 20, 2020).

Court of India.[95] Professor B.S. Chimni, who taught at the JNU, continues to play an important role in propagating a significant heterodoxical theoretical perspective called 'Third World Approaches to International Law' *(TWAIL)* which challenges the Eurocentric model of International Law, and has shaped the debate and narratives in the field.[96] So, a law teacher must also explore opportunities to play a larger role towards bringing the necessary legal, educational, and social reforms, apart from engaging in on campus academic activities.

Concluding Remarks

We law teachers must not only learn from our own past experiences but must strive to keep on innovating our teaching-learning methodologies according to the courses taught, the varying class strengths, and compositions. Learning the pedagogical methods and teaching techniques from our peers in own institution; as well from the other law teachers in different jurisdictions is a desideratum for continually evolving as a law teacher. Requirement of collaborative teaching in certain law courses also furnish greater opportunities for peer-learning and fostering collegiality among colleagues. Regularly reading articles on legal education in the prominent law journals can also be a way to update one's knowledge on the current law teaching methods.

This research paper expounded various roles played, and duties discharged typically by an Indian law teacher. It also explored the utility of these experiences in holistically evolving as a law teacher and, effectively catering to the needs of various stakeholders in general, and the students, thereby facing the professional challenges effectively. Despite the huge availability of qualified candidates, the paucity of *good* law teachers in India remains a major challenge.[97]Teaching law remains a deeply satisfying intellectual profession, which must primarily aim at

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[95] *See*, Prashant Reddy, *A Successful Academic Intervention before the Supreme Court in the Novartis – Glivec Patent Case*, SPICYIP, *available at* https://spicyip.com/2012/11/a-successful-academic-intervention.html (last visited Oct. 19, 2020); and *Novartis AG* v. *Union of India* (2013) 6 SCC 1.

[96] *See,* B.S. Chimni, *Third World Approaches to International Law: A Manifesto*, 8 INTERNATIONAL COMMUNITY LAW REVIEWS 3–28 (2006).

[97] *See,* N.R. Madhava Menon, *The Transformation of the Indian Legal Education: A Blue Paper* 7 (2012) *available at* https://clp.law.harvard.edu/assets/Menon_Blue_Paper.pdf (last visited Oct. 20, 2020).

the developing the legal mind of the students enabling them to cultivate—as Professor Lon Fuller referred to by alluding to Professor Wertheimer's expression—the 'Productive Thinking', leading to the development of their capacity for creativity and objective thought.[98]According to Professor Menon, to strengthen the rule of law and democracy in India, the legal education including, making of our curriculum, adopting our methods of teaching, materials employed, and activities organised for students must all aim towards 'turning out lawyers as change agents, social engineers and justice workers'; and he even suggested curtailing the formal legal education to four years, with the fifth year devoted to train the students to 'serve the justice needs of people in urban and rural areas'.[99]

Though in India, in most of the law schools, the pay-scale offered to a law teacher is the one prescribed by the UGC for various designations and posts, and is clearly mentioned with the post advertised, the policy considerations for offering discretionary remuneration packages assumes some significance for the private sector law schools which may deviate from the UGC pay-scales. This however, remains an important policy issue for the US law schools, who have to first identify the valid criteria like, the experience, seniority, merit, and productivity, and then decide on the weightage given to them, for having a fair, equitable, judicious, non-arbitrary and transparent institutional remuneration policy; and thus, offers lessons for those law schools in India who seek to offer individualised pay packages.[100]

Perhaps one of the greatest tragedies of the Indian Legal and Judicial System has been the non-elevation of any Indian Law Professor to the Supreme Court of India till date, in spite of no dearth of 'distinguished jurists' in the country, which is also a prescribed qualification to be appointed as a Judge of the Supreme Court, under Article 124(3)(c) of the Constitution of India.[101] So, the Judges of the Supreme Court of India have only been drawn from the Bench and the Bar till now, and not from

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[98] Lon L. Fuller, *On Teaching Law*, 3 STANFORD LAW REVIEW 35, 38–39 (1950).

[99] N.R. Madhava Menon, *Foreword*, in Shuvro Prosun Sarker (ed.) LEGAL EDUCATION IN ASIA ix (2014).

[100] *See*, Joseph W Little, *A Plan for Setting Law Teacher Salaries*, 31 JOURNAL FOR LEGAL EDUCATION 1 (1981).

[101] *See also,* Baxi, *supra* n. 63, p. 418.

the legal academy. In the United States, however, as is well-known, eminent law academicians like, Justice Felix Frankfurter and Justice Ruth Bader Ginsburg have served as the Associate Justices of the US Supreme Court; and some other former Law Professors like, Justice Elena Kagan continue to serve their institution, and the People of United States.[102]

The challenges in each role, a law teacher plays, are also unique, and one's individual experiences as well as the organisational structure, values, vision, and mission also determine the efficacy of academic performance, leadership, and mentorship which a law teacher provides. Apart from this, the quality of professional performance and output as a law teacher also depends on the service conditions, secure tenure, institutional support, and appropriate institutional recognition and incentivising of the teaching and research done by an individual teacher. At the end, it is perhaps fair to say, that this article comprehensively and holistically charted out, how one can effectively learn, improve, and deliver as a law teacher.

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[102] For example, *see,* Erwin N Griswold, *Felix Frankfurter Teacher of the Law*, 76 HARVARD LAW REVIEW 7 (1962).

Concept of Education under Constitution of India—A Study with reference to Centre-State Relationship

Amit Raj Agrawal[*]
Smriti Soni[**]

Prologue

An excerpt[1] from the speech of Dr. Bhim Rao Ambedkar at Milind Mahavidyalaya Aurangabad, (1951)

> 'Coming as I do from the lowest order of Hindu Society; I know what is the value of education. The problem of raising the lower order deemed to be economic. This is a great mistake. The problem of raising the lower order in India is not to feed them, to clothe them and to make them serve the higher classes as the ancient ideal of this country. *The problem of the lower order is to remove from them that inferiority complex which has stunted their growth and made them slaves to others, to create in them the consciousness of the significance of their lives for themselves and for the country, of which they have been cruelly robbed of the existing social order.* ***Nothing can achieve this purpose except the spread of higher education. This is in my opinion the panacea of social troubles***.'
> *(Emphasis Added)*

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[1] Chapter III Educational Philosophy of Dr. Baba Saheb Ambedkar, *available at*: http//: shodhganga.inflibnet.ac.in (last visited Nov 5, 2019).

Convincingly, Dr Ambedkar in his wisdom has emphasised upon the need and importance of education, especially among the people belonging to a lowest stratum of Indian society so that these people may come out of the vicious cycle of thraldom, and can be integrated in the mainstream of development- social, economic and political. He has also emphasised, and rightly so, that the education is the 'main' key for the growth and emancipation of such people.

On a similar note, Mahatma Jyotirao Phule has also stated the importance of education for the redemption of *Dalits* in the following words:[2]

> 'For want of education, their intellect deteriorated for want of intellect, their morality decayed, for want morality, their progress stopped, for want of progress, their wealth vanished all their sorrows sprang from illiteracy.'

A nation's progress coincides with the level of education among its people. Education, particularly higher education as a means of achieving perfection nearly in every aspect of human endeavours, plays a key role in the realisation of a country's extraordinary potential and fulfilment of its aspirations of social, economic, political and technological advancements including individual wellbeing. Education is surely the 'gateway' to multifaceted development and prosperity in a country. Although education is essential for each individual irrespective of his class or society, its importance is 'indispensable' for certain sections of society, for instance, *Dalits,* and other weaker sections of the society who have been the victims of oppression for centuries. Education plays a critical role in their upliftment, progress and development.[3]

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[2] *Id.,* p. 54.

[3] Dr. Kiran Walia, MY IDEA OF EDUCATION-SWAMI VIVEKANANDA 19 (Advaita Ashrama Publication Department, Kolkata First edn., 2008 Thirteenth Reprint 2020). Swami Vivekananda works' on education reveals' his idea about education in the following terms Education must provide 'Life Building, man-making, character-making' assimilation of ideas. The ideal of this type of education would be to produce an integrated person- one who has learned how to improve his intellect, purify his emotions, and stand firm on moral virtues and unselfishness.

Despite the fact that education is indispensable for meaningful human existence and progressive growth and India being the signatory to many international human rights declarations and treaties, where right to education has been given a due recognition[4], surprisingly, at the time, when the Constitution of India was put into effect, the subject of education under the provisions of the Constitution was made non-justiciable.[5] However, with the passage of time, some significant steps were taken by the Government in this direction [6] ,but a major breakthrough was achieved only in the year 1992, where the apex Court expressly recognised the importance of education while extending the its scope to constitutional provisions of fundamental rights in *Mohini Jain* v. *State of Karnataka.*[7]

It is also important to note that, at the time, when the Constitution did not expressly recognise education as the subject of fundamental rights, but it did recognise the rights in favour of the citizens to practice any profession, or to carry on any occupation, trade or business and rights of the minorities to establish and administer educational institutions of their choices in terms of Article 19(1)(g)[8] and Article 30(1)[9] respectively of the Constitution of India.

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[4] The right to education is codified in the Universal Declaration of Human Rights (UDHR), International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and Convention on the Rights of the Child (CRC).

[5] M.P. Jain, INDIAN CONSTITUTIONAL LAW 1227 (Lexis Nexis, Gurgaon, seventh edn, 2014). Right to education was initially not included in the chapter of fundamental right in the Constitution it was included as directive principles in Art 45 which required the State to endeavor to provide within a period of 10 years from the commencement of the Constitution, for free and compulsory education for all children, until they complete the age of 14 years.

[6] Dr. Niranjan Aradhya and Aruna Kashyap, *The 'Fundamentals' Right to education in India*, *available at* https://unesdoc.unesco.org/ark:/48223/pf0000151010 (last visited Oct. 27, 2020).

[7] AIR 1992 SC 1858.

[8] *Supra* n. 7, p. 1070.

[9] *T.M.A. Pai Foundation* v. *State of Karnataka*, AIR 2003 SC 355.

Further, the subject of education in terms of Entry 25 List III (Concurrent List)[10] and Entry 66 List I (Union List) has often been the matter of judicial determination on account of myriad aspects associated with the subject of education such as 'University'[11] being the state subject and issues pertaining to legislative competency of the Centre and the State on medium of instruction of education and examination, establishment of the Commissionerate of Higher education by the Act of the State legislature and mode of selection of candidates to medical colleges etc.

The paper attempts to present a holistic view upon the subject of education under the scheme of the Constitution of India.

Education as Fundamental Right under Constitution of India

In *Mohini Jain* v. *State of Karnataka* the Apex Court observed that:

> Without making "right to education" under Article 41of the Constitution a reality the fundamental rights under Chapter III shall remain beyond the reach of large majority which is illiterate. The fundamental rights guaranteed under Part III of the Constitution of India including the right to freedom of speech and expression and other rights under Article 19 cannot be appreciated and fully enjoyed, unless a citizen is educated and is conscious of his individualistic dignity.
>
> The 'Right to Education' therefore, is concomitant to the fundamental right enshrined under Part III of the Constitution. *The State is under a constitutional mandate to provide educational institutions at all levels for the benefits of the citizens*. The educational institutions must function to the best advantage of the citizens. Opportunity to acquire education cannot be confined to the richer section of the society.

Convincingly, 'right to education 'holds a special place of significance in part III of the Constitution, as for effective enjoyment of other fundamental rights, the '*right to education'* is a necessary concomitant.

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[10] The subject of education prior to the Constitution (Forty-second Amendment) Act, 1976 was dealt under Entry 11, List II (State List) of the VII Schedule of the Constitution of India. The aforementioned amendment has placed the education under Entry 25 List III (Concurrent List) of the VII Schedule of the Constitution.

[11] Entry-32, State List (II), Seventh Schedule of the Constitution of India.

The decision of the apex court emphasised upon the fact of existence of a fundamental right in favour of every citizen to get education at all the levels. The Court also pointed out that economic hardships must not be the cause for denial of one's right to education.

Interestingly, though subsequently in *Unni Krishnana, J.P* v. *State of Andhra Pradesh*[12], the apex court split the 'right to education' among two different age groups of people, the first being below the age of fourteen years whereas the other being above that age. The court held that it is only the first group of the people, i.e., below the age of fourteen years that enjoy 'right to education' as a fundamental right flowing from Article 21. The other group does not enjoy the 'right to education' as the right for them becomes subjected to economic capacity and development of the State. Thus, the court observed that:[13]

> [T]he state can be obliged to ensure a right to free education of every child up to the age of fourteen years. Higher education calls heavily on national economic resources. The right to it must necessarily be limited in any given country by its economic and social circumstances. The State's obligation to provide it is, therefore, not absolute and immediate, but relative and progressive.

Though the observations of the Supreme Court in *Unni Krishnan* proffered express recognition to *right to education* as implied from the right to life and liberty guaranteed by Art 21 but limits the scope only up to the age group of 14 years. The Court also observed that the subject of Higher education calls heavily on national economic resources, and therefore the State's obligation to provide education is not absolute and immediate rather it is relative and progressive.

Further, in *Modern School* v. *Union of India*[14] the Apex Court observed that:

> '*The States have a duty to impart education and particularly primary education having regard to the fact that the same is a fundamental right within the meaning of Article 21 of the Constitution of India*, but as the Government had neither resources nor the ability to provide

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12 AIR 1993 SC 2178.

13 *Id.*

14 AIR 2004 SC 2236.

> for the same, it appears, the Legislature permitted the Societies/Trusts to establish the educational institutions from the savings made by them from the Unaided Institutions.'
> (Emphasis Added)

Convincingly, during the period of 1950, until the commencement of the Constitution (Eighty-sixth Amendment) Act, 2002, the Supreme Court implied the right to education from other Articles of the Constitution such as Arts. 21, 24, 30(1) and 39(e) (f).[15]

Parliament of India, in 2002, added a new fundamental right, Article 21A[16]--which provides for the right to free and compulsory education to all the children in between the age group of 6-14 years in such manner as the State may by law determine. Changes were also introduced in the provisions of Directive Principles of the State Policy[17] and Fundamental Duties[18]. Thus, initially through judicial decisions and subsequently, through legislative measures 'right to education' has finally occupied a definite place under Part III of the Constitution of India.

However, in this context, it is important to observe, the justiciable constitutional obligation of the State is only confined till a child completes the age of 14 years and does not extend in the matter of Higher education.[19]

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[15] It is important to note that the Constitution (Eighty-sixth Amendment) Act, 2002, which inserted Article 21A in the Constitution, came into effect from April 01, 2010.

[16] Inserted by the Constitution (Eighty-sixth Amendment) Act, 2002, sec. 2 (w.e.f. 1-4-2010).

[17] Article 45- Provision for free and compulsory education for children- The State shall endeavour to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children, till they complete the age of fourteen years. The original text of Art 45 as mentioned above, is replaced with the following text 'The State shall endeavour to provide early childhood care and education for all children, until they complete the age of six years'by the Constitution (Eighty-sixth Amendment) Act, 2002, sec. 3 (w.e.f. 1-4-2010).

[18] The Constitution (Eighty-sixth Amendment) Act, 2002, sec. 4 (w.e.f. 1-4-2010) inserted clause (k) in Article 51A – 'who is a parent or guardian to provide opportunities for education to his child or, as the case may be, ward between the age of six and fourteen years.'

[19] *See, Ashok Kumar Thakur* v. *Union of India* (2008) 6 SCC 1.

Further, it is interesting to note that, it took almost eight years of time period for the Government to get it fully functional. It is only in the year 2010, when the Parliament of India enacted a comprehensive legislation about education, Art 21A came into effect in its true sense.[20]

However, even after the completion of a decade, the progress on the subject of education as envisaged by the REA is not satisfactory.[21] A pertinent question must be asked, how far actually we have succeeded in realising the objective of Article 21A of the Constitution of India. What are the actual impediments and why there has been a slow progress?[22]

Further, Article 19(1)(g) of the Constitution of India provides every citizen a right to practise any profession, or to carry on any occupation, trade or business subject to the provisions of Clause 6 of the Article 19. On this, a very pertinent question was raised, whether a citizen can claim the right to set up an educational institution under this provision? After detailed examination of the existing authorities on the subject, the Apex Court concluded that "[T]he establishment and running of an educational institution where a large number of persons are employed as teachers or administrative staff, and an activity is carried on that results in the imparting of knowledge to the students, must necessarily be regarded as an occupation, even if there is no element of profit generation."[23]

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[20] The Right of Children to Free and Compulsory Education Act, 2009 (Hereinafter REA) came into stature book with the objective to strengthen the social fabric of democracy through provision of equal opportunities to all, where universal elementary education plays a key role, to address the challenges of drop out ratios, particularly from disadvantaged groups and weaker sections, to ensure satisfactory quality of learning achievement and to achieve the dutiful mandate of Article 21A of the Constitution of India.

[21] Sanchayan Bhattacharjee, *Ten Years of Rte Act: Revisiting Achievements and Examining Gaps*, *available at*https://www.orfonline.org/research/ten-years-of-rte-act-revisiting-achievements-and-examining-gaps54066/ (last visited Oct. 19, 2020).

[22] *Id*. According to the District Information System of Education, only 13 percent of all schools in India have achieved full compliance with these RTE norms.

[23] *T.M.A Pai Foundation* v. *State of Karnataka* AIR 2003 SC 355, (2002) 8 SCC 481.

On the minority rights, Article 30(1)[24] of the Constitution of India confers on all minorities, whether linguistic or religious, a fundamental right to establish and administer educational institution of their choice, and it holds any law or executive direction which seeks to infringe the substance of this right, void to the extent it infringes the provisions of this Article. With regards to the right of the minorities under this Article a question arose: whether such right of minorities to establish and administer educational institutions is absolute or subject to the State regulations?

In reference to the above question, as early as 1958 in *Re Kerala Education Bill*[25], it was discerned by the Apex Court that 'the right conferred on the religious and linguistic minorities to administer educational institutions of their choice is not an absolute right; rather it was subject to the State regulations. If so, then what should then be the conditions for State regulation? As per the observation of the apex court in *Ahmadabad St. Xavier College* v. *State of Gujarat*[26] 'the right conferred upon minority in terms of Article 30(1) to establish and administer educational institutions can be subjected to conditions for ensuring *orderly*, *efficient* and *sound administration*.'[27]

Further, the Apex Court in *T.M.A. Pai Foundation* v. *State of Karnataka*[28] held that the minority educational institutions can be placed into two categories: (1) the institution receiving aid from the State; and (2) institutions, not receiving aid from the State; and these divisions were further divided into sub-divisions according to the nature of the educational institution, namely schools, undergraduate colleges, post graduate colleges and professional colleges.[29] Now, from the point of granting them recognition and casting accompanying regulations the apex court first in the *T.M.A. Pai Foundation Case*[30] and later in the *P.A.*

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[24] *Supra* n. 4, art. 30(1) reads: All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice.

[25] AIR 1958 SC 956.

[26] AIR 1974 SC 1389.

[27] *P.A Inamdar* v. *State of Maharashtra* AIR 2005 SC 3226.

[28] AIR 2003 SC 355.

[29] *Id*.

[30] It is no doubt true that Article 29(2) does curtail one of the powers of the minority

Inamdar[31] case held that the considerations for granting recognition to a minority educational institution and casting accompanying regulations would be similar as applicable to a non-minority educational institution subject to two overriding considerations: (i) the recognition is not denied solely on the ground of the educational institution being one belonging to minority, and (ii) the regulation is neither aimed at nor has the effect of depriving the institution of its minority status. The court also clarified that "when any regulatory measure is assailed, it would be obligatory for the court to find out as to whether the provisions in fact secures a reasonable balance between ensuring a standard of excellence of the institution and of and for preserving the right of the minority to administer the institution as a minority institution".[32]

Recently, in *S.K. Mohd. Raffique* v. *Managing Committee, Contai Rehmania High Madrasah*[33], the Apex Court observed an absolute right of the State to impose regulations on the appointment of teachers in institutions established and administered by the minorities, giving the reasoning that such step is necessary to achieve excellence in education in these institutions.[34] However, the reasoning employed by the Court in the

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institution, but on receiving aid, some of the rights that an unaided minority institution has, are also curtailed by Articles 28(1) and 28(3). A minority educational institution has a right to impart religious instruction — this right is taken away by Article 28(1), if that minority institution is maintained wholly out of State funds. Similarly, on receiving aid out of State funds or on being recognised by the State, the absolute right of a minority institution requiring a student to attend religious instruction is curtailed by Article 28(3). If the curtailment of the right to administer a minority institution on receiving aid or being wholly maintained out of State funds as provided by Article 28 is valid, there is no reason why Article 29(2) should not be held to be applicable. There is nothing in the language of Articles 28(1) and (3), Article 29(2) and Article 30 to suggest that, on receiving aid, Articles 28(1) and (3) will apply, but Article 29(2) will not.

[31] *Supra* n. 41.

[32] *Managing Committee St. John Inter College* v. *Girdhari Singh* AIR 2001 SC 1891.

[33] Civil Appeal No.5808 of 2017.D/d. 6.1.2020, *available at* https://www.latestlaws.com /latest-caselaw/2020/january/2020-latest-caselaw-1-sc/ (last visited Nov 18, 2020).

[34] Krishnadas Rajagopal, *Minority Institutions' Appointments: Supreme Court to Examine Plea to Stay January 6 Ruling*' The Hindu (Jan. 8, 2020) *available at* https://www.thehindu.com/news/national/minority-institutions-appointments-supreme-court-to-examine-plea-to-stay-january-6-ruling/Article30514697.ece (last visited Nov. 18, 2020).

aforesaid judgment directly contradicts the eleven judge bench ruling of the Apex Court in *T.M.A Pai Foundation case.*[35]

Centre – State Relationship on subject of 'Education': Constitutional Arrays and Judicial Delineations

The legislative competence of Centre and States with regards to the subject of 'education' is determined by various entries in the three lists of Seventh Schedule of the Constitution of India. The relevant entries are 63,[36] 64,[37] 65[38] and 66[39] in List-I (Union List), Entry 32[40] in List –II (State List) and Entry 25[41] in List-III (Concurrent List). Here, it is

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[35] *Id.* This judgement has been contended in the court (and the court has agreed to examine the plea) on the point that the judgement is contrary to the constitution bench's decision in the case of *T.M.A. Pai Foundation* wherein the minorities were held to have a fundamental right to administer the educational institution including the appointment of teachers. It has also been contended in the court that the current judgement also contradicts a more recent judgement delivered on September 25, 2019 in *Chandana Das (Malakar)* v. *State of West Bengal* (Civil Appeal No. 2858 OF 2007) that upheld the minority's right to establish and administer their own institutions without government interference in day-to-day affairs of management including appointment of the teachers.

[36] Entry 63 reads: The institution known at the commencement of this Constitution as the Banaras Hindu University, the Aligarh Muslim University and the Delhi University; the University established in pursuance of Article 371E; any other institution declared by Parliament by law to be an institution of national importance.

[37] Entry 64 reads: Institutions for scientific or technical education financed by the Government of India wholly or in part and declared by Parliament by law to be institutions of national importance.

[38] Entry 65 reads: Union agencies and institutions for-
(a) professional, vocational or technical training, including the training of police officers; or
(b) the promotion of special studies or research; or
(c) scientific or technical assistance in the investigation or detection of crime.

[39] Entry 66 reads: Co-ordination and determination of standards in institutions for higher education or research and scientific and technical institutions.

[40] Incorporations, regulation and winding up of corporation, other than those specified in List-I, and universities; unincorporated trading, literary, scientific, religious and other societies and associations; co-operative societies.

[41] *Id.*, entry 25 reads: Education, including technical education, medical education and universities, subject to the provisions of entries 63, 64, 65 and 66 of List I; vocational and technical training of labour.

pertinent to note, the Constitution (Forty-second Amendment) Act, 1976[42] (hereinafter 42nd Amendment), omitted Entry 11 from List II (State List) and transferred that subject to be combined with Entry 25 of List III (Concurrent List) of the Seventh Schedule.[43]

Entry 25 of List III (Concurrent List) is subject to Entry 66 of List I (Union List)

In *Prof Yashpal Sharma* v. *State of Chhattisgarh*,[44] arose a dispute regarding legislative competence of Centre and State with regards to overlapping entries in the Seventh Schedule. The subject of dispute was 'University' and 'determination of standards in institution for higher education', wherein, the 'university' squarely fell under entry 32[45] in List-II, education comes under Entry 25 of List-III and the 'determination of standards in institution for higher education fell under entry 66 in List-I. As per entry 66, List-I the 'coordination and determination of standards' in institution for higher education or research and scientific and technical institutions falls exclusive within the jurisdiction of Union Legislature. This distribution of power led to the confusion about Centre and State's legislative power ensuing from these entries. Taking note of the problem, the apex court held that:[46]

> The consistent and settled view of the Supreme Court is that in spite of incorporation of universities as a legislative head being

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[42] The Constitution (Forty-second Amendment) Act, 1976, *available at* http://legislative.gov.in/constitution-forty-second-amendment-act-1976 (last visited Jan. 13, 2020).

[43] *Infra* 46; *see also*, Dr. Subhash C Kashyap, CONSTITUTIONAL LAW OF INDIA 1627 (Universal Law Publishing, Gurgaon, 2nd edn, volume II, 2015). There were many reasons for transferring the subject of education from State to Concurrent List, like the desired socio-economic goals can be achieved in the country through education. Parliament can secure uniformity in standards and syllabi of education so very necessary to achieve nation integration. Parliament can minimise disparities in the level and standard of education as between various States. *See further*, *supra* n. O 7, p. 539.

[44] (2005) 5 SCC 420.

[45] *Supra* n. 4, entry 32 reads: Incorporation, regulation and winding up of corporation, other than those specified in List-I, and universities; unincorporated trading, literary, scientific, religious and other societies and associations; co-operative societies.

[46] *Supra* n.46.

> in the State List under Entry 32 therefore, the whole gamut of university, which will include teaching, quality of education being imparted, curriculum, standard of examination and evaluation and also research activity being carried on, will not come within the purview of the State Legislature on account of specific entry, that is List I Entry 66, being in the Union List for which Parliament alone is competent. *It is the responsibility of Parliament to ensure that proper standards are maintained in institutions for higher standard or research throughout the country and uniformity in standard is maintained.*
>
> *A university may, therefore, be established by the State in exercise of its sovereign power which would obviously be through a legislative enactment...[b]ut the co-ordination and determination of standards for higher education or research and scientific and technical institutions rest with the Union legislature, i.e., the Parliament.*
> (Emphasis Added)

Though the Apex Court, convincingly, regarding the conflicting entries on the subject concerning education under Seventh Schedule, attempted to settle the controversies by giving Centre an upper hand on account of Entry 66 of the Union List in the matter of Co-ordination and determination of standards in institutions for higher education or research and scientific and technical institution, but the controversy has not yet concluded.

Interestingly, much before *Prof Yashpal Sharma case (Supra)* a very pertinent observation was made by the Apex Court concerning the overlapping entries on the subject of education in following terms, ***'if there be a Central law in respect of that matter, it would have paramountcy over the State law, but even when the Centre does not exercise its power, a State law trenching upon the exclusive Union filed would still be invalid.'***[47]

Further, it is an astute to note that, *Prof. Yashpal Sharma (Supra)* was decided post-42nd Amendment which transferred an entry relating to 'education' from State to Concurrent List. The change brought by this amendment diluted State's exclusive legislative power on 'education'

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[47] *State of Tamil Nadu* v. *Adhiyaman Educational and Research Institute* (1995) 4 SCC 104.

under Entry 11 in State List and extended to Parliament an additional power to legislate under Entry 25 in Concurrent List. This amendment, however, did not have any effect on the issue of 'Coordination and determination of standards in institutions for *higher education...*', because even before the amendment the Apex Court in various cases had conclusively determined the authority of Union on the aforementioned subject.[48] In this context, in *State of Tamil Nadu* v. *Adhiyaman Educational and Research Institute*[49] it was held by the apex court that:

> 'The Subject 'Coordination and determination of standard in institutions for higher education or research and scientific and technical institutions' has always remained the special preserve of Parliament. This was so even before Forty-second Amendment, since Entry 11 of List-II even then was subject, among others, to Entry 66 of List-I. After the said Amendment, the constitutional position on that score has not undergone any change. All that has happened is that Entry 11 was taken out from List-II and amalgamated with entry 25 of List-III. However, even the new Entry 25 of List-III is also subject to the provisions, among others, of Entry 66 List-I. *It cannot, therefore, be doubted nor is it contended before us, that the legislation about coordination and determination of standard in institutions for higher education or research and scientific and technical institutions has always been the preserve of Parliament.'*
> (Emphasis Added)

Indubitably, it is obvious from the decision of the apex court that 42nd Amendment has not brought forth any significant change with regards to the Union's power of '**Coordination and determination of standard in institution *for higher education or research and scientific and technical institution.*'** But, it did afflict the legislative exclusivity of the State legislatures as far as determination of standard in *primary* and *secondary* education is concerned, as before the 42nd Amendment, the same was within the '***exclusive domain***' of State Legislature,[50]but after

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[48] *Kerela SEB* v. *Indian Aluminum Co. Ltd*, (1976) 1 SCC 466; *see also, Osmania University Teachers' Association* v. *State of A.P.* (1987) 4 SCC 671.

[49] (1995) 4 SCC 104.

[50] *See, Gujarat University* v. *Sri Krishna,* AIR 1963 SC 703.

the amendment it comes within the competence of both Centre and State and attracts the application of Article 254[51] of the Constitution.

Before Constitution (Forty-second Amendment) Act-Entry 66 of Union List and Entry 11 of State List – Medium of Instruction and Rule of Harmonious Construction

The scope and authority of Parliament under entry 66 has troubled the Apex Court at many instances wherein the court had to test the legislative competence of the Union and State legislatures regarding the matter in conflict. Prior to 42nd Amendment, one such controversy was brought before the apex court in *Gujarat University*[52] case. Currently, the education was a State subject under Entry 11, List-II. The State of Gujarat amended the Gujarat University Act, 1959 by an Act of 1961 and imposed Gujarati or Hindi or both as 'exclusive medium of instruction and examination', which came into conflict with entry 66, List-I. As at that time the power to legislate in respect of 'medium of instruction' did not fall in a distinct legislative head, the State was of the argument that it must fall within Entry 11 in State List as a necessary incidence of the power to legislate on education. The Apex Court, however, rejected this argument of the State and ruled in favour of 'harmonious construction' between Entries 11 and 66. The court was of the view that although the two entries overlapped, but to the extent of overlapping the power conferred by entry 66 must prevail over the power of State under Entry 11. Thus, the Court held in this case that:[53]

> Powers to legislate in respect of medium of instruction is, however, not a distinct legislative head; it resides with the State Legislatures in which the power to legislate on education is vested, unless it is taken away by necessary intendment to the contrary**.** *Under item 63 to 65 the power to legislate in respect of medium of instruction having regard to the width of those items must be deemed to vest in the Union. Power to legislate in respect of medium of instruction, in so far it has a direct bearing and impact upon the legislative head of co-ordination and*

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[51] Inconsistency between laws made by Parliament and laws made by the Legislatures of the States. The law made by the Parliament shall prevail and the law made by the Legislature of the State shall to the extent of the repugnancy, be void.

[52] *Supra* n. 25.

[53] *Id.*

> *determination of standards in institutions of higher education or research and scientific and technical institutions, must also be deemed by item 66 List I to be vested in the Union*.
> (Emphasis Added)

In this case, the Court did not altogether reject the legislative competence of the State Legislature regarding the power to impose 'medium of instruction' but tried to harmonise and balance the legislative competence of two legislatures on the subject. Regarding linguistic chauvinism of State, the Apex Court also discerned the point that 'an expansive interpretation has been given to the Central entry so as to contain the linguistic chauvinism of the State; medium of instruction has been held to have an important bearing on the effectiveness of instruction and resultant standard achieved thereby.'[54]

Determination of 'Standard of Teaching and Examination' and Establishment of UGC

It is amply clear that since the inception of the Constitution, the 'Coordination and determination of standard in institution for higher education' has always been the exclusive legislative domain of the Union Legislature. Accordingly, under Entry 66 of List I, the Parliament had enacted the University Grants Commission Act, 1956 (hereinafter the UGC Act). The Object and Purpose of the Act provide:[55]

> The Constitution of India vests Parliament with exclusive authority regarding 'Coordination and determination of standard in institutions for higher education or research and scientific and technical institutions'. *It is obvious that neither coordination nor determination of standard is possible, unless the Central government has some voice in the determination of standard of teaching and examination in universities, both old and new*… [t]he Commission will act as an expert body to advise the Central Government on problems connected with the coordination of facilities and maintenance of standard in universities.
> (Emphasis Added)

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[54] *Id*.

[55] The University Grants Commission Act, 1956, *available at*http://www.ugc.ac.in (last visited Nov 22, 2020).

Thus, the Commission was established as an expert body to make recommendations of any university measures necessary for reform and improvement in the field of higher education and to advice the university concerned upon the action to be taken for the purpose of implementation of such recommendations.

In *Osmania University Teachers Association* v. *State of Andhra Pradesh*[56] a matter relating to the establishment of a Commissionerate of Higher Education by the legislation of State of Andhra Pradesh, which resembled to the UGC, was brought before the apex court. The main question raised in this case was whether a State could enact such legislation which although did not violate standard norm but was meant to promote better coordination among various bodies both in the Centre and State for the promotion of higher education in the State concerned. The Court in this case held that the impugned Act fell under entry 66, List-I or in the exclusive domain of the Union, and a State could not take recourse to Entry 25, List-III to legislate on a matter encroaching upon Union's privilege. The Court, therefore, held the Commissionerate Act beyond the legislative competence of the State and thereby declared it void and inoperative. The court further held that:[57]

> *The Constitution of India vests Parliament with exclusive authority regarding co-ordination and determination of standards in institutions for higher education. The Parliament has enacted UGC Act for that purpose*. The University Grants commission has, therefore, a greater role to play in shaping the academic life of the country. It shall not falter or fail in its duty to maintain a high standard in the Universities.
> (Emphasis Supplied)

In the above mentioned case, the court pointed out on two aspects: *firstly*, it reiterated on its earlier decisions relating to recognition of exclusive constitutional mandate of Parliament in the matter of coordination and determination of standard in the institution of higher education; *secondly*, it assigned a greater role to UGC and held that the same cannot be substituted by a State by creating a parallel statutory body. The above observation of the court appears to be accurate because had court decided otherwise, many parallel statutory bodies could have

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[56] AIR 1987 SC 2034.

[57] *Id*.

sprung through different State legislations, eventually leading to a conflicting situation between Centre and State.

Selection of Candidates to Medical College and Determination of Standards for Institution

Interestingly, in *State of Madhya Pradesh* v. *Kumari Nivedita Jain*[58], the Apex Court refused to include 'selection of candidates to the Medical Colleges' as a facet of determination of standard for the institution of higher education within the meaning of Entry 66, List I of the Seventh Schedule. The Court thus, observed that:[59]

> Entry 66 in List-I…relates to 'co-ordination and determination of standard in institution for higher education or research and scientific and technical institution'. This entry by itself does not have any bearing on the question of selection of candidates to the Medical Colleges from amongst candidates who are eligible for such admission. On the other hand, Entry 25 in List-III… speaks of 'education, including technical education, medical education in Universities, subject to Entries 63, 64, 65 and 66 of List I…vocational and technical training of labour'. This entry is wide enough to include within its ambit the question of selection of candidates to medical colleges and there is nothing in the entries 63, 64 and 65 of List-I to suggest to the contrary.

A similar observation was also made in *Ajay Kumar Singh* v. *State of Bihar*[60] in which the Apex Court held that 'Entry 66 in List-I does not take in the selection of candidates or regulation of admission to institutes of higher education. Because standards come into picture after admission were made'. The ratio of the case was based upon the fact that all students appear and pass the same examination at the end of the course, the standard is needed to be maintained during that time; that the rules of admission do not have any bearing on standard; that the quality is guaranteed at the exit stage that therefore even if the students of lower merit are admitted in the course, it will not cause any detriment to the standard.[61]

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[58] AIR 1981 SC 2045.

[59] *Id*.

[60] (1994) 4 SCC 401.

[61] *Id.*

However, subsequently in *Preeti Srivastava (Dr.)* v. *State of Madhya Pradesh*[62] the Court ruled that standard of education is affected by admitting students with low qualifying marks. On this, it was, and rightly so, was pointed out by the Court that the 'norms of admission to an institution of higher education have a direct impact on the standards of education.'[63]

In this case, the Constitution bench of the Apex Court was of the view that by virtue of Entry 25 List-III (Concurrent List) both the Centre and States have power to legislate on education including 'medical education', subject *inter alia* to entry 66 in List-I. In the present case the Court had clarified two points: *first*, that by virtue of entry 25 in Concurrent List, the State also has the right to 'control' education including medical education so long as the field was not occupied by the Union legislation. *Secondly*, at the same time a State while controlling the education under it, cannot encroach upon the standards in institution for higher education as it comes under the 'exclusive domain' of Union under Entry 66, Union List.

Regarding the 'admission criteria in higher education', the Court also held that 'while prescribing the criteria for admission to the institutions for higher education including higher medical education, the state cannot adversely affect the standard laid down by the Union of India under Entry 66 of List-I.' Regarding the changes brought by 42nd amendment the Court clarified that 'from 1977, education including *inter alia* medical and university education, is now in the Concurrent List so that the Union can legislate on admission criteria also; if it does

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[62] AIR 1999 SC 2894. In the instant case a common entrance examination was held for admission to post graduate degree courses. The cut-off point for admission for general category candidates was fixed at 45%, but for reserved category candidates it was fixed 20%. The court examined the validity of these rules and held that it is basically for an expert body like the Medical Council of India to determine whether in the common entrance examination viz. PGMEE, lower qualifying marks can be prescribed for reserved category candidates as against the general category candidates; and if so, how much lower. The court held that it must be kept at a level where it is possible for the reserved category candidates to come up with certain level of excellence when they qualify in the specialty of their choice.

[63] *Id*.

so, the State will not be able to legislate in this field, except as provided in Article 254.'

Epilogue

As has been already mentioned, a nation's progress coincides with the level of education among its people, and 'education', particularly the 'higher education' as a means of achieving perfection nearly in every aspect of human endeavours, plays a key role in realisation of a country's extraordinary potential and fulfilment of its aspirations of social, economic, political and technological advancement, and of achieving the status of ensuring wellbeing to its people. Because of this 'indispensable' nature of education in an individual's life, Dr Ambedkar and Jyotirao Phule emphasised on spreading of education, especially among the people belonging to lower stratum of Indian society in order to take out these people of an 'unending cycle of their subjection to powerful people', and to integrate these people in the mainstream of development be it social, economic, political, technical or any other.

The concept of 'education' finds its relevance in chapters of fundamental rights, directive principles of State policy, fundamental duties and in the three lists in seventh schedule of the Constitution of India. In its various judgements relating to 'right to education' the Apex Court has held that 'right to education' holds a significant place in fundamental rights' chapter, as this right is a pre-requisite for the enjoyment of other fundamental rights. Thus, in the case of *Mohini Jain* the Apex Court observed that although the constitution does not expressly guarantee 'right to education' as a fundamental right, but reading cumulatively Article 21 in Fundamental Rights, and Articles 38, 39 (a), 41 and 45in Directive Principles, it becomes clear that the framers of the Constitution made it obligatory on the State to provide education for its citizens.

In *Unni Krishnan*, though the Apex Court interpreted 'right to education' as a fundamental right emanating from right to life and personal liberty under Article 21, but it also narrowed the ambit of this rights as to be enjoyable only by the citizenry falling in the age group of up to fourteen years and beyond this age group, his right gets subjected to the limits of economic capacity and developmental conditions of the State. Subsequently, Parliament brought forth the Constitution (Eighty-

sixth Amendment) Act in 2002 and added a new Article 21A providing 'right to education' as a fundamental right for all children in between the age of six-fourteen years. Changes were also made in the chapters of directive principles and fundamental duties. Thereafter, in *Ashok Kumar Thakur (Supra)* the court explicitly mentioned that 'higher education' does not fall under Article 21A. This means that the fate of the higher education is dependent on the 'policy of the State'.

Article 30(1) confers on all minorities a fundamental right to establish and administer educational institutions of their choice. In regard to the question whether this right of minorities to establish and administer is an absolute or limited, the apex court in *re Kerala Education Bill* discerned that such a right was not absolute, but subject to State regulation. In *St. Xavier College,* the court held that such right was subject to conditions for ensuring *orderly*, *efficient* and *sound* administration. Such a view was also taken by the apex court in *T.M.A. Pai Foundation* case to ensure that the minority institutions do not fall short of standards, but also at the same time the regulation should not be such as to take away the right of minority guaranteed under Article 30. In T.M.A Pai foundation case, the Court also observed that Education comes under the head 'occupation' in terms of Article 19(1)(g) of the Constitution of India and therefore, the Citizens have right to carry out the same. Interestingly, though convincingly, the Court located the right of both majority and minority to establish educational institutions under Art 26(a) on account of its being charitable activities.

The Legislative competence of the Centre and States about 'education' is determined by various entries in the three lists in Seventh Schedule. However, prior to 42nd amendment, education including universities was an 'exclusive domain' of the States under Entry 11, List-II, subject to entry 66, List-I under which 'coordination and determination of standards in institutions for higher education' is an 'exclusive domain' of Union. Post-42nd amendment entry 11 was omitted and in its place a new Entry 25 was added to List-III. This amendment, however, did not change the position regarding 'coordination and determination of standards in institutions for higher education' as it always remained the 'exclusive domain' of the Union; it however affected the legislative competence of the State legislatures regarding 'primary' and 'secondary' education as prior to the amendment, it was under the

exclusive legislative competence of the State, and thereafter it squarely fell within the legislative competence of both Centre and States.

This legislative competence of Centre and States in different entries has often led to the confusion between Centre and States, and one such confusion was raised in the *Gujarat University* case wherein the court brought in the rule of "harmonious construction" between the Entries 11 of the State List and Entry 66 of the Union List. In this case, although the court did not nullify the legislative competence of State, but held that so far such legislation had a direct bearing on entry 66, it must be deemed void. It was this Entry 66 in Union List under which the Parliament created University Grants Commission as an expert body to recommend necessary measures for reforms and improvement to universities. In *Osmania University* a matter was raised before the Supreme Court wherein a parallel body to UGC was created under Commissionerate Act enacted by the State of Andhra Pradesh. In this case, the court held that such an Act was beyond legislative competence of the State as it contravened with Entry 66 of Union List and hence declared it null and void.

Another interesting issue was raised in *Kr. Nivedita Jain* case wherein the Apex Court refused to include 'selection of candidates to medical colleges' as a facet of determination of standard in institution for higher education under Entry 66. Subsequently in *Preeti Srivastava,* it was held by the Apex Court that the norms of admission to institutions for higher education have a direct impact on the standard of education, and if the students with low qualifying marks are admitted, it would necessarily affect the standard of education. However, in the same case the court also clarified the two points in unequivocal terms- *first*, under Entry 25 State has power to 'control' education including medical education, but only till the time a Union legislation is not enacted on the same matter; and *secondly,* the court while controlling education cannot encroach upon the standard in institution for higher education as it is an absolute domain of Union under Entry 66 of List-I (Union List).

Sustaining Mental Health-Care in India:
Learning from Cross-Jurisdictional Model

Mercy K. Khaute[*]

Introduction

A significant proportion of global ailments are constituted by disorders impacting mental health of individuals. The World Health Organisation (WHO) defines mental health as a state of well-being in which the individual realises his or her own abilities, can cope with the normal stresses of life, can work productively and fruitfully, and is able to contribute to his or her community.[1] For long, the WHO has emphasised on the need for nation states to develop programs focusing on aspects of mental health, in tandem with physical health improvements. Significantly, in 2001, WHO published its World Health Report on the theme of mental health.[2] More recently WHO's Mental Health Atlas 2017 has consolidated a comprehensive overview of the position of mental health services across the globe.

Despite these there has been a noticeable absence of requisite training and funding in the field of mental healthcare in several nations that reflect the lack of importance ascribed to this vital subject. Conservative and unsupportive societal mindsets, prevalence of age old misconceptions, fear of stigmatisation and the related shame are some of the factors closer to home that could be credited for obstructing the route of reformation, treatment and rehabilitation of persons inflicted with mental illness in India. It is thus unsurprising that while the World Health Organisation had included mental health as an integral part of

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[1] World Health Organisation, 'The World Health Report 2001 - Mental Health: New Understanding, New Hope', *available at:* https://www.who.int/whr/2001/en/ (last visited Dec 12, 2019).

[2] *Id*.

health back in 1978, globally this aspect of health has failed to receive the required attention until recent years.

Efforts at breaching the subject of mental health, particularly in the international sphere though remain noteworthy. The World Health Assembly adopted the Global Strategy to Reduce the Harmful Use of Alcohol in 2010 and the Comprehensive Mental Health Action Plan in 2013. These documents are significant, but more so because they helped to pave the route for the inclusion of mental health and substance abuse in the Sustainable Development Goals (SDGs). As mental health and substance abuse are often correlated, but very poorly resourced at present, programs meant to address these together are arguably more likely to have an impact on communities across the globe in comparison to isolated efforts to address each issue. Through the SDGs these issues have now become part of national developmental plans and health agendas at both bilateral and multilateral levels of cooperation. This has in turn ensured that millions of people suffering from mental disorders can gradually receive the help that they have long deserved.

Within the health goal in the SDGs, one target is related to mental health and substance abuse. Target 3.4 addresses the issue of premature mortality from non-communicable diseases and aims for a reduction of the same by 'one third through prevention and treatment and *promotion of mental health and wellbeing*'.[3] In this context Director-General of the WHO Dr Margaret Chan's statement that[4] 'the inclusion of non-communicable diseases under the health goal is a historical turning' is significant also, given that mental disorders are a key constituent of this category.

It is important to keep in mind that the Sustainable Development Goals, also known as the Global Goals, were adopted by all member States of the United Nations and call for universal collective actions on various fronts including the field of human health. The SDGs act analogous to a developmental blueprint and have consequently laid down the

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[3] *Id*., Target 3.4 requests that countries: 'By 2030, reduce by one third premature mortality from non-communicable diseases through prevention and treatment and promote mental health and well-being.' About the Sustainable Development Goals - United Nations Sustainable Development, *available at:* https://www.un.org/sustainabledevelopment/sustainable-development-goals/ (last visited Dec 12, 2019).

[4] *Id*.

foundational aspirations based on which many subsequent national and international plans has been designed. It is the SDGs which for the first time have emphatically called upon world leaders, not as a request, but as a mandate, to direct their attention onto mental health concerns, the very vital yet neglected aspect of health, in order to secure a holistically healthy population, and more importantly a stronger workforce. This is indeed a very welcoming move and rightfully acknowledged by the Secretary-General of the United Nations Mr. Ban Ki-moon who observed, '…the new agenda is a promise by leaders to all people everywhere. It is a universal, integrated and transformative vision for a better world.'[5]

Following up on the SDG target of promoting mental health has been prioritised in many parts of the world including the two most populous states in the world where action was evidently necessitated given that the Global Burden of Disease 2013 study revealed that India and China added together represented one third of the global burden on mental health disorders.[6] The first Mental Health Law of People's Republic of China came into effect on May 1, 2013. Neighbouring states of India and Bangladesh enacted legislation on the subject subsequently in 2017 and 2018 respectively.

Considering that mental illnesses and disorders are fast emerging as the biggest health challenges of our time, sincere efforts made by the individual states at the domestic front and world community at large are of the urgent need lest this issue irreversibly consume much of our human resource, without whom no development can ever be sustainable or worth the efforts.

Mental Healthcare: The Chinese Perspective

China's journey in pursuance of its aspiration to achieve the SDGs has been remarkable, especially in terms of ensuring a wholesome development of all quarters of its society. The enthusiasm to develop its human resource on an integrated and comprehensive community based mental health system approach led China to commence the 686

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[5] Goal 3: Sustainable Development Knowledge Platform, *available at:* https://sustainabledevelopment.un.org/sdg3 (last visited December 12, 2019).

[6] Global Burden of diseases, injuries and risk factors for young adults, *available at:* https://doi.org/10.1016/S0140-6736(16)00648-6 (last visited Dec 29, 2019).

Programme in 2004 with an investment of 6.86 million Yuan, marching forward towards developing administrative support and infrastructure for inclusive hospital and community services for persons with serious mental illness. Following the SARS epidemic, the '686 Project' also called the 'Central Government Support for the Local Management and Treatment of Serious Mental Illness Project' reaffirmed China's commitment to rebuild its public health infrastructure resulting in the scaling up of community mental health services in the country. This ushered in multifunctional treatment teams into both full-time or part time, taking the services directly into interiors of the villages and urban communities. Constructing multifunctional teams in and within the community constituted a greater commitment of resources.

The programme has made recovery and rehabilitation the central theme to clinical activities of the core multifunctional teams and has encouraged alliances with various international expert groups for furtherance of its objectives. It has consistently supported practices of cultivating skills through training and providing materials to teachers to facilitate the availability of a wide variety of courses for all types of personnel who either administer or provide services for the mentally ill. Professor Ma[7] in her short report on the programme has highlighted its observance of the perceived significance of building a 'rich database of experiences in community-based health reform' in China. The program appears to have achieved several objectives though the most major impact of the programme has arguably been the ushering in of the broad reform programmes of mental health care in China, on the lines of community-based programs in Australia, the United States and Europe.

The Chinese Mental Health Law as it stands today standardises mental health care services, obligating general hospitals to set up special outpatient clinics and provide counselling, resultantly giving rise to a need for the training of more doctors in specialisations related to mental healthcare.[8] Under the Law, undergoing of examination of mental

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[7] PMC, E., 'Integration of hospital and community services—the '686 Project'—is a crucial component in the reform of China's mental health services', *available at:* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4198849/ (last visited Dec 29, 2019).

[8] Chen, H., Phillips, M. et al, *Mental Health Law of the People's Republic of China (English* translation *with annotations): Translated and annotated version of China's*

health has been made a voluntary choice, except when the person concerned is a danger to himself or others. Only registered psychiatrists are competent to commit people to hospitals for treatment with diagnosis of a severe mental illness. Additionally, the right to appeal in case of any breach of the law has further instilled faith in the government, viewed to be having a healthy outlook towards mental health. With a view to moving forward, the Chinese State has been attempting to overcome societal peculiarities marked by age old traditions and stigma concerning mental disorders through specific efforts against long term prejudices and discrimination against the mentally ill which had earlier caused it to lag its Western counterparts.

The 2015-2020 National Planning Guideline for the Healthcare Service System[9] of China contains key measures for mental health services. The inclusion of specifications for the treatment and care of patients with serious mental disorders, improvement of specialised mental health services and systems with active participation of community management services, and the dissemination of mental health education through improved system of social coordination are significant steps in the right direction. One of the other main objectives of this planning document is to facilitate capacity building through the licensing of 40,000 psychiatrists (and assistant psychiatrists) by 2020. This measure is meant to ensure the recognition of the role of psychiatrists and aid in removing the social stigma attached to mental illness.

The Mental Health Law also mandates undertaking of mental health work commissioned by the national China Disabled Persons' Federation[10] and its local branches. According to the Law, rural village committees and urban neighbourhood committees are to undertake mental health work and assist the government in their respective communities in pursuance of such work. This is in furtherance of the state's inclusive approach to the subject matter of mental health. The State has further widened up the ambit of mental health related services

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new Mental Health Law (December 2012), *available at:* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4198897/ (last visited Dec 12, 2019).

[9] Xiong, W. & Phillips, M.R. *Translated and annotated version of the 2015-2020 National Mental Health Work Plan of the People's Republic of China* (February 25, 2016), *available at:* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4984605/ (last visited Dec 12, 2019).

[10] *Supra* n.8, art .10.

by legally permitting various players like the Trade Union, the Communist Youth League, the Women's Federation, the Red Cross, the Science and Technology Association, among other organisations to be involved in aspects related to the field of mental health. The Law seeks to draw active participation of various stakeholders with scope for honours and rewards to be awarded to organisations and individuals with outstanding contributions to mental health work.

To further enhance encouragement and support[11]the training of specialised personnel in mental health, provisions are present under the Law for the protection of the legal rights and interests of mental health workers, and the strengthening of the professional mental health workforce. An integrated approach of scientific research in mental health and development of modern medical science, traditional Chinese medicine, ethnic medicine, and psychological science[12] has also been incorporated through encouragement of international exchange and collaboration in the area of mental health. Regard is also made to ensuring requisite administrative support with Article 12 calling upon all levels of the government and relevant administrative departments at the county level and above to extend support to voluntary mental health services.

As put forth by Bin Xie,[13] viewed from the perspective of supply side, the model of China's mental health services is bound to usher in major transformations encompassing more diversified multi professional and personalised participation, increased patient centric social support projects focused on alleviation of burden of diseases and wholesome education and awareness of mental healthcare. The endeavours have not been without their complexities given the width of China's geography and huge population marked by the regional differences in culture and practices across the country.

From 2010 to 2012, China invested approximately 9.1 billion renminbi in the expansion of buildings and operations for health institutions in the country and about 1.45 billion renminbi in purchasing equipment

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[11] *Supra* n. 8, art. 11.

[12] *Supra* n. 8, art. 12.

[13] Xie, B., *Strategic Mental Health Planning and its Practice in China: Retrospect and Prospect*, (April 25, 2017), *available at:* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5518260/ (last visited December 12, 2019).

necessary for specialised services. With the improvement of patients' protection through welfare policies such as financial subsidies and health insurance, there was a rise in the specialised medical services' financing level leading to an improvement in treatment services. In this midst, to augment the professional proficiency of psychiatric teams there were standardised trainings for physicians followed by resident physicians in all corners of China.[14] These measures laid the foundation for the mental health service system construct that came to regard psychiatric hospitals as the centre of the healthcare system.

Some other steps also contributed towards the development of the Chinese model. The Mental Health Joint Conference was held in 2007. Progress on the Mental Health Centre for Disease Control and Prevention and the community management program for severe mental disorders served as the hallmark for the Chinese model and the community-based mental health service network began to lay down its framework from 2010. This resulted in upgrading of the community-based treatment. Ultimately all legislative and administrative ministrations resulted in two rounds of special planning in mental health in 2002-2010 and 2008-2015 during which various departments and social groups began to form the rough framework for mental health management and services.

China's model of mental healthcare appears to be structurally robust and in sync with the position of the World Economic Forum that has rightfully observed that investments in mental healthcare go beyond saving and improving countless lives. It also perhaps takes a cue from the World Bank which has notably beckoned interventions on mental healthcare that are feasible, affordable, cost-effective and scalable in all economic settings. Additionally, in 2013, the WHO had suggested that the best approach, should be one that is based on a multi-sectoral strategy, combining universal and targeted interventions for the promotion and prevention of mental disorders, thereby reducing stigmatisation, discrimination and violations of human rights, aspects which the Chinese approach appears to have closely mirrored.

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[14] *Id*.

A Canadian Overview of Mental Healthcare Law

The Canada Health Act, 1984 was enacted with the objective of ensuring access to healthcare without any barriers and to promote overall wellbeing, both mental and physical, of Canadians.[15] The 1984 though do not specifically constitute the governing text of mental healthcare in the nation. The mental healthcare system in Canada is premised on a set of Acts, with each respectively governing one among its territories and provinces. This is because each province and territory is responsible for developing its own laws regarding healthcare. Although consensual admission of patients is encouraged under the resultant cumulative framework that emerges, provisions also exist within the laws providing for involuntary committal, subject to fulfilment of specified requirements. Each jurisdiction prescribes its own understanding of the term 'mental disorder'.

Serious regard is given to the aspect of rights of patients who are committed for the purpose of undergoing psychiatric treatment. In general, all the mental health legislations are mandatorily required to be in consonance with the Canadian Charter of Rights and Freedoms. Apart from that, the various Acts also lay down a range of rights, which may be available to a committed patient depending on the governing jurisdiction. These include right of detention, right of consulting legal counsel, right of appeal for release and right of refusal of treatment. These rights are not always absolute.[16] For instance, in British Columbia, in case a committed patient refuse to undergo treatment the medical director of the psychiatric facility may provide consent to commence treatment.

Advanced directives in relation to medical care are also dealt with under the provincial mental health laws.[17] The approach to such directives is not common across the board. If the advance directive of a patient committed to a facility in Ontario contains a refusal to psychiatric treatment, it must be respected. On the other hand, advanced directives are not given such absolute regard in all provinces.

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[15] Canada Health Act, 1985, Preamble.

[16] Richard L O'Reilly & John E Gray, *Canada's Mental Health legislation*,11(3) *International Psychiatry*, 65-67 (August 2014), *available at:* https://www.ncbi.nlm.nih.gov /pmc/articles/PMC6735142/ (last visited Dec 12, 2019).

[17] *Id*.

In Manitoba, it is required that the directive of the individual should be adhered to till the point that it endangers the health of the patient. On the other hand, in Saskatchewan, the attending medical professionals may consider the contents of an advanced directive containing a refusal to psychiatric treatment in the process of their decision-making regarding the course of action for the committed patient, but they are not specifically bound by its contents.

There are two prevalent models which are applicable in different states of Canada for the making of decisions for committed patients. The provinces of Quebec, British Columbia, Newfoundland, Saskatchewan and New Brunswick follow the state model under which an appointee of the state is provided with the power to authorise treatment.[18] In the other model, also called the private model, the decisions regarding treatment of the patient are taken by a relative, guardian or other person appointed as a substitute decision maker by the patient during a period of competency. State authorities in Canada acknowledge that there exist several social impediments in the path of accessing mental healthcare, such as stigma concerning mental illness and stereotypes which perceive persons with mental disorders as specifically violent.[19] It has been acknowledged that there is a need for educating not just the masses, but also authorities like correctional officers and police personnel regarding mental health and associated illnesses.

The Mental Health Commission of Canada has undertaken dedicated efforts for educating state officials regarding matters concerning mental health as well as worked on understanding the nature of interactions that mentally ill persons have with Canadian justice system through its specific projects. Specifically in association with the Canadian Association of Chiefs of Police, it has developed TEMPO, short for Training and Education about Mental Illness for Police Organisations, as a framework to train police to understand mental health issues and

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[18] John E. Gray & Richard L O'Reilly, *Clinically Significant Differences Among Canadian Mental Health Acts*, 46(4) THE CANADIAN JOURNAL OF PSYCHIATRY (May 2001).

[19] Mental Health Commission of Canada, *Mental Health and the Law*, *available at:* https://www.mentalhealthcommission.ca/English/what-we-do/mental-health-and-law (last visited Dec 12, 2019).

respond appropriately to them.[20] The National Trajectory Project of the Mental Health Commission of Canada seeks to study persons declared as not criminally responsible due to a mental disorder in Ontario, Quebec and British Columbia in order to gauge their interactions with the criminal justice system.[21]

The South African Approach to Mental Healthcare Legislation

A study estimated that in the 2016-17 period, South African government incurred public expenditure of approximately US $615.3 million pertaining to mental healthcare.[22] Yet the impact of such spending may be severely limited given that wide disparities exist between the availability of mental health services between insured and uninsured persons. Significantly, within this same period, only up to 7.35% of uninsured persons requiring mental health services were able to avail of the same. Additionally, the South African mental healthcare services are also plagued by issues of poor infrastructure, lack of adequate number of trained professionals and limited supply of necessary medicines.

The mental health policies and awareness generation endeavours are supervised by the National Department of Health working alongside the National Directorate: Mental Health and Substance Abuse.[23] On the legislative front, the main documents which constitute the mental healthcare framework in South Africa are the Mental Healthcare Act 2002, Mental Health Policy Framework ('MHPF') for SA and the Strategic Plan 2013 - 2020. The Policy Framework is significant in its approach as it seeks to tackle eight distinct areas including intersectoral

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[20] Mental Health Commission of Canada, *TEMPO: Police Interactions - A report towards improving interactions between police and people living with mental health problem*, *available at* https://www.mentalhealthcommission.ca/English /media/3677 (last visited Dec 12, 2019).

[21] Mental Health Commission of Canada, *The National Trajectory Project*, *available at:* https://www.mentalhealthcommission.ca/English/media/3674 (last visited Dec 12, 2019).

[22] Sumaiyah Docrat, Donela Besada, et al, *Mental health system Costs, Resources and Constraints in South Africa: A National* Survey, 34(9) HEALTH POLICY AND PLANNING 706-719(2019) *available at:* https://academic.oup.com/heapol /article/34/9/706/5572608 (last visited Dec 12, 2019).

[23] World Health Organisation, WHO-AIMS Report on Mental Health System in South Africa (September 2007).

collaboration, developing human resources, institutional and infrastructural capacities in relation to mental healthcare and advocacy for promotion of mental health. The Mental Healthcare Act 2002,[24] though remains the most important legal instrument regarding the dealing of matters concerning mental healthcare in the country.

The 2002 Act was preceded by the Mental Health Act, 1973. Though passed in 2002, the Act came into effect only two years later in 2004. The new 2002 Act was drafted with in keeping with the key principles prescribed by the World Health Organisation in relation to the framing of laws on mental healthcare. Some have credited this Act with ushering in an era of patient centric psychiatric care within South African mental healthcare model.[25] Peculiarly, under the Act, an individual seeking mental healthcare is defined to be a 'mental health care user'. Apart from this general category, the Act also defines other users who are within its ambit including mentally ill prisoners, assisted mental health care users and involuntary mental health care users.

There are some broad objectives upon which the Act is premised. *Firstly*, it seeks to regulate the system of mental healthcare to ensure that services are provided equitably and efficiently, keeping in mind the best interests of the mental health care users. *Secondly*, it attempts to integrate mental healthcare within the existing family of general health services. *Thirdly*, it focuses on ensuring accessibility of mental health services. *Fourthly*, it seeks to outline the rights and obligations of the users as well as their mental health care providers. *Finally*, it also seems to address the way the properties of mentally ill or profoundly intellectually disabled persons are to be dealt with by law courts.

The Act makes important prescriptions regarding the role of health establishments in the provision of mental health care. On the same note, authorisation from a mental health practitioner is also mandated for admitting a user for upwards of two months for the purpose of providing inpatient secondary healthcare.

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[24] Mental Healthcare Act 2002.

[25] Christopher Paul Szabo & Sean Zalman Kalisk, *Mental Health and the Law: A South African Perspective*, 14(3) BJ PSYCH INTERNATIONAL, 69-71, *available at:* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5618904/ (last visited Dec 12, 2019).

The earlier 1973 law was focused on control of the mentally ill and viewed them as a source of concern for the welfare of the society. Since the Act was not focused on benefiting those suffering from mental health issues, but instead to protect the society from such individuals, it permitted sending individuals to certified psychiatric facilities based on a reasonable degree of suspicion regarding mental illness. This provision was widely exploited during the tenure of the Act and at times even used to settle vendetta or silence dissenters through interference with the human rights and personal liberties of certified patients. In contrast to the 1973 Act that inadvertently facilitated violation of the rights of several patients, the 2002 Act explicitly provides that the rights of mental health care users must be respected. It also provides that the care and treatment provided to a mental health care user must be proportionate and as minimally intrusive as possible. It also delineates several other key rights for users including, but not limited to right to representation, right against unfair discrimination and right to knowledge of rights. At the same time, it obligates mental health care providers to ensure maintenance of confidentiality and protect users from any form of exploitation or abuse. An important provision under the 2002 Act is requirement of 72 hour assessment of a user in case of an application for involuntary care of an individual. It is based on the assessment conducted by a mental health care practitioner and another medical practitioner over this 72 hour period that the head of the health establishment is required to undertake a decision regarding whether involuntary care is required and thereafter also determine whether to discharge the user or seek permission from the Mental Health Review Board for further involuntary care.

Although on paper, the idea of such an observational period appears to be sound, it has not translated very smoothly at the ground level as reflected by a study of district hospitals in South Africa.[26] It has been observed that several mental health care users who are subjected to 72 hour assessment are heavily sedated thereby reducing the scope of proper review of their condition. In other cases, inadequate sedation of particularly agitated users has been noted to make them difficult to

[26] J.K. Burns, *Implementation of the Mental Health Care Act (2002) at District Hospitals in South Africa:* Translating *Principles into Practice*, 98(1) SOUTH AFRICAN MEDICAL JOURNAL (2008), *available at:* http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S0256-95742008000100023 (last visited Dec 12, 2019).

handle causing an unsafe situation for the medical practitioners working with them. In addition to this, it has been observed that there have been instances relating to inadequate observation of the medical condition of the user resulting in faulty assessment and inappropriate dosage of medications administered during the 72 hour period leading to side effects on a later date.

Despite the many goals envisioned under the 2002 Act and the MHPF, the state of mental healthcare in South Africa is far from perfect. Several issues have remained which continue to pose impediments in the path of the mentally ill receiving quality care. Relevant issues which require to be addressed are proper resource allocation, training of adequate medical professionals in field of mental healthcare, developing community programmes for ensuring better access to mental health services and developing systems for continuity of care to the mentally ill.[27] Lack of adequate supervision regarding use of invested capital in mental healthcare, existence of informational gaps in healthcare data sets and severe treatment gap of among the mentally ill are some other issues which plague the South African system of mental healthcare.

Mental Healthcare Law in India

The Indian Lunacy Act 1912 ('ILA') was the sole legislation that governed mental health in India. Post-independence in 1982, India adopted a Mental Health Program ('MHP'),[28] one of the first of its kind among developing nations. Unfortunately several logistical and broader circumstantial hurdles lead to underwhelming performance and eventual failure of the implementation of the programme.[29] Since the WHO's declaration on the importance of the subject of mental health, India has witnessed rejuvenated interests by various

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[27] C. Lund & I. Petersen, *Mental Health Services in South Africa: Taking Stock*, 15(6) AFR J PSYCHIATRY (JOHANNESBG). 402-405. 2012), *available at:* https://pubmed.ncbi.nlm.nih.gov/23160613/ (last visited Dec 12, 2019).

[28] Wig, N.N., & Murthy, S. R., *The Birth of National Mental Health Program for India* (2015), *available at:* http://www.indianjpsychiatry.org/article.asp?issn=0019-5545;year=2015;volume=57;issue=3;spage=315;epage=319;aulast=Wig. (last visited Dec 12, 2019).

[29] Goel, D.S., *Why Mental Health Services in low- and middle-income countries are under-resourced, Underperforming: An Indian Perspective (2011*), *available at:* https://www.ncbi.nlm.nih.gov/pubmed/21668055 (last visited Dec 12, 2019).

stakeholders.[30]This lead to revamping of the MHP to a large extent,[31] for instance now the District MHP is based on six key features ranging from life course, recovery, equity, evidence based, health systems, and right based.[32] The MHP developments culminated in the formulation of the first mental health policy[33] formed in tandem with the human rights covenants. These steps in turn cumulatively contributed to the enactment of Mental Health Care Act in 2017.

The Mental Health Act ('MHA'), 1987 was enacted and adopted in 1993 and served to repeal the ILA, 1912. The main objective of the MHA was to establish Central and State authorities for licensing and supervision of the psychiatric hospitals, custody of mentally ill patients unable to fend for themselves or persons who due to their mental health status may have posed a threat to others around them and, to provide legal aid to mentally ill criminals. Under the 1987 MHA, provisions for simplification of procedures on admission and discharge of voluntary patients were inserted. The Act protected the human rights of mentally ill patients while also dealing with subjects such as cost of their maintenance and their properties. It strongly prohibited any kind of research conducted on mentally ill persons.

However, despite the efforts made to redress the emerging issues the MHA 1987 failed to effectively reflect the government policy as envisioned under the Mental Health Policy of 1987. It also lacked reflections on any discussion of the Mental Health Programme of 1987 altogether. Further, the Act was drawn without consulting members of the Indian Psychiatric Society, which added to its list of serious drawbacks. Additionally, it also failed to highlight the importance of family and community psychiatry, which are essential in dealing with persons with mental health issues. The most appalling shortcoming of

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[30] Patel, V., & Copeland, J., *The Great Push for Mental Health: Why it matters for India*, *available at:* http://www.ijmr.org.in/article.asp?issn=0971-5916;year=2011;volume=134;issue=4;spage=407;epage=409;aulast=Patel (last visited Dec 12, 2019).

[31] Policy Group DMHP, *XII Plan District Mental Health Programme (June 29, 2012*), *available at:* https://mhpolicy.files.wordpress.com/2012/07/final-dmhp-design-xii-plan2.pdf(last visited Dec 12, 2019).

[32] *Supra* n. 8.

[33] National Health Policy 2015 Draft, *available at:* https://www.nhp.gov.in/sites/default/files/pdf/draft_national_health_policy_2015.pdf (last visited Dec 12, 2019).

the Act though was the absence of guidelines and provisions addressing emergency or crisis situations that would have required immediate help for the patient or members of the family. In retrospect it can be said that the guideline of the WHO was not incorporated within the MHA.

The Mental Healthcare Act 2017

Mental disorders have been identified as global barriers to sustainable development. Prevalence of ill mental health within their populations has a direct adverse impact on the human resources thereby preventing countries from achieving the SDGs and also stunting economic growth. Coupled with the need for a comprehensive legislation and commitment to the SDGs, it was realised that the subject of mental health needed to be looked at as not a theme that is taken up once in a decade, but instead seen as a process which must evolve with time.[34] In cognisance of the same, post the adoption of the United Nations Convention on Rights of Persons with Disabilities ('CRPD') in 2008, the Mental Healthcare Act 2017 was enacted in India, having been drafted on the lines of the CRPD and its optional protocol.[35]Unlike the Act of 1987, the development of this Act from the Bill stage itself was participatory and the legislative process witnessed active engagement from various stakeholders concerned and involved in serving persons with mental health and related issues.[36]

Progressive attempts have been made in various regards under the 2017 Act. One such effort is discernible from the definitional clauses where the definition of mental illness has been broadly formulated to encompass various forms and manifestations of mental disorder of thinking, mood, perception, orientation or memory which grossly impair judgment, behaviour and/or capacity to recognise reality or ability to meet the ordinary demands of life. Mental conditions associated with alcohol and drug abuse are also included within the

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[34] Trivedi, J.K., &Jilani, A. Q., *Pathway of Psychiatric Care (2011)*, *available at:* http://www.indianjpsychiatry.org/article.asp?issn=0019-5545;year=2011;volume=53;issue=2;spage=97;epage=98;aulast=Trivedi (last visited Dec 12, 2019).

[35] The Mental Healthcare Act 2017 (Act No. 10 of 2017).

[36] Rao, G. P., Math, S. B., & Sathyanarayana, T. S., *Mental Health Care Bill, 2016: A Boon or Bane*, *available at:* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5100113/ (last visited Dec 12, 2019).

scope of the Act.[37] It is thus unfortunate that the Act has entirely missed out on including within its purview 'mental retardation', a developmental disability due to arrested or incomplete development of the mind of a person, specially characterised by sub-normality of intelligence which is well below the average and significant limitations in the day to day living skills also referred to as adaptive functioning.[38]

The National Mental Health Survey, 2016 reported that close to fourteen percent of India's population required active mental health interventions and about two percent suffered from severe mental disorders. Despite these reported findings, it is important to remember that there remain vast numbers suffering from mental health conditions who are undiagnosed. Apart from other factors, it is argued that the stigmatisation attached to the mentally illness in Indian society contributes significantly towards preventing those in need of mental healthcare from reaching out for help. It is therefore unsurprising that of those that receive a diagnosis, few receive treatment or medical interventions of any form.

A study conducted for the National Care of Medical Health, as reported by WHO revealed that at least six percent of the Indian population suffered from some form of mental illness.[39] Studies have assessed that at some stage in life, some form of mental disorder will affect one in every fourth person. Further in December 2017,[40] President Ram Nath Kovind warned of a potential 'mental health epidemic' in India, casting a light on one of India's most major, but severely neglected public health concerns. The situation requires urgent attention particularly given that people with mental disorders are most vulnerable to abuse and

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[37] Supra n.24, s. 2 (r).

[38] Wikipedia, *Developmental Disability* (December 12, 2019), *available at:* https://en.wikipedia.org/wiki/Developmental_disability (last visited Dec12, 2019).

[39] Desk, I. T. W., *India is the most depressed country in the world* (November 1, 2019), *available at:* https://www.indiatoday.in/education-today/gk-current-affairs/story/india-is-the-most-depressed-country-in-the-world-mental-health-day-2018-1360096-2018-10-10 (last visited Dec 12, 2019).

[40] Parry, N., *Mental Health* (April 2, 2019), *available at:* https://www.healthissuesindia.com/mental-health/ (last visited Dec 12, 2019).

violation of their rights.[41] It is encouraging to note that at the highest levels, India is beginning to acknowledge mental health as a legitimate public health concern, and more and more public bodies are beginning to acknowledge the concerns of the mentally ill. The challenges that exist for the nascent Mental Healthcare Act 2017 though are far from over. It is currently too early to substantively predict about the potential success or failure of the Act. Careful study of ground realities over the next few years is thus arguably crucial to discern the trajectory that India's mental healthcare landscape will take.

Assessing the Ground Reality

In order to develop a lucid understanding of the essence of mental health in the context of sustainability, the author attempted a general survey to determine the concerns associated directly and indirectly to the subject in the city of New Delhi. A total of 192 subjects: 32 senior officers serving at different ministries under the Government of India, 40 advocates practicing at the High Court of Delhi and the Supreme Court of India, 15 medical social workers, 15 mental health professionals, 20 medical doctors, 40 students pursuing master's in psychology and 30 corporate professionals were interviewed and interacted with[42] during the course of this research in the period between July to December 2019.

All interviewed persons cited *lack of trained medical professionals* and *funds* in mental healthcare services as the major factors contributing to the gap in mental healthcare facilities, in respect of both treatment and awareness. Notably, it was found that female subjects across the different categories remained more anxious than male subjects regarding the lack of trained medical professionals. Further, as per the statistical analysis, has been revealed, trained medical professionals expressed considerable unease with the existing state of their profession. The author quizzed them, regarding possible reasons that in

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[41] MAth, S. B., Murthi, P., &Chandrashekar, C. R..*Mental Health Act (1987): Need for a Paradigm shift from custodial to community Care, available at:* https://ijmr.org.in /article.asp?issn=0971-5916;year=2011;volume=133;issue=3;spage=246;epage= 249;aulast=Math (last visited Dec 12, 2019).

[42] The author had carried out the survey over visits to the mental healthcare service units, under the oath of secrecy for not revealing the identities of the interviewed subjects.

their opinion were contributing to such considerations. The most typical causes which were recognised were inadequate recognition to the professionals functioning within the realm of the general healthcare system, lack of facilities accorded to them in the hospitals and poor infrastructure.

110 out of the 192 subjects pointed out that the *stigma, fear and shame* attached to mental health, also encompassing religious beliefs, could be cited as the main factor behind patients and their relatives not readily approaching the formal setup of mental healthcare centres. In addition, *long duration of treatment, high chances of relapse and loss of income* were said to have been looked upon as the most challenging impediments in the path of provision of mental healthcare service to patients meant to avail of the same. These causes received an almost unanimous response from all categories of the subjects interviewed. While issues pertaining to *gender* were significant from the point of women reaching out for professional healthcare service, 10 medical social workers maintained that they did not see any gender bias amongst their patients or the relatives. 18 medical professionals however mentioned the existence of higher number of male patients than female. Further, 37 out of the 40 students interviewed stated that gender could be a crucial factor in seeking out help for mental health concerns, more particularly because of skewed gender ratios in settings, which in their respective case was potentially constituted by the fact that 95% of the class composition of their course was female.

On the question of *whether India should focus more on mental healthcare in terms of sustainability,* 29 senior officers were of the view that India had already begun to give importance to the subject since the 1990s though a lot more must be done in terms of developing infrastructure. 03 officers lamented that there was not much that could be done by the government as an external authority because mental health is an extremely personal issue. 19 out of the 20 corporate professionals opined that the issue of mental health should be cautiously handled as more youths are joining the workforce. Advocates unequivocally asserted that the enactment of the Act in 2017 itself is a proof on the importance given to mental health in India; the law is adequately comprehensive to address issues or doubts if any.

There were varied responses to a query seeking suggestions for sustainable efforts towards making mental health more inclusive. The most common response suggested an increase in the number of professionals in the field of mental health, attracting talent with attractive emoluments. Other recommendations were regarding development of better infrastructure, and creation of awareness campaigns involving celebrities and religious leaders to remove the stigma attached to mental health. Collectively, the interviewees echoed that these efforts were essential, and the time was ripe to raise the bars for India's mental healthcare system. The senior officers held the view that the government's welfare policies are in many ways channelled towards income guarantee so as not to hamper access to healthcare services. The advocates held that the government must issue directives to insurance companies to effectively cover mental illness within their cover. Medical professionals reflected that the rising number of recorded cases of mental disorders is in itself an indication of the need to shift more attention to mental health. The medical social workers expressed their concern over the lack of licensing and registration accorded to them as an indication of the lackadaisical attitude of the government.

Analysis of the survey reflects that mental healthcare in India has received importance in today's time. However, there is a lot more that is required to be done as loopholes in the system, especially absence of robust monitoring is absent. The survey also demonstrates that non-licensing of medical social workers is another issue which needs to be addressed at the earliest, since they played a significant role in the service delivery.

Lessons from Overseas

In as much as there may be vast variations across the regions of India, China, South Africa and Canada, the common and biggest drawbacks between these nations are the existence of treatment gaps between the urban and rural regions because of inequities in the distribution of mental health resources, and variations in the implementation of mental health policies. With less than 1% of the national health-care budget allocated to mental health in both India and China, both human and financial resources for mental health are grossly inadequate. South Africa is slightly better positioned in this regard with 5% of total public

health expenditure being dedicated to mental health, but arguably still has a long way to go in terms of prioritisation. Looking to the West, the Canadian state invests 7.2% of health budget towards mental healthcare, but over time it appears to have channelised its funds into endeavours oriented towards equitable funding and addressing related risks such as suicide prevention. Although India has shown renewed commitment through its national programmes for community-oriented mental health care, progress in achieving coverage is far more substantial in the other nations studied. In comparison to the resilient action plans on mental health in these other nations, India's response to its similar mental health burden appears rather bleak.

Health Insurance

Health indicators in India have lagged economic progress due to low levels of public spending on health. This is largely due to the high out of pocket expenditure persons need to incur for availing health services. In this regard, experts have lamented that India should draw cautionary measures on health insurance from China. The method of reimbursing healthcare providers on a fee-for-service basis in China has led to a high margin of cost escalation, which the government is now trying to control. The Chinese insurance layer is broad, covering more than 95% of the population, yet some health services not reimbursed or only partly reimbursed, causing the Chinese citizens to make large out-of-pocket payments for them. In Canada too substantial costs may have to be borne by patients who opt for mental health services delivered through private practitioners such as counsellors, psychotherapists and psychologists. This is because several mental health services if not received within a hospital are not considered to be medically necessary, which is required for coverage under territorial and provincial health plans. The position in South Africa too is not too promising, despite the introduction of the National Health Insurance scheme meant to work on the goal of universal coverage, given that there have been limited attempts at comprehensively integrating mental health within the scheme's strategic scope.[43]

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[43] *The sums on mental health care in SA are 'not pretty*, October 16, 2019, *available at:* https://www.medicalbrief.co.za/archives/the-sums-on-mental-health-care-in-sa-are-not-pretty/ (last visited Dec 12, 2019)

The Insurance Regulatory and Development Authority of India has guidelines on standardisation of exclusions in health insurance contracts, which prohibit the exclusion of treatment of mental illness, stress or psychological disorders in health insurance policies.[44] The circular in this regard merely states that there should be no discrimination between mental and physical illnesses. This does not seem to hold much difference for insurers in terms of their underwriting decision. A standard health insurance policy pays for in-patient hospitalisation only. Outpatient treatment services which are availed are not covered within the schemes. This is problematic however given that only an exceedingly small portion of persons with mental illness actually need hospitalisation,[45] and most clinical treatments occur as part of outpatient facilities.

At this juncture the need of the hour is to formulate more government-sponsored health insurance schemes. The governments' flagship programme, Ayushman Bharat offers up to INR 5 lakhs insurance coverage and has seventeen packages relating to mental health disorders, which includes psychoactive substance use. However, this insurance facility has severe limitations as it is applicable to public sector hospitals only and not private hospitals whereas, for other medical disorders, it covers treatment in private hospitals as well.[46] A few state governments have also opted out of Ayushman Bharat citing their own health schemes.

The situation is worse off at the state level. Swasthya Sathi, the health insurance scheme of the Government of West Bengal offers coverage up to INR 5 lakhs per annum per family,[47], but the scheme has no provision

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[44] Guidelines on Standardisation of Exclusions in Health Insurance Contracts, Circular Ref: IRDAI/HLT/REG/CIR/177/09/2019 *available at:* https://www.irdai.gov.in /ADMINCMS/cms/whatsNew_Layout.aspx?page=PageNo3916&flag=1 (last visited Dec 12, 2019).

[45] Bhaskaran, D., *Health insurance plans to cover mental illness too,* but *will that help?* LIVE MINT, (August 20, 2018), *available at:* https://www.livemint.com /Money/o0pRqJbfCkMiaiPHRV0TSK/Health-plans-to-cover-mental-illness-too-but-will-that-help.html (last visited Dec 12, 2019).

[46] Home | Ayushman Bharat – PMJAY, *available at:* https://www.pmjay.gov.in/?page=7 (last visited Dec 12, 2019).

[47] Swasthya Sathi at a Glance, *available at:* https://swasthyasathi.gov.in/ (last visited Dec 12, 2019).

to cover mental illness. Aarogyasri Health Scheme of Telangana State Government covers up to 1 year post therapy for specified diseases and procedures, but also does not cover mental illness.[48] Similarly, Delhi Government's 'Quality Health for all' scheme does not mention mental disorders.[49] On the brighter side, Biju Swasthya Kalyan Yojna of the Odisha government covers the cost of treatment of psychiatric disorders in government hospitals.[50] However, the overall dismal coverage of mental health disorders under government health insurance schemes is disheartening. Given the rising figures of mental illness in India, it is only apt for government schemes to show the way forward by including the cost of outpatient department treatments within the scope of coverage and facilitate medical follow-up on mental disorders without discrimination as envisaged by Metal Health Care Act, 2017.

Multi- Organisational Participation

The Mental Health Law of the People's Republic of China, 2013[51] expressly encourages and calls upon various organisations to undertake and assist the government on mental health issues. Private psychiatric care in China grew at a compounded 20% annually to 2014, largely to treat common disorders like anxiety, depression, substance abuse and psychosis.[52] The 2015-2020 plan for mental health work in China set a goal to manage the conditions of more than 80 per cent of people with severe mental illnesses by 2020.[53] Today the demand for mental health care services exceeds supply, as there has been a major shift in the way

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[48] Aarogyasri Health Care Trust, *available at:* https://aarogyasri.telangana.gov.in/ (last visited Dec 12, 2019).

[49] *What is Arvind Kejriwal's 'Health for All' scheme in Delhi and how it will Benefit You*, *available at:* https://www.financialexpress.com/India-News. (last visited Dec 12, 2019).

[50] *Biju Swasthya Kalyan Yojana Odisha (BSKY), available at:* http://www.pmjandhanyojana.co.in/biju-swasthya-kalyan-odisha-naveen-care-health-insurance-scheme/ (last visited Dec 12, 2019).

[51] *Supra* n.8.

[52] PTI, 'Beijing opens first-ever private mental health clinic', *The Economic Times,* August 3, 2015, *available at:* https://economictimes.indiatimes.com/news/international/world-news/beijing-opens-first-ever-private-mental-healthclinic/articleshow/48328738.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cpp (last visited Dec 12, 2019).

[53] *Supra* n.9.

Chinese people have begun to think about mental health. 'People are increasingly aware of the need for treatment of those problems as society grows more prosperous.'[54] Psychiatric healthcare is viewed as a market with immense opportunities.[55] Among others, timely recognition of such an untapped market resulted in China's largest private mental health care operation Wenzhou Kangning Hospital.[56] The hospital as of date owns five centers and manages four others and has raised several millions for further expansion, thereby demonstrating how the private sector has the capacity to fulfil the gaps within public mental healthcare offerings while simultaneously profiting handsomely.

In South Africa, there had been large-scale deinstitutionalisation witnessed in terms of reduction of budgets for mental healthcare and capacity of hospitals specialising in mental health services. Unfortunately, adequate efforts were not made for developing community based mental health services at the time, resulting in severe gaps in the provision of mental healthcare. Consequently, the private sector has today become majorly involved at the stage of psychosocial rehabilitation, given that the nature of such services provided through the National Health department of the government vary from region to region. The gap is particularly witnessed in the rural areas and so private organisations are required to step in. Several of these non-governmental organisations are supplemented in their endeavours through grants from the Social Development department.

Data indicates that in 2015, the public and private sectors cumulatively spent approximately CA$15.8 billion on healthcare related to non-dementia disorders in Canada. Mental health services are made available by both public sector institutions and private players. Patients can choose to avail of services from either, but the nature of health plan

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[54] Laura He, *China's first listed psychiatric hospital set to break mental health taboo, and raise HK$681 million in the process*' SOUTH CHINA MORNING POST, (November 19, 2015), *available at:* https://www.scmp.com/business/china-business/article/1880563/chinas-first-listed-psychiatric-hospital-set-break-mental (last visited Dec 12, 2019).

[55] *Id.*

[56] Chen, S.-C.J., *Mental Health Care: China's Next Big Market*, (February 29, 2016), *available at:* https://www.forbes.com/sites/shuchingjeanchen/2016/01/26/mental-health-care-chinas-next-big-market/#2caf44b744fe (last visited Dec 12, 2019).

is usually a decisive factor. While the private sector entities offer a range of specialised facilities to address mental health concerns, many are unable to sustain visits to private professionals. In order to counterbalance this, the public mental healthcare infrastructure has been extensively developed to cater at all levels to primary, secondary and tertiary mental healthcare needs.

India can benefit from improving public healthcare facilities to the levels that the private sector has been offering in recent decades. This is important specifically given that most of the population is unable to afford private healthcare, but mental health is a concern for the lower stratums of Indian society. Creating a sustainable framework of mental health services demands a balance between affordability and quality of care, as well as ensuring accessibility of healthcare facilities to the maximum number of persons. The Indian public sector is, despite the government's optimistic vision, arguably still lagging the private sector which means that healthcare equity in terms of care for mental ailments is still far away.

Recognition and Rewards

Health literacy has been described as the 'ability to access, understand, and use the information to promote and maintain good health.'[57] Awareness and health literacy are two sides of the same coin. Mental health literacy is increasingly acknowledged as an important measure of the awareness. The ignorance and stigma surrounding mental health is so vastly entrenched that governmental authorities cannot tackle the same merely through their policy measures. Therefore, several governments have begun to engage with non-governmental organisations which help the State in taking the messages regarding mental health awareness to the masses. Several dedicated individuals, including influential persons, are also joining hands with the State to tackle concerning mental health.

Recognition and rewards of efforts in the field of mental health can help motivate various players into entering this area of health service towards raising awareness. This has taken different forms in the nations

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[57] Don Nutbeam, *Goals and targets for Australia's health in the year 2000 and beyond*, (Australian Government Publishing Service, 1993).

studied. According to Article 12 of the Mental Health Law in China,[58] organisations and individuals with outstanding contributions in the field are eligible to be honoured with recognitions. In Canada, as reflected in the Pan-Canadian Health Organisation Report titled 'Fit for Purpose', there has been an increasing recognition of the benefits of building partnerships between state health agencies and ground level organisations for bettering the mental health framework. In pursuance of this idea, there have been several key collaborations including, but not limited to between the Mental Health Commission of Canada and the Canadian Mental Health Association, and between the Government of the Northwest Territories and the Strongest Families Institute to improve the nature and availability of mental health services, which include not only administrative, but also monetary contributions made towards the mental health efforts of the organisations.

Recognition regarding the need for intersectoral collaborations is also found in South Africa where the National Mental Health Policy encourages cumulative efforts by state departments working alongside relevant non-governmental organisations. While such efforts have fructified to a certain extent at the national level, local levels are yet to witness such collaborations.[59] In comparison to these nations, despite several organisations doing good work in the field of mental health services, the government appears to be reluctant to involve them in its drive for better mental health, as demonstrated by successive instances of exclusively choosing National Institute of Mental Health and Neurosciences to undertake its envisioned plans.

Conclusion

Series of papers have proven that effective contact coverage for the most common mental and substance use based disorders is low and even worse in cases of severe mental illnesses. There exist huge variations across the regions under study, but the progress in achieving coverage of mental healthcare services is far more substantial in nations like China, South Africa and Canada when compared to India. It is proposed

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[58] *Supra* n.8

[59] Carrie Brooke-Sumner, Crick Lund & Inge Petersen, *Bridging the gap: investigating challenges and way forward for intersectoral provision of psychosocial rehabilitation in South Africa* 10 INTERNATIONAL JOURNAL MENTAL HEALTH SYSTEMS, 21 (2016).

that for improvement of the state of mental healthcare, both the supply-side and demand-side barriers related to the subject need to be addressed. Collaborating with community-based workers in a step-care framework on various tasks is one approach that is suitable to be scaled up, precisely through integration within national priority health programmes. Additionally, it is emphasised that India needs to make further investments to meet the increasing demand for services in mental healthcare through dynamic engagement with the community, reinforce service provider leadership and safeguard the content and delivery of mental health programmes, ensuring that they are culturally and contextually appropriate in their approach.

The Government of India has successively[60] given assurances about its intent to transform India's unsatisfactory healthcare system, culminating in various programmes focused on expanding health assurance for all. Notwithstanding substantial improvements in some health indicators in the past decade, India continues to contribute inexplicably to the global burden of disease. An enormous proportion of the population is impoverished because of high out-of-pocket health-care expenditures resulting in adverse consequences of poor quality of care. These existing impediments are exacerbated in the context of seeking mental healthcare, as services by seasoned mental health are largely concentrated in urban areas and often prohibitively expensive. To combat these issues, India needs to adopt a cohesive national health-care system centred on a strong public primary care system with an articulated supportive role for the private and local sectors. Accountability in terms of implementation of the law and state policies concerning mental healthcare needs to be ensured through governance by a strong regulatory framework.

Targeted poverty alleviation programmes should also factor in specific mental health recovery models in order to aid individuals from weak economic backgrounds suffering from mental disorders in the process of early identification, diagnosis, treatment and eventual recovery from mental health problems. Radical restructuring of the health-care system is needed to give rise to a framework that can engage in health equity and eliminate the prospect of impoverishment due to out-of-pocket

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[60] Vikram Patil, Rachana Parikh et al, *Assuring health coverage for all in India*, 386 (10011) THE LANCET, 2422-2435 (December 12, 2015)

expenditures for health services. In this regard balancing of the development of community and hospital based mental healthcare efforts should be considered Health policies need to warrant that more resources are advanced in the improvement of community based mental health care. The lack of manpower caused by limited number of trained mental health professionals, general physicians and primary health care providers in the country can be tackled through registration and licensing of medical social workers. It is fundamental to highlight the role of family caregivers in the context of community based mental health services.

Besides ensuring the availability of requisite medication, effectual psychosocial interventions such as anti-stigma interventions should be developed rigorously to advance mental health care and augment the quality of mental health services. Use of social media through interactive content has to some extent succeeded in educating the masses on the normalcy of mental illness. Early education as part of the school level curriculum, counseling centers in wellness institutions and sustained outreach aimed at debunking societal myths regarding mental disorders are other means which can further the need of mass awareness and de-stigmatisation. Finally, teams of multidisciplinary professionals (e.g., nurses, social workers and medical and psychology students) should be established and trained to provide further support for high quality mental health services.

Mental health-related issues have long been overlooked.[61] The condition is particularly dismal in third world nations like India, which have historically had relatively weak frameworks for addressing mental health issues. Most low and middle-income nations are reported to have spent <2% of health budget on the treatment and prevention of mental disorders. More than 80% of these funds are utilised in mental hospitals.[62] In 2004, Mental Disorders accounted for 13% of global disease burden. About one third of this disease burden (i.e., overall 4.3%) was due to depression, which alone is now expected to be number

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[61] Horton, R., *Launching a new movement for Mental Health*,370 (9590) THE LANCET, 806 (2007).

[62] World Health Organisation, 'Mental Health Atlas 2017' (January 21, 2019), *available at:* https://www.who.int/mental_health/evidence/atlas/mental_health_atlas_2017/en/ (last visited Dec 12, 2019).

one contributor to the disease burden by 2030. If one had to factor only the disability component, mental disorders would account for 25.3% and 33.5% of all years lived with a disability in low and middle-income countries respectively.[63] In terms of economic output, it is estimated that mental disorders would result in worldwide losses of US $16 trillion by 2030.[64] Rapid socio-economic change is likely to bring about a general increase in psychological pressure and stress and in recent years has been generating new challenges for India and its mental health system. Hence, the need to develop a robust system of mental healthcare is no longer merely an option, but instead a necessity towards sustainability of our generation.

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[63] World Health Communication Associates, *The 'Unofficial' World Health Communication* Associates *(WHCA) Action Guide to the: WHO – 65th World Health Assembly*, *available at:* http://www.whcaonline.org/uploads/WHA2012FINAL.pdf (last visited Dec 12, 2019).

[64] The Global Economic Burden of Non-communicable Diseases, *available at:* http://www3.weforum.org/docs/WEF_Harvard_HE_GlobalEconomicBurdenNonCommunicableDiseases_2011.pdf (last visited Dec 12, 2019).

Gambling:
The Rights, the Vices and Penumbra in Between

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Shourajeet Chakravarty[**]

Introduction

Jean-Jacques Rousseau and John Locke, among the leading proponents of the 'Social Contract Theory', explored the origins of society as a whole through their works.[1] As per them, in the beginning, there was nature and everyone lived by its mandates. Life was brutish, short, uncertain and full of anxieties.[2] The human need for socialising led to the observation that there is strength in numbers, and thus a Social Contract and the concept of society was born.

From the said social contract among the first people, the concept of an all-powerful institution to govern the members of the society so formed was also born.[3] This all-powerful institution or 'supreme individual' has over time evolved, and in the contemporary world is termed as the government or the governing authority. Jean-Jacques Rousseau in his works proposes that humans were born in the state of nature and were intrinsically selfish and protected their person and property to the limits of their power.[4] However, with the formation of the society, several of

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[1] Liliya Abramchaye, *A Social Contract Argument for the State Duty to Protect from Private Violence*, 18 JOURNAL OF CIVIL RIGHTS AND ECONOMIC DEVELOPMENT 849 (2004).

[2] *Id*.

[3] *Id*.

[4] *Id.* p. 850.

the rights of humans were transferred to the supreme individual, i.e., a governing authority; and the said *supreme* was entrusted with the function of protecting the body and property of the individual.[5]

John Locke in his works has also credited the formation of society and the individuals giving up their liberties in favour of a supreme entity solely in the interest of preservation of their rights.[6] Thus, the concept of the State (governing entity) having the duty of protecting, not only the person but also the property of its subjects, is constant; i.e. a State, to fulfil its duty towards its subjects, must act as a *parens patriae*[7] and accordingly formulate positive laws and policies, to protect them from any vices which may threaten their person or property.

The concept of social contract may even be traced to ancient India, where the laws of the society were formulated by the codes of men (*Vedas, Upanishads, Puranas, Manusmriti*, etc.) to protect and preserve the person and property of the members of the society. The Constitution of India, 1950 ('**Constitution**') has been constituted *by* the citizens of India, whose authority *flows* from the citizens of India and which aims to *govern* the people in India.[8] The Constitution further resolves in its 'Preamble', to *constitute* India into a Sovereign *'Socialist'* Secular Democratic Republic.[9] The *socialist* nature of the Constitution furthers the concept of Indian government being *parens patriae*[10] to its citizens and thus making the welfare of the citizens of India, one of its primary duties. The socialist nature of the Indian Constitution is further enforced by Article 38[11], Article 39[12] and Article 39A[13] of the Constitution wherein the State has been directed to promote the welfare of the people of India.

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5 *Id*.

6 Steven J. Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 41 DUKE LAW JOURNAL 514 (1991).;
See also, John Locke, TWO TREATIES OF GOVERNMENT, 514 (McMaster University Archive of the History of Economic Thought, 1823).

7 *Shafin Jahan* v. *Asokan* K.M, MANU/SC/0340/2018, para 30.

8 The Constitution of India, 1950, Preamble.

9 *Id*.

10 *Supra* n. 7.

11 Constitution of India, 1950, Art. 38.

12 Constitution of India, 1950, Art. 39.

13 Constitution of India, 1950, Art. 39A.

Following the mandates and directions of the Constitution, the Indian State has taken several steps to promote public welfare and has also worked towards eradicating vices alluring to the common citizens. For the said public welfare, the State has enacted several positivist legislations, over the past several decades and has further retained relevant legislations enacted during the pre-independence era. However, with the society growing leaps and bounds and with the dawn of the *age of the Internet*, human socialisation is now not just limited to the physical space or the outdoors but has also transgressed into the digital bytes and thus infiltrated even into the comforts of one's home.

As is true about everything, with every development made several vices are born as well. The same has been the misfortune of the digital era where even though the world has become a tighter knit community because of the growing access it has found to the lives of every individual, the same access has also been used as a loophole by several opportunists to sidestep the legal structure drawn by governments to safeguard the interests of individuals.

Historically, India has shown a natural proclivity towards gaming as a recreational activity. Several modern games can find its origins in the ancient Indian texts in one form or another. Games like '*chaucer*', '*taash*', '*jua*' and '*pasha*' were a source of entertainment and socialisation in ancient times even though the society looked down upon them because of their connection with wagering, gambling and betting. The vices of wagering, gambling and betting have in modern times continued to allure individuals by 'games of chances' such as card games or dice games. With the advent of the digital age, such games of wager have found their way, via online mode into the homes of every common man.

Modern gaming has also been considered to be a social and recreational activity for consumer engagement, securing interest in the activity, brand consumption as well as creating brand value and loyalty.[14] The association of Indians with such recreational activities and the compulsive gambling behaviour can be traced back to the ancient era

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[14] The Sports Law and Policy Centre, *Introduction – Contextualising Gaming Laws in India*, The Sports Law and Policy Centre (Feb. 2018) *available at* https://fifs.in/wp-content/uploads/2020/07/Fantasy-Sports_Legality_India_Report.pdf p. 07 (last visited September 09, 2020).

qua scriptures and religious texts.[15] With the penetration of digital infrastructure and an increase in the usage of the Internet around the globe, the understanding of traditional gaming has evolved considerably. KPMG, in research conducted in the year 2017, predicted that the Internet penetration is expected to reach 53 % of India's entire population by the year 2021.[16]

The foundation of the online gaming market can be traced back to the pre-2005 times where the market was restricted to a niche customer segment.[17] However, soon with the introduction of social networking platforms, a significant population across different age, gender and socioeconomic groups started exploring, learning and sharing online games across the platforms.[18] Over the years, with the introduction of smartphones, the true potential of the Indian gaming market was realised. This paved the way for the local gaming companies to enter the Indian gaming market, which was initially restricted to only a few global players who earlier had established local companies to exploit the Indian market.[19] Thus, the potential of the gaming appetite of Indians has been continuously attracting investors, game developers and publishers. The primary distinguishing factor between gaming and gambling is determined by evaluating the degree of skill or chance involved in engaging with the Game. Generally, as per the Indian legislations and judicial pronouncements, a game which is predominantly based on skill has been categorised as gaming whereas, a game which is predominantly based on chance has been categorised to be gambling.

The tragedy of the 'coronavirus pandemic'[20] confined, almost the entire population of the world, within the four corners of their homes which

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[15] Ajit V. Bhide, *Compulsive Gambling in Ancient Indian Text,* 49 INDIAN JOURNAL OF PSYCHIATRY (2007).

[16] KPMG, *Online Gaming in India: Reaching a New Pinnacle*, KPMG Report (May 2017) *available at* https://assets.kpmg/content/dam/kpmg/in/pdf/2017/05/online-gaming.pdf p. 12 (last visited September 09, 2020).

[17] *Id.*

[18] *Id*.

[19] *Id*.

[20] World Health Organisation, *WHO Director-General's opening remarks at the media briefing on COVID-19 - March 11 2020*, World Health Organisation (March 11,

in turn led to the increase in engagement of individuals with the virtual world of online video games and e-sports. In August of 2020, 'Dream11' (Sporta Technologies Private Limited)[21], became the title sponsor of the Indian Premier League ('**IPL**') for the year 2020.[22] The launch of IPL in 2008 had initially led to the birth of Dream11 and over the years, the company has garnered a user base of about 1 (one) crore who are engaged in its fantasy sports platform.[23]

The current Indian jurisprudence continues to carry the tacit anti-gambling outlook that was prevalent in Great Britain and ancient India during the formative years of the legislation.[24] Online gaming does not constitute as a subject matter under any of the lists provided in the Seventh Schedule of the Constitution. However, the Constitution does recognise 'Lotteries organised by the Government of India or the Government of a State' and 'Betting and Gambling' as a matter of legislation under Entry 40 of the First List (Union List) and Entry 34 of the Second List (State List) of Seventh Schedule of the Constitution granting powers to the Union and the State, to legislate on the said subject matters, respectively.[25]

The Public Gambling Act, 1867 along with certain state legislations are the only law available on gambling in India. As far as online gaming is concerned, Nagaland,[26] Sikkim[27] and Telangana[28] are the only states

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2020) *available at* https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020 (last visited September 09, 2020).

[21] Sports Technologies Private Limited is a Mumbai, Maharashtra based company incorporated as per the provisions of Companies Act, 2013.

[22] IPL Media Advisory, *BCCI announce Dream11 as Title Sponsor for IPL-2020,* Indian Premier League (August 19, 2020) https://www.iplt20.com/news/ 206403/bcci-announce-dream11-as-title-sponsor-for-ipl-2020 (last visited September 10, 2020).

[23] Dream11, *About us*, Dream 11 (2020), *available at* https://about.dream11.in/about-us (last visited September 09, 2020).

[24] *Supra* n. 14.

[25] Constitution of India, 1950, Schedule VII.

[26] Nagaland Prohibition of Gambling and Promotion and Regulation of Online Games of Skill Act, 2015.

[27] Online Gaming (Regulation) Act, 2008.

[28] Telangana Gaming Act, 1974; the aforesaid Act along with the Telangana

which have enacted specific legislation on online gaming. While on September 03, 2020, the State Cabinet of Andhra Pradesh approved a proposal to amend the Andhra Pradesh Gambling Act, 1974 that would criminalise online gambling and betting platforms.[29]

The cautious approach of all the stakeholders to address the lacuna in the law has been of immense significance. The paradigm shift from the traditional games to online games such as Poker, Rummy, blackjack, fantasy games and other similar games have left the legislative enactments to fend for the age-old games rather than to address the present need. Despite the growth in the gaming industry, as on date, there is no dedicated law to regulate the issue of gaming and gambling in India. The limited amount of legislation available on the issue of traditional gambling along with the judicial precedents has set the tone to interpret the future course of action to test the legality of such industry.

Scope of Article

The authors intend to dissect the aforementioned issues through the various chapters of this article and discuss the legality of the online gaming industry from the perspective of existing gambling laws and understand the growth of the industry from its traditional anti-gambling outlook to the current diversified tacit acceptance *supposedly* given by the society.

This article is bifurcated into chapters wherein each chapter addresses an essential aspect regarding gambling. *Chapter I* provides a brief '*Introduction*' to the subject matter of the article, *Chapter II* tries to shed some light on the '*History of Gaming and Gambling*' in the Indian context, *Chapter III* is '*Gaming and Gambling Laws in India*', *Chapter IV* is '*Central Legislations Affecting the Gaming Industry*', *Chapter V* discusses '*Online Gaming Statutes of India*', and is followed by *Chapter VI* on '*Neo-Gambling*

Gaming (Amendment) Ordinance, 2017 and the Telangana Gaming (Second Amendment) Ordinance, 2017 have been challenged as violative of Art. 14, Art. 19(1)(g) and Art. 21 of Constitution. The case is pending in the High Court of Judicature at Hyderabad as on September 10, 2020.

[29] Staff Reporter, *Andhra Pradesh bans online gaming, betting platforms*, The Hindu (September 04, 2020) https://www.thehindu.com/news/national/andhra-pradesh/state-bans-online-gaming-betting platforms/article32519907.ece (last visited September 10, 2020).

and Neo-Gaming', *Chapter VII* makes a case for '*State's Obligations to Formulate Welfare Legislations*' and finally *Chapter VIII* followed by the '*Suggestions and Conclusion*' of this article.

History of Gaming and Gambling

Gambling, despite its prevalence in ancient India, was considered as a vice rather than virtue and an immoral act in the Indian society. Even though there was the explicit codification of such games of chance, the possibility of upheaval and destruction it carried ensured that it was treated with a sceptical approach. The said approach has been reflected in many *Hindu* scriptures such as *Rig-Veda*, *Mahabharata* and *Ramayana* wherein the sovereign authority was either expected to prohibit gambling or to regulate it.[30] Similarly, as per Islamic scriptures, Quran's Chapter V- *Surah A-Maída* Verse 90 and 91 explicitly desists its followers from engaging in activities in gambling as it creates hatred and animosity.

According to Paragraph 223 of Manusmriti, it is stated that:

> *'…when inanimate (things) are used (for staking money on them), that is called among men gambling (dyuta), when animate beings are used (for the same purpose), one must know that to be betting (samahvaya) (223) When birds, rams, deer or other (animals) are caused to fight against one another after a wager has been laid, it is called betting (samahavya).'*[31]

This distinction read with the definition of wagering provided in the Judgment of *Gherulal Parakh* v. *Mahadeodas Maiya,*[32] as defined by Sir William Anson was stated to be:

> '*…A promise to give money or money's worth upon the determination or ascertainment of an uncertain event*…'

Thus, a wagering agreement is a promise to give money or money's worth on the happening or non-happening of an uncertain event; gambling is the promise to give money or money's worth on wagers made on non-living (inanimate) things; and betting is the promise to

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[30] Law Commission of India*, Legal Framework: Gambling and Sports Betting Including in Cricket in India,* Report No. 276 (July 2018) pp. 7-12.

[31] *Id*.

[32] *Gherulal Parakh* v. *Mahadeodas Maiya*, MANU/SC/0024/1959, para 11.

give money or money's worth by placing the money on the future uncertain actions of living things (animate).

A similar definition of gambling has been given in the Black's Law Dictionary wherein it is stated that:

> '*…gambling involves, not only chance, but a hope of gaining something beyond the amount played. Gambling consists of consideration, an element of chance and a reward.*'[33]

Thus, a game in which there is no monetary component in the Game shall not fall under the ambit of gambling. However, when a monetary component is introduced in a game, it may be considered as gambling.

Presently, 'Betting and Gambling' is a matter of legislation under Entry 34 of the Second List (State List) of the Seventh Schedule of the Constitution, which grants powers to the state governments to legislate on the said subject matter. The Constituent Assembly of India while drafting the Constitution discussed the possible banning of gambling and the reason for mentioning 'Betting and Gambling' under the State List was also provided by Dr B.R. Ambedkar (Chairman of the Drafting Committee), which is as follows:

> '*…If my friends are keen that there should be no betting and gambling, then the proper thing would be to introduce an article in the Constitution itself making betting and gambling a crime, not to be tolerated by the State. As it is, it is a preventive thing, and the State will have full power to prohibit gambling. I hope that with this explanation they will withdraw their objection to this entry.'*[34]

Therefore, it can be gathered that the Constituent Assembly of India was in favour of prohibiting gambling and empowered the state governments by the insertion of Entry 34 in the State List, to formulate their respective laws on gambling and betting to the exclusion of lotteries.

The first law relating to 'betting and gambling' in India was the Public Gambling Act, 1867. After the adoption of the Constitution, the Public Gambling Act, 1867 ceased to be applicable on the whole of India as

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[33] *Dr K.R. Lakshmanan* v. *State of Tamil Nadu* AIR 1996 SC 1153, para 3.

[34] The Constituent Assembly of India, Constituent Assembly Debates (e-parliament library, 1949, p. 917).

'Gambling and Betting' were made a part of the Second List (State List) of Seventh Schedule of the Constitution and thus, primarily a state subject. The scheme adopted by the aforesaid Gambling Act was, either extended to other States or new statutes were enacted with similar provisions.[35]

Furthermore, it must be noted that 'wagering agreements' are considered void under Section 30 of the Indian Contract Act, 1872.[36] As a consequence, all gambling agreements are also *void ab initio*.

The below table[37] is a ready reckoner for applicable gambling legislation in each state.

SN.	*State*	*Legislation*	*Game of skill permitted (Yes or No)*
1.	Andhra Pradesh	Andhra Pradesh Gaming Act, 1974	Yes (proposal to prohibit online gambling is underway)[38]
2.	Andaman Nicobar	Public Gambling Act, 1867	Yes
3.	Arunachal Pradesh	Arunachal Pradesh Gambling (Prohibition) Act, 2012	Yes (if played without involving money)
4.	Assam	Assam Game and Betting Act, 1970	No (No distinction between Game of skill and Game of chance)
5.	Bihar	Public Gambling Act, 1867	Yes
6.	Chandigarh	Public Gambling Act, 1867	Yes
7.	Chhattisgarh	Public Gambling Act, 1867	Yes
8.	Dadar and Nagar Haveli	Public Gambling Act, 1867	Yes
9.	Delhi	The Delhi Public Gambling Act, 1955	Yes

[35] Noorul Hassan and Aparajitha Narayanan, *Luck Factor - An analysis of changes in Gaming Law*, Lexology (December 05, 2007) *available at* https://www.lexology.com/library/detail.aspx?g=8ec7a210-52d3-43d9-99ab-02199b610796#:~:text=According%20to%20Black's%20Law%20Dictionary,in%20State%20of%20Bombay%20v (last visited September 09, 2020).

[36] Indian Contract Act, 1872, Sec. 30.

[37] *Supra* n. 30; *See also*, *Supra* n. 14 pp. 52.

[38] *Supra* n. 29.

SN.	*State*	*Legislation*	*Game of skill permitted (Yes or No)*
10.	Goa and Daman and Diu	The Goa, Daman and Diu Public Gambling Act, 1976	Yes
11.	Gujarat	The Bombay Prevention of Gambling (Gujarat Amendment) Act, 1964	Yes
12.	Haryana	Public Gambling Act, 1867	Yes
13.	Himachal Pradesh	Public Gambling (Himachal Pradesh Amendment) Act, 1976	Yes
14.	Jammu and Kashmir	The Jammu and Kashmir Public Gambling Act, 1920	Yes
15.	Jharkhand	Public Gambling Act, 1867	Yes
16.	Karnataka	Karnataka Police Act, 1963	Yes
17.	Kerala	Kerala Gaming Act, 1960	Yes
18.	Madhya Pradesh	Public Gambling Act, 1867	Yes
19.	Maharashtra	The Maharashtra Prevention of Gambling Act, 1887	Yes
20.	Manipur	Public Gambling Act, 1867	Yes
21.	Meghalaya	The Meghalaya Prevention of Gambling Act, 1970	Yes
22.	Mizoram	Public Gambling Act, 1867	Yes
23.	Nagaland	Nagaland Prohibition of Gambling and Promotion and Regulation of Online Games of Skill Act, 2015 and rules made thereunder	Game of skill permitted with a license
24.	Odisha	Odisha Prevention of Gambling Act, 1955	No
25.	Pondicherry	The Pondicherry Gaming Act,1965	Yes
26.	Punjab	Public Gambling Act, 1867	Yes
27.	Rajasthan	The Rajasthan Public Gambling Ordinance, 1949	Yes

SN.	*State*	*Legislation*	*Game of skill permitted (Yes or No)*
28.	Sikkim	Sikkim Online (Regulation) Act, 2008 and rules made thereunder	Game of skill permitted with license and Game of chance is also permitted subject to compliances.
29.	Tamil Nadu	Tamil Nadu Gaming Act, 1930	Yes
30.	Telangana	Telangana Gaming Act, 1974	No (vide amended by The Telangana Gaming (Amendment) Act, 2017
31.	Tripura	Tripura Gambling Act, 1926	Yes
32.	Uttar Pradesh	Public Gambling Act, 1867	Yes
33.	Uttarakhand	Public Gambling Act, 1867	Yes
34.	West Bengal	The West Bengal Gambling and Prize Competitions Act, 1957	Yes (certain conditions special approval required)

Gaming and Gambling Laws/Judgements

The Hon'ble Supreme Court of India, in one of its judgments[39] in the year 1957 had described gambling as a '*sinful and pernicious vice*' and looked down upon its practice, citing examples of verses from *Rig-Veda*, *Manusmriti* as well as accounts from the *Mahabharata* which depict the staunch stance of ancient seers and lawgivers of India towards the practice of gambling.[40] The Hon'ble court further observed that the practice of 'gambling and betting' has not only been looked down upon by the ancient Indian society but has also been cautioned against and disfavoured in England, Scotland, the United States of America as well as Australia. The Hon'ble court opined that it found it incorrigible to accept that the Constituent Assembly of India intended to bring within the ambit of Article 19(1)(g) or Article 301, activities *'encouraging reckless propensity for making easy gain by lot or chance'*[41], leading to loss of hard-earned money of the common man and in turn driving him to a state of

[39] *State of Bombay* v. *R.M.D. Chamarbaugwala*, AIR 1957 SC 699, para 50.

[40] *Id.*, para 37.

[41] *Id.*, para 50.

chronic indebtedness. [42] Furthermore in the matter of R.M.D. Chamarbaugwalla[43] The Hon'ble Supreme Court has held that Article 19 (1) (g) and Article 301 of the Constitution only protects those trades, commerce and professions which are not *unlawful* in nature and character; whereas activities such as gambling and betting, which are intrinsically unlawful, cannot be said to be protected under the said Articles of the Constitution and are termed as *res extra commercium*.[44]

In *D. Siluvai Venance* v. *State*,[45] the Madurai Bench of the Hon'ble Madras High Court raised its eyebrows when informed by the prosecution about the non-regulation of online gaming by the State of Tamil Nadu. The subject matter of the aforesaid case pertained to the charges of gambling filed by the police against the petitioner in the matter, and while dealing with the case, the Hon'ble Court commented on the lack of action taken by the police concerning online gambling and was informed about the absence of any relevant legislation in regards of online gaming and gambling.

The Hon'ble Court further painstakingly discussed a plethora of cases decided by the Hon'ble Supreme Court of India along with the Hon'ble High Courts of several other states wherein the jurisprudence regarding gaming, gambling and betting has been developed.[46] The Hon'ble court also observed that neither the Public Gambling Act, 1867 nor the Tamil Nadu Gaming Act, 1930 provided explicitly for regulating virtual (online) gaming. [47] The Hon'ble court, in its judgment, has very interestingly summarised modus operandi of online gaming/gambling and has observed that:

> *'42. If X and Y want to play a game, both must bet a sum of Rs. 10/- (Say). The winner will get the amount that he put in place, i.e., Rs. 10/- and in addition to that, he will get an additional sum, Say 75% that was put in place by the opponent, being the prize amount. The balance, i.e., 25%, will be credited to the account of the online gaming site. The loser will lose everything.*

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[42] *Id.*, para 41.

[43] *R.M.D. Chamarbaugwalla* v. *The Union of India*, MANU/SC/0020/1957.

[44] *Id.,* para 5.

[45] *D. Siluvai Venance* v. *State*, MANU/TN/3677/2020.

[46] *Id.,* para 25-36.

[47] *Id.,* para 37.

> *43. If a group of persons (Say 10) want to play a game, each one of them have to bet a sum of Rs. 10/- (Say). At the end of the Game, the winner will get his amount as well as 100% of his bet amount, being the prize money. The Runner will get his amount as well as 70% of his bet amount, being the prize money. The losers will lose not only the Game but also lose Rs. 10/- that was put in by them. A rough calculation for the scenario above will give a whooping sum of Rs. 63/- to the online gaming site while awarding Rs. 20/- to the Winner and Rs. 17/- to the Runner. Naturally, a player, if he loses his amount, will try to meet out his loss by playing again and again.*'[48]

The Hon'ble Supreme Court, through its judgment in the Satyanarayana Case[49] has distinguished a 'game of skill' from a 'game of chance' and stated that 'Rummy' is to be deemed as a 'game of skill' even though a proponent of chance is involved in the Game. As per the Hon'ble Court, where a game is mainly and preponderantly of skill, the Game must be treated as a 'game of skill' even if an element of chance is involved in the Game.[50]

The Hon'ble Supreme Court further, in the cases of Dr K.R. Lakshmanan[51] has held that horse racing does not fall under the ambit of gambling or gaming and is a game of complete skill as the success of the person placing the bets primarily depends upon the substantial degree of skill despite there being an element of chance.[52]

In the case of D. Krishna Kumar,[53] the Andhra Pradesh High Court, while deliberating on the legality of Rummy under the Andhra Pradesh Gaming Act, 1974 held that until the said Act is amended to explicitly place playing 'rummy with stakes' within the ambit of gaming, the same cannot be treated as gaming under the Act described above. Moreover, Poker was, by the High Court of Karnataka, held to be a 'game of skill' and further elaborated that a 'game of skill' does not require any license for being conducted in club premises meant for recreational purposes.[54]

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[48] *Id*.

[49] *State of Andhra Pradesh* v. *K. Satyanarayana*, AIR 1968 SC 825.

[50] *Id.,* para12.

[51] *Supra* n. 33.

[52] *Id*., para 41.

[53] *D. Krishna Kumar* v. *State of Andhra Pradesh*, MANU/AP/1385/2002.

[54] *Indian Poker Association (IRA)* v. *State of Karnataka*, 2013 SCC OnLine Kar 8536.

The Hon'ble Gujarat High Court pronounced a contrary decision in the Dominance Case,[55] wherein it was deliberating upon whether 'poker' and its variant 'texas hold'em', were 'game of skills' or 'game of chance', the Hon'ble court held that the Game of Poker and its variant 'texas hold'em' cannot be termed as a 'game of skill'.[56] The Hon'ble court further observed that the State was obligated by the Directive Principles of State Policy, which are provided in the Constitution '*for the governance of people with the aim and object of welfare.*'[57] The Hon'ble court, in its judgment held that the nature and character of the Game of Poker, especially 'texas hold'em', depends particularly, ***firstly,*** on the chance of the players getting favourable cards, ***secondly,*** on bluffing, deceiving and disguising and ***lastly,*** on the ability to place bets, i.e. risk-taking and having deeper pockets, neither of which may be deemed to be a skill and thus 'poker' cannot be termed as a 'game of skill'.[58]

On the aspect of online fantasy sports which have become very popular among the youth, the Punjab and Haryana High Court, in the Varun Gamber case[59] held that 'Dream11', an online fantasy sports would not fall under the ambit of gambling as it requires a substantial level of skill to play the Game wherein the players must possess a level of knowledge and judgment about the sport in which they are creating a fantasy team to score the maximum points.[60] In another judgment, the Bombay High Court also held that Dream11 is a game of skill and not a game of chance.[61]

In a recent Public Interest Litigation filed before the Madras High Court in August of 2020, the petitioner has sought a complete ban on online rummy games wherein any foreign entity has any monetary interests and has further prayed before the Hon'ble court to direct the

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[55] *Dominance Games Pvt. Ltd* v. *State of Gujarat*, MANU/GJ/1995/2017.

[56] *Id*., para 75.

[57] *Id.,* para 45.

[58] *Id.,* para 58-60.

[59] *Varun Gamber* v. *Union Territory of Chandigarh*, MANU/PH/1265/2017.

[60] *Id.,* para 19-21.

[61] *Gurdeep Singh Sachar* v. *Union of India*, MANU/MH/1451/2019, para 8-9, 18.

government to regularise those online games where any foreign entities hold no such monetary interests.[62]

Central Legislations Affecting Gaming Industry

Apart from the laws made under Second List (State List) of the Seventh Schedule of the Constitution, few central legislations, such as the Foreign Exchange Management Act, 1999 and the rules made thereunder,[63] the Information Technology Act, 2000 and the rules made thereunder,[64] and the Indian Contract Act, 1872,[65] continue to regulate the gaming market in one manner or the another. A brief description of few such laws is provided herein below:

I. The Lotteries (Regulation) Act, 1998

As discussed earlier, under the Constitution, lotteries have been given a specific entry i.e. Entry 40 under the First List (Union List) of the Seventh Schedule of the Constitution. Consequently, lotteries have been excluded from the scope of 'Betting and Gambling' as provided under Entry 34 of Second List (State List) of the Seventh Schedule of the Constitution.

II. Indian Contract Act, 1872

Under Section 30 of the Indian Contract Act, 1872, a wagering agreement is void and unenforceable except where an amount won or promised to be paid in future is above the value of INR 500 in case of horse racing.[66] Therefore, even though the parties may enter into such a wagering agreement, no party, engaging in such 'gambling or betting', would be able to bring a suit to enforce any winnings accrued out of such bet or gamble.

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[62] Meera Emmanuel, *Petition before Madras HC against unregulated conduct of online Rummy games*, Barandbench (August 27, 2020) *available at:* https://www.barandbench.com /news/litigation/petition-before-madras-hc-against-unregulated-conduct-of-online-rummy-games (last visited September 11, 2020).

[63] *Supra* n. 30 p. 51.

[64] *Id*., pp. 54-55.

[65] *Id*., p. 49.

[66] Indian Contract Act, 1872, Sec. 30.

III. The Young Person's (Harmful Publications) Act, 1956

The Young person's (Harmful Publication) Act, 1956 defines a harmful publication to mean:

> '*…any book, magazine, Pamphlet, leaflet, newspaper or other like publication…in such a way that the publication as a whole would tend to corrupt a young person into whose hands it might fall…*'[67]

The section above read along with the observation of the Madurai Bench of Madras High Court[68] that:

> '*…online games, viz., Rummy Passion, Nazara, Leo Vegas, Spartan Poker, Ace2Three, Poker Dangal, Pocket52, My11Circle, Genesis Casino, etc., are mushrooming and there are so many advertisements appearing in almost all the social media and websites. It appears these advertisements are mostly targeting the unemployed youth, inducing them to play such games, on the pretext of earning money comfortably from their homes.*'[69]

establishes that incorrect impressions are created in the impressionable minds of a young person's which ultimately corrupts them.

IV. The Prevention of Money Laundering Act, 2002

The Prevention of Money Laundering Act, 2002 obliges all entities offering games to be played for cash or its equivalent either through online or offline medium to comply and adhere to specific regulations and maintain its records.[70]

V. Foreign Exchange Management Act, 1999 and rules made thereunder

The Foreign Exchange Management Act, 1999 has explicitly prohibited foreign direct investment and even investment by a person resident outside India in entities conducting 'lottery Business including Government/private lottery, online lotteries etc.' and 'Gambling and

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[67] Young person's (Harmful Publication) Act, 1956, Sec. 2(a).

[68] *Supra* n. 45, para 9.

[69] *Id.,* para 9.

[70] *Supra* n. 30, p. 52.

Betting including casinos etc.'[71] The Act mentioned above has explicitly prohibited any activity like gambling and betting.

VI. Information Technology Act, 2000 and the rules made thereunder

Section 67 of the Information Technology Act, 2000 states that: '*Whoever publishes or transmits or causes to be published or transmitted in the electronic form, any material which is lascivious or appeals to the prurient interest or if its effect is such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it…*'[72]

Accordingly, online gambling or gaming can be construed to be affecting individuals and corrupt their outlook. Additionally, Information Technology (Intermediaries Guidelines) Rules, 2011 obligates the intermediary to remove any content which encourages gambling in India.[73]

VII. The Cable Television Network Rules, 1994

The Cable Television Network Rules, 1994 prohibits the advertisement of gambling activities.[74]

VIII. Consumer Protection Act, 2019

The Consumer Protection Act, 2019 defines unfair trade practice to mean:

> '*…adopts any unfair method or unfair or deceptive practice…permitting (b) the conduct of any contest, lottery, game of chance or skill, for the purpose of promoting, directly or indirectly, the sale, use or supply of any product or any business interest, except such contest, lottery, game of chance or skill as may be prescribed…*'[75]

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[71] Department of Promotion of Industry and Internal Trade, Foreign Direct Investment Policy, 2017, *available at* https://dipp.gov.in/sites/default/files/CFPC_2017_FINAL_RELEASED_28.8.17_1.pdf (last visited September 12, 2020) p. 22.

[72] Information Technology Act, 2000, Sec. 67.

[73] Information Technology (Intermediaries Guidelines) Rules, 2011, Rule 3(2) (b).

[74] Cable Television Network Rules, 1994, Rule 7; *see also, Supra* n. 30, p. 56.

[75] The Consumer Protection Act, 2019, Sec. 2(47) (iii).

Accordingly, if unfair trade practices are adopted in which a contest, lottery, Game of chance or skill is used for promoting a product or business interest other than the one which has been prescribed by the Central Government then such contest, lottery, Game of chance or skill would be deemed to be unfair trade practice under the Consumer Protection Act, 2019.

Gaming Statutes in States of India

Presently, online gaming has only been recognised by the State of Nagaland, Sikkim and Telangana. A brief description of each such law is as follows:

I. State of Telangana

The State of Telangana vide The Telangana Gaming (Amendment) Act, 2017 ('**Telangana Act** '') amended the Telangana Gaming Act, 1974. As per the aforesaid Telangana Act, the term 'gaming' has been defined under Section 2(2) to mean:

> '*…playing a game for winnings or prizes in money or otherwise and includes playing a game of mutka or satta or* ***online gaming for money or any other stakes*** *and lucky board and wagering or betting, except where such wagering or betting takes place upon a horserace (sic.)… (d) any act of risking money, or otherwise on the unknown result of an event* ***including on a game of skill****…*'[76]

Through this amendment, the Legislature of Telangana has extended its prohibition to include non-engagement of state subjects in a 'game of skill' through both online as well as offline mode.

Telangana is the first state to take a 'no tolerance' stance vis-à-vis online gaming. Presently, the aforesaid Telangana Act has been challenged in the High Court of Judicature at Hyderabad.[77] As per the recent order of the Hon'ble High Court, the entities engaged in the business of online gaming have been given a partial relief wherein they are permitted to

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[76] Telangana Gaming Act, 1974, Sec. 2(2).

[77] *Auth Rep, Head Infotech (India) Pvt. Ltd., Hyderabad & Anr* v. *Chief Secy, State of Telangana, Hyderabad & 3 Ors*, 240261 of 2017.

conduct their business by engaging subjects who do not reside within the territory of Telangana.[78]

II. State of Nagaland

The Nagaland Prohibition of Gambling and Promotion and Regulation of Online Games of Skill Act, 2015 ('**Nagaland Act**') and rules made thereunder regulate the laws of gambling in the State of Nagaland.

As per Section 2(1) of Nagaland Act, Gambling has been defined as:

> '*…means and includes wagering or betting on games of chance but does not include betting or wagering on games of skill…Explanation: Once a license has been obtained under this Act, wagering or betting on online 'games of skill' or making profit by providing a medium for playing 'games of skill' shall not amount to gambling so long as they are being provided to players and are being accessed by players operating from territories where 'games of skill' are exempted from the ambit of gambling…*'[79]

The Nagaland Act permits engagement in 'game of skill' ***firstly***, only in such territories of India[80] where that state permits such ' Game of skill' and ***secondly***, only upon the obtaining of a license by the entity which offers such games per its provisions.[81]

The Nagaland Act has defined 'game of skill' wherein there is a preponderance of skills over chance[82] and 'game of chance' to mean a game wherein there is a preponderance of chance over skills.[83]'Schedule A' of Nagaland Act provides a list of 'games of skill'.[84]

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[78] Ranjana Adhikari and Tanisha Khanna, *A Tale of Two States: Skill Games on India's Radar*, Nishith Desai and Associates (Sep. 2017), *available at* http://www.nishithdesai.com/fileadmin/user_upload/pdfs/NDA%20In%20The%20Media/News%20Articles/170913_A_A-Tale-of-Two-States_iGB.pdf (last visited September 11, 2020).

[79] Nagaland Prohibition of Gambling and Promotion and Regulation of Online games of Skill Act, 2015, Sec. 2(1).

[80] *Id.*, Sec. 2(2).

[81] *Id.*, Sec. 2(1).

[82] *Id.*, Sec. 2(3).

[83] *Id.*, Sec. 2(4).

[84] *Id.*, Sec. 2(3)(i).

As per Nagaland Prohibition of Gambling and Promotion and Regulation of Online Gaming Rules, 2016,[85] every license shall be issued for a 5 (five) year period.

Every licensee:

a) For the first three years must pay an annual fee of INR 10,00,000 per Game per annum or pay INR 25,00,000 for a variety of games per annum;[86] and
b) For the next two years has to pay an annual fee of INR 20,00,000 per Game per annum or INR 50,00,000 variety of games per annum:[87]

along with 0.5% of the gross revenue generated as royalty to the State government (excluding service tax).[88]

III. State of Sikkim

a) The Sikkim Casinos (Control & Tax) Act, 2002

The Sikkim Casinos (Control & Tax) Act, 2002 read along with The Sikkim Casinos (Control & Tax) Rules, 2007 permit functioning of casinos in the State and regulate 'game of chance' played using machines or instruments available in five-star hotels.[89] A license is required to be obtained to act as a casino within the territory of the State. The provisional license is available for 5 (five) years.[90] Vide a notification applicable from July 04, 2016, the State has banned the entry of locals into the casinos.[91]

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[85] Information procured from the Law Commission Report No. 276 since Nagaland Prohibition of Gambling and Promotion and Regulation of Online Gaming Rules, 2016 was not available on any online medium.

[86] Government of Nagaland, *about us*, Government of Nagaland, https://webtest.nagaland.gov.in/lottery/about-us/ (last visited September 11, 2020).

[87] *Id.*

[88] *Id*.

[89] Information procured from the Law Commission Report No. 276 since the Sikkim Casinos (Control & Tax) Act, 2002 was not available on any online medium.

[90] *Id*.

[91] Government of Sikkim, *Directorate of State Lotteries*, Finance Department,

b) The Sikkim Online Gaming (Regulation) Act, 2008

The Sikkim Online Gaming (Regulation) Act, 2008 ('**Sikkim Online Gaming Act**') read along with the rules made thereunder regulate online games and restrict the offering of such games to the physical premises of the 'gaming parlour' in which it is conducted by using intranet gaming terminals.[92]

Under Section 2(d) of Sikkim Online Gaming Act, an online game has been defined to mean all 'games of chance' as well as all games which have a degree of chance as well as skill. As per Sikkim Online Gaming Act, a license must be obtained according to the provision of the act above and every license shall be issued for a 5 (five) year period.[93]

Neo-Gambling and Neo-Gaming

The World Wide Web and the Internet have connected people across the globe. With the advent of smart technologies, access to materialistic allures of the physical world has infiltrated the daily lives of every common man. 'Everything' is available in the virtual space. The industry of gaming too, has adapted accordingly to reap the benefits of exposure provided by the Internet by introducing contemporary games in the online format. The online games which are offered are either games which are predominantly based on chance or games which are predominantly based on skills. The games offered include, not only those which are played for sheer entertainment, but also those which offer the users an opportunity to win money or money's worth and may be deemed to be in the nature of 'gambling and betting'.

The lack of contemporary legislation and the out-datedness of those legislations which govern the aspects of 'gambling and betting' in India, at times facilitate those offering online games like gambling to continue conducting business without any regulation. It must be noted that even though, hosting or offering to gamble, i.e. running a 'common gaming house' is prohibited under the Public Gambling Act, 1867 and other

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https://sikkim.gov.in/departments/finance-revenue-expenditure-department/directorate-of-state-lotteries (last visited September 11, 2020).

92 The Sikkim Online Gaming (Regulation) Amendment Act, 2015.

93 *Supra* n. 27.

State legislations (except some state legislations), [94] as the aforementioned legislations do not mention anything about offering games in the nature of gambling in the virtual space, there exists ambiguity regarding the subject. [95] This ambiguity is often taken advantage of by miscreants to set up games in the nature of gambling and offer them to the common, unassuming people around the globe. These online gambling games lure the users by offering an opportunity to earn massive rewards (in case they win) in exchange for little investments (stakes) from the comforts of their house and the guise earns enormous profits by way of haircutting. The ever evolving online gaming industry continues to bring new games which require to pass the 'preponderance of skill' test for them to be considered legal in India.

I. Online Poker

The traditional Game of Poker has received mixed responses *viz a viz* the test of 'preponderance of skill'. The State of Nagaland[96], Sikkim[97], Odisha[98], Maharashtra[99] and Karnataka[100] have considered Poker as a 'game of skill' whereas the State of Gujarat in the case of Dominance Games[101] considered Poker to be entirely a 'game of chance'.

As far as laws of the States of Nagaland and Sikkim are concerned, online Poker has been recognised and authorised by them whereas other States of India (other than Telangana) have not yet applied their legislative intellect with regards to online gaming. However, on scrutiny of the Game being played on the online platform, one recognises that ***firstly***, Poker as discussed in the judgment by the Hon'ble Gujarat High Court is completely a 'game of chance' since, the players engaged in the Game have no control over the cards distributed to them, ***secondly***, in arguendo, even if it is contended that some skill is involved in the behaviour of the player by their ability to place a bet or by bluffing, deceiving and disguising, after the distribution of the cards

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[94] States of Nagaland, Sikkim and Telangana have legislated on online gaming.

[95] Public Gambling Act, 1867, Sec. 3.

[96] *Supra* n. 79.

[97] *Supra* n. 27.

[98] Odisha Prevention of Gambling Act, 1955.

[99] *Nasir Salim Patel* v. *State of Maharashtra*, W.P. (Crl.) 427 of 2017.

[100] *Supra* n. 54.

[101] *Supra* n. 55.

then the same also gets diluted since it is being played on an online platform. ***Lastly***, due to the virtual nature of the games played by the players, there is a significant chance of manipulation on the end of the entity offering the online games therefore tilting the test of 'preponderance of skill' involved in such a game towards 'preponderance of chance'.

II. Online Rummy

In the *Satyanarayana case*[102], the Hon'ble Supreme Court of India held that the Game of 'rummy' is a 'game of skill'. Analysing the judgment above to understand the legality of 'online rummy' it can be observed that 'online rummy' continues to satisfy the 'preponderance of skill' test provided that ***firstly***, the fall of the cards and ***secondly***, the building up of Rummy is done fairly. However, as discussed earlier, due to the virtual nature of the online games, there is a significant chance of manipulation on the end of the entity offering the online Game and therefore tilting the test of 'preponderance of skill' involved in such a game towards 'preponderance of chance', which thereby may impact the legality of the Game.

III. Fantasy Games

A fantasy sports games offered by Dream11 was explained as:

> '*…a game which occurs over a pre-determined number of rounds (which may extend from a single match/sporting event to an entire league or series) in which participating users select,* ***build and act as managers of their virtual teams (constituted of real players or teams) that compete against virtual teams of other users, with results tabulated on the basis of statistics, scores, achievements and results generated by the real individual sportspersons or teams in certain designated professional sporting events. The winner of such fantasy sports game is the participant whose virtual team accumulates the greatest number of points across the round(s) of the game.***'[103]

The fantasy sport games are one of the new variants of online games which have been scrutinised by various High Courts in India. The High

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[102] *Supra* n. 49.

[103] *Supra* n. 59.

Courts while deciding on the legality of one such fantasy game i.e. Dream11, held that it involved a substantial aspect of skill to play the Game when the players are expected to select a team of sportspersons who are then placed in a sequence and the players get points based on the performances of the real individual sportspersons in real matches. Fantasy games due to the nature of the Game are a mixture of 'game of chance' and 'game of skill'.

Accordingly, based on the case laws of various High Courts, it can be said that fantasy sports games are a part of new gaming and cannot be equated to gambling as it involves a substantial degree of skill.

IV. Introducing loot boxes in e-sports

The evolution of the Internet, technology and online gaming have been a continuous process. The dynamics of online gameplay and game-user-interactions have been changing and developing at a neck-breaking pace. Online games have in recent times tried to keep themselves relevant by continually tweaking the game code to introduce new dimensions to their gameplay. One such method used by the entities offering these online games is providing downloadable content to the users in the form of new updates. Another mode of keeping the players engaged and engrossed in the Game is the introduction of loot boxes by these entities.[104]

Loot boxes usually offer unknown (variable) rewards to the players either in return of completing 'set goals' by spending time in the Game or in return of in-game purchases made by the players by spending real money.[105] It is to be noted that the in-game purchases made by the players does not guarantee the players to receive 'anything certain', but provides the players with an opportunity of getting an uncertain reward.

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[104] Tom Gerken, *Video game Loot Boxes Declared Illegal under Belgium Gambling Laws, BBC* (April 28, 2018) *available at* https://www.bbc.com/news/technology-43906306 (last visited September 11, 2020).

[105] Peter Naessens, *Research Report on Loot Boxes* (translated), Belgium Gaming Commission (Apr. 2018) *available at* https://www.gamingcommission.be/opencms/export/sites/default/jhksweb_nl/documents/onderzoeksrapport-loot-boxen-Engels-publicatie.pdf (last visited September 11, 2020) p. 5.

The uncertainty of the reward receivable by the players raises the question of whether loot boxes may be read within the ambit of online gambling. Belgium, in answer to the abovementioned question, has replied in the affirmative and has banned online games from offering loot boxes in the territory of Belgium.[106] The Netherlands too has banned the offering of loot boxes in online games in 2018.[107] A Select Committee of the House of Lords of the United Kingdom in June of 2020 has recommended that regulations should be made under the United Kingdom Gambling Act, 2005 specifying that loot boxes is a 'game of chance' and has further observed that: '*if a product looks like gambling and feels like gambling, it should be regulated as gambling*.'.[108]

The stances taken by the aforesaid countries in declaring loot boxes as a 'game of chance' and thus, treating it at par with gambling is indicative of the fact that any activity which is either a 'game of chance' or looks or feels to be associated to gambling needs to be treated at par with gambling and requires regulations. Thus, these interpretations by different nations on the treatment of loot boxes specify the need to curb the mischief. India, despite being one of the largest markets of online gaming, has failed to regularise and legislate on the said subject matter as of now.

Upon critically analysing the stances taken by the Netherlands, the United Kingdom and Belgium and then further evaluating loot boxes upon the 'preponderance of skill' test developed by the Hon'ble courts in India, the authors are of the view that the introduction of loot boxes in an online game, which is preponderant of skill, increases the ambit of chance in the Game and thus tilts the balance of the preponderance test earlier made.

Loot boxes are inherently a 'game of chances', where the outcome is uncertain. The fact that the Game is virtual, and the user has no control

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[106] *Id*.

[107] Shabana Arif, *The Netherlands Starts Enforcing Its Loot Box Ban*, IGN India (June 20, 2018) *available at* https://in.ign.com/star-wars-battlefront-sequel/124405/news/the-netherlands-starts-enforcing-its-loot-box-ban (last visited September 11, 2020).

[108] Select Committee on the Social and Economic Impact of the Gambling Industry 2020, *Gambling Harm—Time for Action*, HL Paper 79 (June 2020) p. 115, para 445-446.

of the outcome, coupled with the opportunity of manipulation in the results of the loot boxes, warrant a greater degree of regulation and control by the legislature to ensure transparency and minimise (eradicate) cheating and fraud.

State's Obligations to Formulate Welfare Legislations

As discussed, gambling, betting and wagering are evil vices that are considered to destroy civilisations and lure susceptible subjects of the society, including the poor and young. Especially in a socialist country, these evil vices are required to be kept at bay, and the State must interfere and legislate on the subject matter by prohibiting online gambling and regulating online gaming to promote the welfare of its subject, both socially and economically.[109]

The constitutional framework places 'Gambling and Betting' within the legislative power of each State and restricts the Union to interfere in such law making power only in specific situations, i.e. when there is an emergent situation of national importance which needs to be addressed,[110] or when the States (2 or more States) have specifically requested the Union to make law.[111] The State legislatures have failed to provide any clarity on the subject and further to fulfil their constitutional obligation to regulate online gaming and prohibit online gambling but also disregarding public interest. The lack of any legislation has, in turn, led to exploitation of the lacunas and loopholes present in the pre-existing laws by the miscreants. The online gaming platforms are continuously being regulated by legislation which was never legislated or equipped to deal with online gaming and online gambling. This apparent oversight by legislation has led to discrepancies in opinions of various high courts which in turn has unleashed chaos concerning the subject at hand and further continues to harm the Indian society at large.

Suggestions and Conclusion

Based on the social construct of today's society, it shall be more beneficial for us to continue to prohibit online and offline gambling and

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[109] *Supra* n. 55, para 45

[110] Constitution of India, Art. 249; *see also*, *Supra* n. 30 p. 29.

[111] Constitution of India, Art. 252; *see also, Id.*

at the same time, take constructive measures to regulate online gaming in India.

Self-regulation will not be sufficient to address the issue at hand. The Union may either by exercising its powers under Article 249 of the Constitution, be enabled to legislate on the subject matter in pursuance of national interest or each State must proactively pen down the criteria based on which one may distinguish between a game to be based preponderantly on skill or chance and reduce the existing ambiguity between gaming and gambling.

The daunting absence of legislation on the subject matter leaving the judiciary to address the issues arising on the matter without any legislative enactment would not be serving the purpose for an extended period and result in exploitation of the poor, needy and impressionable strata of the society.[112]

The noble intent of the Constituent Assembly of India while placing 'Gambling and Betting' under Entry 34 of the Second List (State List) of Seventh Schedule of the Constitution no longer serves the purpose and since, online gaming is not explicitly provided for, under the aforesaid entry, the parliament must interfere by using the residuary powers provided to it under Entry 97 of First List (Union List) of the Seventh Schedule of the Constitution to regulate gaming (online-offline) and distinguish between online gaming and gambling; and as a consequence, assist the State Governments in formulating required legislation and regulating online gambling by bringing the same within the ambit of existing State legislations.

Presently, the ambiguity existing with respect to the distinction between gaming and gambling coupled with the lack of clarity and legislations regulating the online marketplace of gaming gives a field day to the opportunist miscreants casting a penumbra of non-regulation on the said subject matter.

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[112] National Crime Records Bureau, in the year 2018 have charged 1, 56, 110 people under the existing gambling laws of India, *available at* https://ncrb.gov.in/sites/default/files/Crime%20in%20India%202018%20-%20Volume%201.pdf p.77.

Factors influencing Vulnerability of Children without Parental Care: An Empirical Study in South East District of Delhi, India

Vasundhra[*]
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Introduction

Lately, it is observed that agencies are focusing on non-institutional family-based care for children who are without parental care. The Ministry of Women and Child Development (MWCD) in its report stated that 3,77,649 children are residing in 9,623 registered Child Care Institutions.[1] The Juvenile Justice (Care and Protection of Children) Act 2015, reiterates the importance of family-based care, however, before it is implemented, it is essential to assess the readiness, strength and adequacy of the current child welfare system to respond to the needs of these children. At the same time, the extent of the existing situation along with potential crisis also needs to be ascertained, if the system truly wants to establish a family-based care system.

The policies and strategies other than institutional care have not been attempted so far; therefore, not enough evidence is available to assess their effectiveness. So, to assess the effectiveness of these strategies and their potential for scale-up, it is crucial to estimate the children who

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[1] Government of India, *The Report of the Committee for Analysing Data of Mapping and Review Exercise of Child Care Institutions under the Juvenile Justice (Care & Protection of Children) Act, 2015 and other Homes* Volume-I (Ministry of Women and Child Development, 2018), *available at* https://wcd.nic.in/sites/default/files/CIF%20Report%201.pdf (last visited September 8, 2020).

need such care. An agency working in a particular district may be able to report on the number of children they have placed in alternative care, but the figure as to how many need such services is missing and neither there seems to be an initiative to this figure.

We are familiar that children without families are often mobile and face problems of shelter, unhealthy living conditions, drug abuse, sexual abuse involved in criminal activities, violence by police or rival gangs[2] besides continuous harassment and violence from municipal authorities and the police. The diseases such as asthma, dysentery, skin infection come etc. comes as a bonus with all the sufferings.

Integrated Child Protection Scheme (ICPS),[3] the flagship scheme of Ministry of Women and Child Development acknowledges in its guiding principles that, child protection is a primary responsibility of a family, supported by the community, government and civil society[4], loving and caring family is the best place for the child [5] and institutionalisation of children should be the last option.[6]

While reviewing ICPS in June 2018, it was observed that despite growth in support services, the Scheme has failed to achieve its goal. It has failed to prevent the abuse of children in family and community. Instead, the National Crime Records Bureau in 2018 reported that crime against children increased to 24% in 2016 as compared to 21.1% in 2015.[7] The money given to state Government under the Scheme has become a source to create infrastructure and employment, rather than creating a cadre of professionals to protect children.[8]

Few international agencies like Save the Children and UNICEF made efforts to estimate the number of children living on streets and accepted in their report the existence of gap on street children estimates.

The Study on Child Abuse by MWCD estimated that 66% of the street children were with their families, suggesting that as many as one third

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[2] Save the Children, *Life on the Street*, (2016)

[3] Integrated Child Protection Scheme Revised, 2014.

[4] *Supra* n. 3.

[5] *Supra* n. 3.

[6] *Supra* n. 9

[7] National Crime Records Bureau (NCRB, 2018) p. 54.

[8] Government of India, *Report of National Consultation on Child Protection Services*, (Ministry of Women and Child Development, 2018*).*

of all children living on streets are living without families and surviving on their own. Though the number of street children varies from city to city, but a majority of these children were boys in all cities, and 40% were between 11-15 years, whereas another 33% were between 6-10 years.[9] It further highlights that 51.84% slept on the footpath, 17.48% slept in shelters and 30.67% slept in other places such as under flyovers and bridges, railway platforms, bus stops, parks, market places, etc.[10]

Save the Children[11] reported that a total of 50,923 children below 18 years of age were identified as street children in Delhi in 2010. The study suggested that 46% of the children were spending their nights in open or public places and 37% were living away from their family members. Most of the children (88%) who had left their homes had contact with their families.[12] The data implies that there are almost 20,000 children on the streets of Delhi that are under the extremely vulnerable situation, living away from family, in extreme poverty and needing immediate support.

This study was aimed at not only assessing the factors that enhance the vulnerability of children when without parents but also in identifying the government services and schemes being utilised and gaps which still needs to be addressed in a particular district, which may be used in future for other locations and cities.

Objectives of Study

The main objectives of the study were as follows:

- To assess the factors that enhance the vulnerability of children who are separated from families in given geography (South-East district of Delhi) as a baseline for implementing initiatives to support such children and their families

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[9] Street Children in India, Childline India Foundation, *available at* http://www.childlineindia.org.in/street-children-india.htm (last visited September 11, 2020).

[10] *Study on Child Abuse*: India 2007, Ministry of Women and Child Development, Govt. of India, *available at* https://www.childlineindia.org.in/pdf/MWCD-Child-Abuse-Report.pdf.

[11] Save the Children is a Global NGO working in India since 2008 for the rights of children.

[12] *Id.*

- To identify current services availed by such children and gaps in availability and accessibility of desired services by children and their families

Methods Adopted for Study

For this study, a child was classified as someone up to the age of 18 years as stipulated in UNCRC.[13] The children were broadly divided into four categories:

1. Children living with families with no apparent risk of vulnerability
2. Children living with families, but living under stress and on the moderate risk of vulnerability
3. Children living with families on streets
4. Children living without families on their own

To get a realistic estimate of children in each of the identified categories, both primary and secondary data was explored. For primary data collection, a widely used Social Mapping technique was used along with Snowball technique. Information from the Government Agencies like Child Welfare Committee (CWC), South-East District, District Child Protection Unit (DCPU) and Census (2011) data were utilised.

For the initial estimation, a walkthrough within the entire cluster helped in the development of a social map of the area to identify spots or pockets where children in some number were expected to be available. School and residential areas of families with low socio-economic status were two important locations which were identified along with other pockets such as, Anganwadi Centre, Day Care Canters, Hobby Classes, Signals and Crossings, dump yards (places for rag picking), shops, road side eateries (*Dhabas*), repair shops, construction sites and small industries where children might be working and homes where children may be working as domestic labour. As per an estimate, nearly 700,000 children aged up to 18 years were expected to be in the South-East district of Delhi having a population of nearly 2.7 million people.

To carry out the study, a semi structured tool with open-ended questions was developed to specifically capture the details of a child,

[13] *See,* Article 1of the United Nation Convention on the Rights of the Child.

their opinion, knowledge on child protection issues, service providers in the child protection area, problems, challenges, and suggestions.

A total of 928 children were interviewed across the South-East district of Delhi. The survey was covered in such a manner that the entire geography was covered where children were available or existing either staying alone or staying with friends, relatives or parents.

Results of Study

The salient findings of the survey undertaken with children as well as parents are in two separate sections discussing on various components and indicators including the socio-demographic profile. The survey was administered to 982 children residing in South-East district of Delhi. All the children were in the age group of 6-18 years. The data collected was analysed based on four levels of vulnerability as mentioned below:

Category	*Current Situation*	*Vulnerability Level*
C1	Living with family, going to school and currently not working	Minimum
C2	Living with family but not going to school	Moderate
C3	Living on the street with or without family but in contact with family	Severe
C4	Not living with family and not in contact with family	Extreme

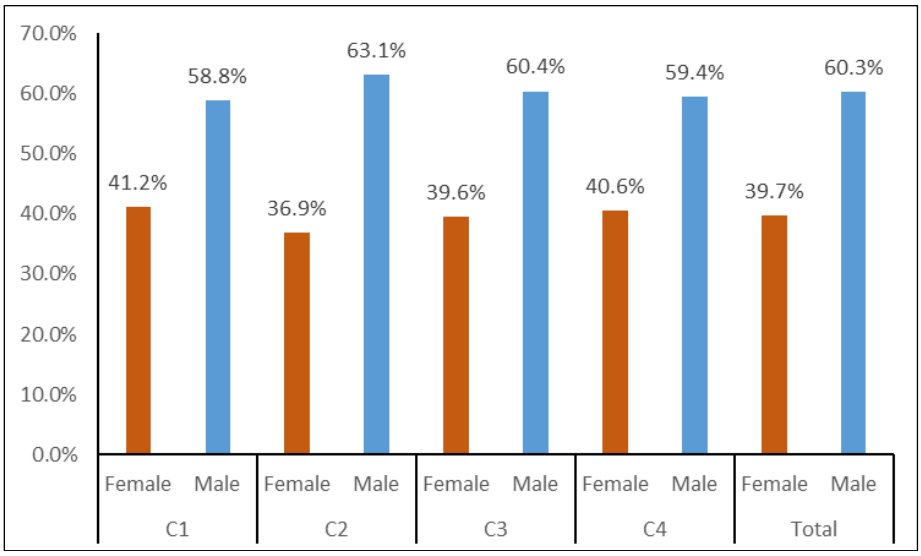
Out of 982 children covered under this category, 537 children were found to be living with families with a minimum level of vulnerability, 274 children were with families and not going to school and 171 children were living on streets without parents and as per the category, fall in a severe and extreme level of vulnerability.

Profile of Children Included in Survey

Among all 982 children included in the survey, 60% were male and 40% were female children. Further analysis revealed that 35% of children were in the age group of 11-14 years. By categories, the proportion of elder children (15-18 years) was 47% in the C2 category, and the lowest was in the C1 category. On the other hand, the proportion of very young

children (6-10 years) was 42%, highest in the C3 category and the lowest was in the C2 category.

Chart 1: Distribution of Children by Gender



Occupation of Parents of Children

Data related to the occupation of the parents revealed that parents of 32% of the children are daily labourers, followed by 20% of those having their own business, and 13% doing government or private jobs. A tiny proportion of children shared that their father is into agriculture or agricultural labour, rag picking, driving auto rickshaws and begging. No differentials were found across the categories of children, and a similar trend was observed among each category.

As regards mothers' occupation, it was observed that mothers of 50% of the children were housewives. There were about 2 out of 10 children who reported their mothers were engaged in daily labour work. Like fathers, the proportion of mothers into other occupations like government or private jobs, agriculture or agricultural labour, rag picking, and begging was found to be very low.

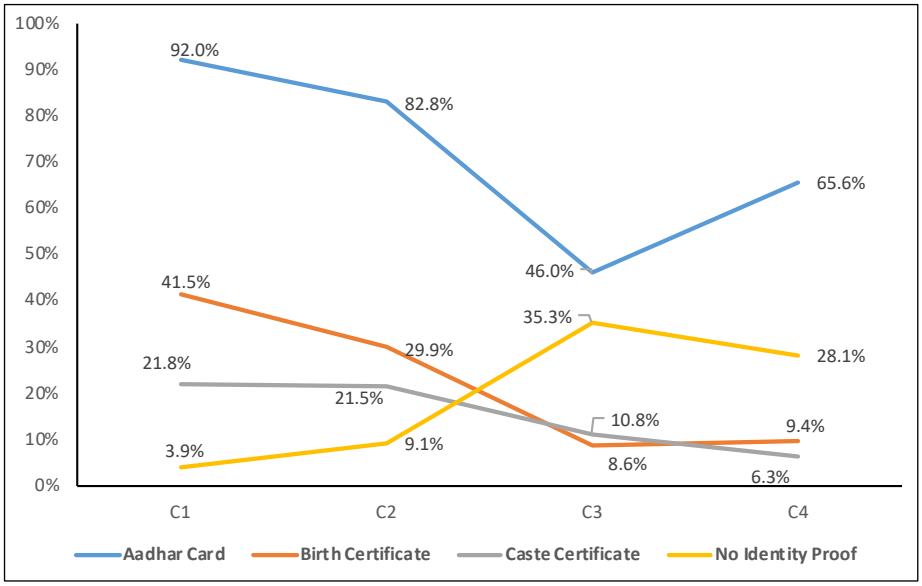
About 9% of children reported that their father was not alive, and 4% of children did not have a mother alive. The important observation was that C4 category had a maximum percentage of children without father

and 34% without mother suggesting that type of profession and absence of parents in the lives of children increases their vulnerability.

Identity Proof of Children involved in Study

Almost 80% of the children had Aadhar Card, whereas about 30% were those who had their birth certificates and 20% had the caste certificate. However, 11% of children were found to be with no identity proof issued by Government Authorities. Further analysis also revealed that the proportion of children having different varieties of identity proof decreased when their vulnerability level increased from minimum to extreme. Chart 2 illustrates that the proportion of children having different identity proofs is more among children with minimum or moderate levels of vulnerabilities as compared to children with high or extreme levels of vulnerabilities.

Chart 2: Identity Proofs Possessed by Children



Similarly, the proportion of children having no identity proofs is more among the high or extreme level of vulnerabilities as compared to the children with a minimum or moderate level. Hence, it can be interpreted that the vulnerability level of the children had an impact on their status of having any document supporting their identity.

Whether Shelter was Accessible to Children

The survey reveals that 88% of the children stay at a fixed place in either makeshift house or semi-constructed houses, whereas 8% live in a tent and rest 4% in open areas. No children with minimum or moderate level of vulnerabilities were found living in a tent or open areas.

Among the children with severe vulnerability in Category C-3, the proportion of children living in a tent or open areas was 73% far more than the proportion of children living in a fixed place which is 27%. However, among children with extreme vulnerability in category C-4, the ratio of children living in a fixed place and living in temporary houses or open places was found to be 60:40.

Almost 3 out of 10 children (30%) with severe vulnerability and almost 6 out of 10 children (56%) with extreme vulnerability were living with a member of extended family. Findings show that one-fourth of children with extreme vulnerability (C-4) were living on the street, and 6 % of them were currently living at their workplace. Less than 5% of children with extreme vulnerability (C-4) live in shelter homes, and less than 10% of children with severe vulnerability (C-3) live with their friends.

Data also highlights that 7% of children were living with their friends. While enquiring about how they were known to these friends or relatives, the majority of the children (41%) did not give any response to this question. This indicates that the majority of the children did not want to disclose how they come to know about these friends/relatives with whom they were currently residing. However, 30% of the children stated that relatives were their family members and 28% of these children stated that they were living with these friends or relatives, as they belong to the same village. Notably, 25% of children with extreme vulnerability sleep on the streets or railway stations/ platforms, whereas 4% of children with severe vulnerability sleep on the streets or bus stops at night.

Reasons why Children Live Without Parents

As regards reasons to leave home, the majority of the children, around 42% stated that searching for work to earn money was the main reason for them to leave home and come down to Delhi. Again, 47% of the children with severe vulnerability had left their home to earn money, whereas 41% among children with extreme vulnerability had left their

home because they were orphan (without parents). Nearly 20% of children did not specify any reason to leave their home.

More than 60% of these children had come to Delhi with their relatives, and around 10% of them did not know how they came to Delhi. About 45% of them came to Delhi because their relatives are in Delhi, and 23% came with the expectation to get work and earn money. About 1 out of 10 children (14%) choose Delhi with no specific reason.

Upon asking, do they miss their family? More than two-thirds of children (70%) revealed that they miss their family mostly and 38% out of them usually their mother before going to bed at night. Slightly less than half the children (45%) could not express their feeling of missing the family.

Keeping contacts with family plays a vital role in the life of a child and on enquiring if they are still in contact with their family, it was found that more than two-thirds (67%) of these children were still in contact with their families. More than a quarter of children (28%) do not have a family with whom they can make contact. Also, half of these children (48%) could not express any reason for not being in touch with the family. Sadly, about 20% of the children stated that they do not want to be in touch with their families.

Willingness to Live with Another Family

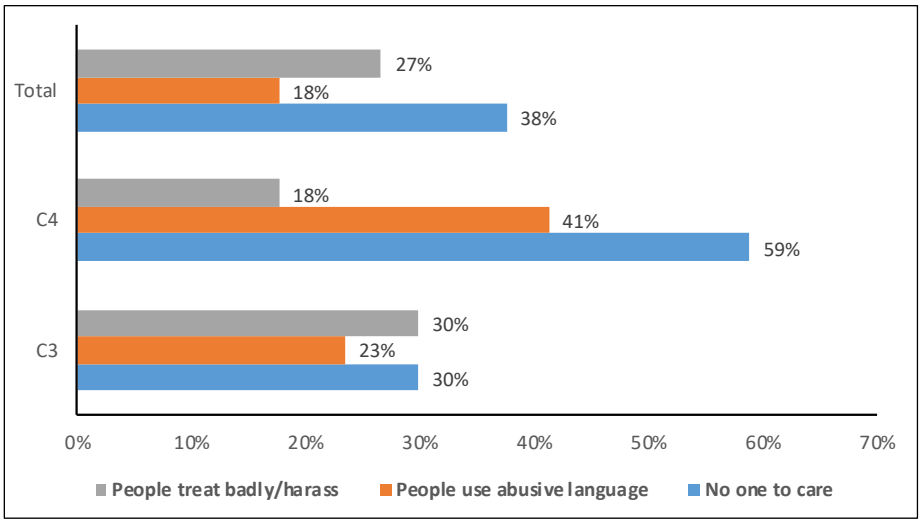
Longing to be with a family was very much visible in the answers of children. Nearly half of these children (58%) showed their willingness to go back to their home and live with their family however, only after earning lots of money. An equal proportion of children (10% each) expressed their willingness to be with their family only if parents come to take them back.

Despite the willingness to go back home, 3 out of 10 children (31%) wanted to be fostered or adopted by another family, around (45%) of them were against foster care or adoption. Nearly 55% cited love, affection and education to be with a foster family. About 10% of them preferred to live alone and independent of any adult supervision.

The three primary reasons described by children for not being with their family were neglect (38%), verbal abuse from others (28%), harassment by people other than family members (27%). Chart 3 highlights the

distribution of children who were expressing reasons for not being with their family.

Chart 3: Reasons for not being with Family



Education Level of Children

More than 80% of children reported that they attended school in the initial years of their life, and of these, 4 out of 10 children (41%) have completed the primary level of education. About 7 out of 10 children (69%) in the age group of 6-14 years were found to have completed primary and middle level of education.

Sadly, more than half of the children did not have age-appropriate education. The proportion of children not having age-appropriate education was more among the children with moderate, severe or extreme levels of vulnerability. About 2% of the children could not recall their school days and their school life.

The dropout rate in India is very high; therefore, the question for dropping out was included in the questionnaire. Strikingly, more than 60% of these children had no clue why they have stopped going to school, whereas 10% of them revealed 'not interested in studies', 'working to earn money', 'due fear of punishment in schools' and 'health or family problems' as the main reasons.

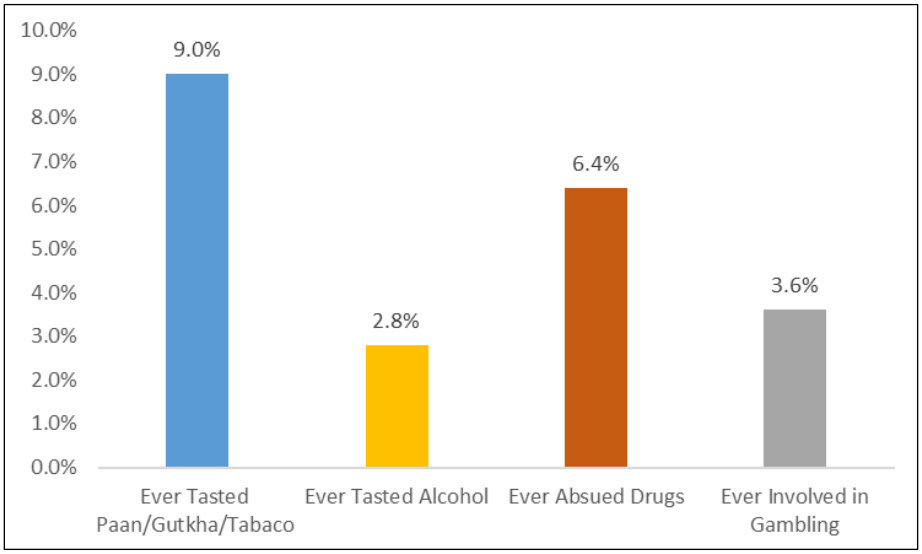
Only 23% of children were found to be aware of the Right to Education Act, 2009 and the proportion of these children were comparatively

higher among the children with a minimum level of vulnerability than other categories. It can be presumed that children with a minimum level of vulnerability were currently going to school and were aware of the Right to Education Act. For 63% of children, the school was the primary source for this information followed by television (36%) and people living in their community (26%).

Day-to-Day Life of Children

It was felt essential to understand the daily routine of children, to have a sneak peek view of issues children might be dealing in their lives, which is not visible from outside. Almost 24% of children passed their time by merely wandering on the roads or playing with friends. Just 2% of children were found to be engaged in skill training programmes, like computer, tailoring, painting, dancing classes during their in free times.

Chart 4: Distribution of Children Who Have Ever Involved in Substance Abuse



About 5% of children had tasted *paan* or *gutkha* or tobacco at least once, whereas 4% of the children were continuing. Similarly, only 2% of the children had tasted alcohol earlier and 7% of them were found to be habitual to have taken alcohol. Concerning other habits, it was observed that 6% of children had ever abused drugs while 4% of them had ever involved in gambling. Data collected suggests that 6-12% of the children did not respond to questions related to addiction habits. Chart 4

illustrates the status of children who have had a habit of substance or drug abuse.

Harassment and Exploitation

The data revealed that around 15% of children accepted that they had been subjected to sexual abuse very often. About half of the children (50%) were being harassed physically or verbally by their friends or elder children followed by 35% by other people from the locality.

One out of four children (25%) revealed that elder children were sexually exploiting them. Surprisingly, 16% of children accepted of being abused by police and 64% have faced harassment by family members in their day to day life. The reason behind not complaining was the assumption that, even on reporting, no action would be taken against the perpetrators (24%).

Association with any Government or NGO Centres

NGOs play a significant role in providing care and protection to the children residing on the street or slum areas in Metro city like Delhi. An effort was made to understand the knowledge and awareness of the target children about any NGOs present in the community working for children.

Findings revealed that only 23% of the children had knowledge about NGOs working for children in their areas and even knew their names.

According to the children, the major activities carried out in these canters were basic education or vocational training (84%) and other activities like dance, song, game, distribution of foods, sharing information etc. Among all these activities, 56% of the children were attracted to activities like the game, dance and songs. Almost 10% did not like any educational activities, and 20% had no interest in recreational activities.

Further, more than half the children acknowledged that their reading and writing ability has improved after visiting the Centres run by NGOs or Agencies. The primary benefit children had was they became vocal about their needs and rights and ready to fight back when harassed. Only 1 out of 3 children (36%) were aware about Child Line or 1098.

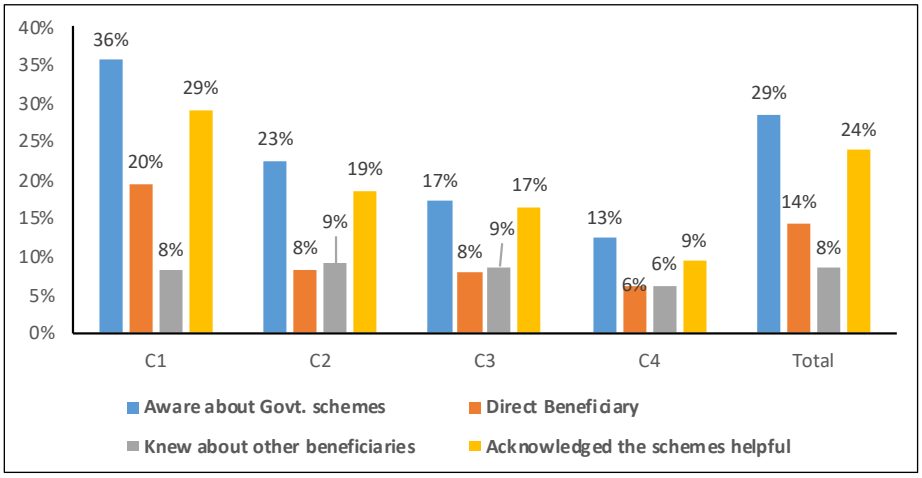
Among those who were aware of the NGOs working in the area, more than half (52%) believed that police can help the children when required followed by NGOs (22%), influential persons in the community (20%) and Childline (13%). A quarter of these children (25%) were found clueless in this context.

These children were asked if they know, how they can help a child in in need of help. About 1 out of 3 children (33%) had no idea what they can do in this situation. About 30% of the remaining children said they can take the help of police and only 2% children mentioned about making a call to Childline Helpline number.

Awareness on Government Schemes for Children

Data further revealed that only 1 out of 4 children (29%) was aware about any government schemes that were being implemented for children in their area. As expected, the schemes related to free education was known to almost all children, whereas more than half (56%) knew about schemes related to food and shelter. Schemes on foster care was not known to any child. About 3 out of 10 children (30%) believed that these schemes give any benefit to while 80% believed that the Government schemes are beneficial. Chart 5 represents the knowledge of Government schemes.

Chart 5: Distribution of Children as per their Knowledge about Government Schemes



Summary of Findings

A broad estimate suggests that almost 50,000 children with severe or extreme vulnerability may be staying in the entire district of South-East Delhi. Out of 982 children covered in the survey, the majority (54.7%) were found living with a minimum level of vulnerability, whereas (27.9%), (14.2%) and (3.3%) children were living with a moderate, severe and extreme level of vulnerability respectively. About 40% of these children are girls and 34% are between 6-10 years of age. About 34% children in the C4 category belonged to single parent family, meaning that either the father or mother was not alive.

Among the children with severe vulnerability (C3), the proportion of children living in a tent or open areas (73%) was far more than the proportion of children living in a fixed place (27%). About 30% of children in C3 or C4 category did not possess any identity proof and their struggle increased due to lack of IDs.

About 20% of the children stated that they do not want to be in touch with their families. Three significant difficulties faced by children living without families included no proper care (38%), facing abusive languages (28%) and being poorly treated and harassed by the people (27%).

More than two-thirds of children (70%) revealed that they do miss their family very often and of these, 38% of them usually miss their mother before going to bed at night**.** Nearly half of these children (58%) showed their willingness to return to their families after earning lots of money.

In spite of the willingness to go back home, 3 out of 10 children 31% wanted to be fostered or adopted by any other family for a better life. While 45% refused to be in foster families but, could not express any valid reason for not willing to be fostered by any other family. At the same time about 10% of them preferred to live alone and independently.

While discussing with children, substance abuse did not come out as a significant concerning issue, but it is likely that children purposely did not talk about their addiction. Only 2% of children admitted that they had ever tasted alcohol and about 9% said they are addicted to some form of tobacco.

About a quarter of children admitted that they regularly face exploitation and abuse when they are outside the family. **About 20%**

children admitted facing sexual violence regularly and another 20% children admitted they have faced sexual violence in their life. There might be many other children who may have chosen not to disclose exploitation, harassment or abuse that they have faced.

Conclusion

While the data in this study may not be large enough, but it is sufficient to highlight the issues that children face in a metro city like Delhi. Though these children leave their homes and families in search of better life, they land up in situations which snatches away their childhood and pushes them more towards abuse, harassment and criminal activities for survival. The percentage of children under these conditions is alarmingly large and if converted into absolute numbers, this can well cross 50,000 in just one district of State of Delhi. The challenge is that these children are invisible or not recognised by the child protection institutes nor they have access to any of these institutions. These children are left to survive on their own who are exploited and abused at every corner in the state.

Another vital aspect to this issue is that each child is unique and has unique issues to resolve. Integrated Child Protection Scheme stresses a lot upon child protection mechanisms at the local and village level, but there is hardly any emphasis on children who are alone in the cities. Even those who live with their families, get little support from their families and are rather used as instruments to earn money. In a literal sense, these are the forgotten citizens of our country who do not even have an identity to prove their existence.

Having faced so much apathy from the family, system and society, their childhood seems to be lost. These children only seem to be children because of age. They preferred to keep the secrets to themselves and were not willing to talk or share their bad experiences with others. Their silence speaks volume about how they have lost faith in society, in their family and child welfare system. They are too young to understand their rights but, it is the responsibility of the system and society to uphold their rights and give opportunities to excel in their lives.

With shrinking opportunities in rural areas, widening wealth gap and massive migration from rural to urban areas in search of livelihood this population has increased over the years. Unless concrete steps are taken

at policy and programme level, the vulnerabilities of such children will continue to increase, and they will continue to suffer. The longingness for their families, love and affection in 80% of the children suggests that family-based care should take the lead while drafting policies. The well-drafted policies need to be implemented at the local level in the country. Family strengthening, gate keeping, kinship care and foster care must be promoted and become the caring culture for the children.

Navigating the Contours of Non-Traditional Trademarks: Decoding the Conundrum

Neelu Mehra[*]
Nitya Thakur[**]

'Marketers also believe that consumers' thoughts occur only as words…Of course, words do play an important role in conveying our thoughts, but they don't provide the whole picture. People generally do not think in words.'[1]

—Gerald Zaltman

Introduction

A trademark is a sign that a person instinctively reacts to without any conscious thinking. In general parlance, it is a sign that can distinguish the goods and services of one undertaking from those of other undertakings. It is defined as *'a mark capable of being represented graphically and which is capable of distinguishing the goods or services of one person from those of others…'*[2] Therefore, to be referred to as a trademark, the sign must be qualified to act as a mark, be capable of being represented in a graphical form and capable of distinguishing the goods and services of one from those of others. The Trademarks Act, 1999 defines a 'mark' to include *'a device, brand, heading, label, ticket, name, signature, word, letter, numeral, shape of goods, packaging or combination of colours or any combination thereof'*.[3]

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[1] Gerald Zaltman, HOW CUSTOMERS THINK: ESSENTIAL INSIGHTS INTO THE MIND OF THE MARKET 13, (Harvard Business School Press, 2003).

[2] Trademarks Act, 1999, s. 2(zb).

[3] Trademarks Act, 1999, s. 2(1)(m).

Burgeoning Frontiers of Trademark Law

One of the primary functions of a trademark is the communication of information in a symbolic form. Communication connotes the commercial origin or source of the goods, provides information or marketing message about the goods or services sought to be communicated by the brand like the manufacture, kind, quality and nature of the goods or services, the trade connection between the goods or services being represented and the registered proprietor of the mark as well as the trade channels through which the goods flow before reaching the marketplace. Goodwill of the brand has a lasting impression on the minds of consumers' and influences their decision-making process.[4]

For the law to be in harmony with society, the perimeter of modern trademark law requires to be re-defined in light of commercial magnetism of new-age advertising methods and recognition of modern marks as 'marketing devices. Extending the boundaries of protection to newer facets of trademarks arises on account of the proliferation of technology, significant business development and a competitive market economy. Greater the developments in science and technology, more advanced and progressive the governing laws need to be.[5]

Trademarks denote the attractiveness of a brand which has been developed and cultivated by the trademark proprietor's advertising strategies. As evidenced through research studies, advertising strategies generate sales and retain the customer base. Brands are today focusing on investing in the creation of innovative advertising strategies which appeal and allure to a broader audience by stimulating sensorial perceptions. These novel advertising methods are an endeavour, for brand owners, towards creating '*a brand experience for all senses that has the potential to become a product in its own right and a core asset of the trademark owner's business*'.[6] These modern marketing techniques

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[4] A. Chronopoulos, *Legal and economic arguments for the protection of advertising value through trademark law*, 4 QUEEN MARY JOURNAL OF INTELLECTUAL PROPERTY 256 (2014).

[5] *Id*.

[6] Irene Calboli & M. Senftleben (eds.), THE PROTECTION OF NONTRADITIONAL TRADEMARKS: CRITICAL PERSPECTIVES 2 (OUP, 2018).

incorporate unconventional brand insignia, which are more abstract in nature than figurative marks.[7]

Non-traditional marks are merely an extension of the domain of traditional trademarks. While traditional marks primarily appeal to the eye, non-traditional marks are signs that are recognizable and perceived by senses extending beyond vision and sight such as touch, taste, hearing and smell. Through these unique marks, traders can acquaint consumers over time to connect with a unique smell, sound, taste or a design feature to a particular product or service emanating from a definitive source.[8]

The dynamism of trademark law has also led to the inclusion of newer functions such as the operation of the mark as a 'marketing device' with an 'acquired independent value' which appeals to consumers not because of the product it denotes but because of a consumer's attraction and attachment to the mark in itself.[9] The intrinsic attractive trait of a mark is a standalone function, having a social value, which a consumer buys into.[10]

Protection of Non-traditional Trademarks: Exploring Challenges

Incorporation of a registration system for the protection of these marks is what creates complexities. For an effective registration system to be in place, it must try and capture the most concrete, distinctive attributes of each trademark operating in the market. Thus, the need arises for formulating a standardised set of rules and definitions based on which a trademark's attributes are to be assessed. Norms devised for a trademark registration system not only require encapsulating the attributes of a mark but also unambiguously representing the same in the Register.[11]

The problem arises concerning non-conventional trademarks which, stemming from technological advancements in recent times, fail to fit

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[7] *Id*., p. 2.

[8] *Supra* n. 4, p. 256.

[9] M. Vivant, *Revisiting trademarks*, 3 QUEEN MARY JOURNAL OF INTELLECTUAL PROPERTY 307 (2013).

[10] *Id*.

[11] David Kitchin et al., KERLY'S LAW OF TRADEMARKS AND TRADE NAMES 14 (Sweet & Maxwell, 14thedn., 2005).

into the straight-jacket structure of traditional trademark requirements. The conflict between the marketing *modus operandi* for non-traditional trademarks incorporating sensory experiences with the traditional trademark requirements of source indication is likely to pose a potential threat towards registration for non-traditional trademarks.[12] These marks transcend beyond the notion of visual perception by means of graphical representation and are perceived through non-visual senses such as taste, touch, smell and hearing. As against the conventional trademarks like words and figurative marks, these unconventional marks pose a difficulty in conforming to the pre-set requirements of trademark law as these marks consist of matter, which is generally not perceived, in the ordinary course of trade, as denoting trademark significance. The more unconventional is the feature or element, more significant are the problems in complying with conventional requirements of graphical representation and distinctiveness.[13] This, in turn, affects a trademark's fundamental functions of communicating trade origin and guaranteeing quality.

Theoretically, the global trend appears to be the protection of non-traditional trademarks so long as they are distinctive and can distinguish the goods and services of one undertaking from those of others. However, a crucial hurdle lies in the contentious requirement of 'graphical representation'.

Graphical representation operates as a fixed reference point, indicating the scope of the mark. It is not merely a procedural requirement and irrespective of the demands stemming from sensory branding strategies, in the benefit of all stakeholders, it provides clarity and precision to the Trademarks Register and ensures legal certainty and comprehensibility. Although the mark is required to be identified with precision, the underlying rationale for graphical representation does not mandate that every single mark on the Register be defined with extreme accuracy. A permissible degree of variation for graphical representation is present in all marks, which is influenced by the type of the mark, the

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[12] Anne Gilson La Londe & G. Gilson, *Getting real with Nontraditional Trademarks: What's next after red oven knobs, the sound of burning methamphetamine, and goats on a grass roof?* 101 THE TRADE MARK REPORTER 186 (2011).

[13] James Mellor et al., KERLY'S LAW OF TRADEMARKS AND TRADE NAMES 19 (Sweet & Maxwell, 15th edn., 2011).

inherent nature of the mark and its distinctive character.[14]A sign may be represented graphically, with a certain amount of precision, in more ways than one. Non-conventional marks can be represented figuratively with sufficient clarity thereby, qualifying the requirement of graphical representation; although subsequent inference would be required to determine its use and impact.[15]Although the Trademarks Act, 1999 mandates the requirement; however, a small step in the direction towards liberalizing the restriction was made through the Indian Trademark Rules, 2017. The definition of 'graphical representation' was re-cast from initially connoting '*representation of a trademark for goods or services in paper* form'[16] to subsequently encompassing '*representation in digitized form'*[17]as well.

Retention of the requirement of graphical representation as an essential criterion for the protection of non-traditional marks, which are essentially non-visual marks, has stunted the process of liberalization of the Intellectual Property framework.[18] Although the Trademark Rules, 2017 were a step towards expanding the contours of Intellectual Property protection; however, the same were not tailored to recognize the recent technological advancements in the field or protect the commercial interests of the traders using such marks. The requirement of graphical representation is believed to be a result of an overzealous approach to trademark registration.[19] It is argued that the rigidity and inflexibility of the Indian trademark regime have led to reduced registrations for non-traditional trademarks.[20] From a practical perspective, there appears to be a reluctance on the uptake of these marks owing to the possibility of the costs of maintenance exceeding the

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[14] *Supra* n. 11, p. 15.

[15] *Supra* n. 13.

[16] Trademarks Rules, 2002, Rule 2(1)(k).

[17] Trademarks Rules, 2017, Rule 2 (1)(k).

[18] Kuruvila M. Jacob & N. Kulkarni, *Non-Conventional Trademarks: Has India Secured an Equal Footing?* 9 The Indian Journal of Intellectual Property Law 47 (2018).

[19] Inês Ribeiro da Cunha & Randakevičiūtė-Alpman, *New types of marks available after the European Union Trademark Reform: An Analysis in the light of the U.S. Trade Mark law*, 10 JOURNAL OF INTELLECTUAL PROPERTY, INFORMATION TECHNOLOGY AND E-COMMERCE LAW 375 (2020).

[20] *Supra* n. 18.

overall benefits and the risks and additional costs for implementation likely to be incurred.[21]

Another rationale for unconventional trademarks being faced with issues of difficulty in registration is attributed to an absence of distinctive character amongst these marks. The associated risk is that although, theoretically speaking, a trademark constitutes a sign attached to a product. However, regarding non-traditional trademarks, which are more conceptual rather than figurative, there is a potential threat that the mark may be mistaken as a part of the product itself.[22] Non-traditional marks are protectable only on the development of secondary meaning or acquired distinctiveness owing to the fact that the mark protected such as the taste, touch, sound or smell is most often perceived as an inherent attribute or even a decorative aspect of the product it denotes rather than as a distinguisher identifying trade origin. Such marks lack inherent distinctiveness, and in the absence of the public being acquainted with these marks, it makes it more difficult for them to be perceived as signalling trade origin. If this be the case, then 'graphical representation' must not hinder registration for those non-conventional trademarks where distinctiveness could be established such as Metro-Goldwyn-Mayer Lion Corp's (MGM) sound of the lion roar which was being used in feature films since 1928.[23]

Jurists opine that if the position of nontraditional trademarks in the litmus test of distinctive character is assessed from the standpoint that consumers are not accustomed into perceiving these signs as trademarks *per se*, then the argument would become futile with each passing nontraditional mark which brand owners develop. Instead of focusing on a mark's capability to reflect the commercial source, it is argued that its *'capacity to distinguish'* the products it denotes is in-fact crucial. A trademark applicant can seek to justify distinctiveness of a mark based on its product feature, which is recognizable by the human senses. If Trade Marks Offices accept this justification, it could help expand legal protection for nontraditional marks

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[21] Kensaku Takasi & M. Nakayama, *Japan introduces Nontraditional Trademarks*, 249 MANAGING INTELLECTUAL PROPERTY 16 (2015).

[22] Robert W. Emerson & K.C. Collins, *Mutating Marks: Refusing to Lose the Trademark Trail*, 15 NORTHWESTERN JOURNAL OF TECHNOLOGY AND INTELLECTUAL PROPERTY 149 (2018).

[23] *Supra* n. 13, p. 23.

by implying a lower threshold demonstrating the '*source-identifying ability*' of the mark and instead focusing on the specific features of the sign for which protection is sought. Consequently, with every innovative non-conventional trademark created and marketing strategy devised to educate the public, the impact of these marks would be further fortified in the minds of consumers and the factum of the public not being habituated to these marks would lose force.

Recognition of non-traditional trademarks raises another pertinent question regarding whether such marks can transgress the boundaries of trademark law into the realm of other IP laws and whether trademark proprietors can mutate or morph copyright and industrial design protection within their marketing image.[24] With the possibility of being perceived as characteristic features of the product they represent, non-traditional trademarks not only augment the areas of overlap between copyright, trademark and industrial design laws but also enhance the likelihood of potential damage to the '*cycle of innovation*' in industrial product designs or creative artistic and literary works owing to indefinitely renewable trademark rights beyond the statutory term of copyright and design protection.[25] A consequent outcome is a threat to the stable market equilibrium as perpetual rights in a trademark may thwart the potential evolution of innovative products and widen the scope of incongruities within the Intellectual Property law scheme. However, a conflicting belief is that a rigid 'product mark dichotomy' could curtail trademark protection to only certain specific marks which can be affixed to a product and thus, reduce the incentive for the creation of new marks.[26]

Another colossal challenge faced by such marks is the proof of dilution or likelihood of confusion and the extent of similarity for an allegedly famous non-traditional mark chiefly owing to the thin line difference while comparing sensorial marks. One obstacle specific to these marks is the presence of a traditional trademark alongside a non-traditional trademark. A traditional mark makes identification of the non-traditional mark possible. In most cases, a Defendant would deliberately ensure the use of an undisputed, distinct traditional mark

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[24] *Supra* n. 9.

[25] *Supra* n. 6, p. 6.

[26] *Supra* n. 6, p. 5.

for the same or similar non-traditional mark thus, making the evidence for the likelihood of confusion even more complicated.[27]

An additional flipside of non-traditional trademarks as often argued by legal scholars is that instead of enhancing the quality and efficacy of the product, companies spend resources towards building creative advertising strategies to develop a 'brand image'. This exaggerated and externally induced product image created through persuasive advertising leads to an artificial differentiation. Brand loyalty is deemed indicative of '*ethical decadence*' of modern society. Proponents of this theory are of the view that the advertising function of a trademark is an evil linked to the implementation of the origin function. They believe that the broader protection of the advertising function of trademarks leads to '*ethical corruption*' amongst consumers leading them to become '*branding personalities*'.

Further, another factor that comes into play is that even though non-traditional trademarks promote the development of innovative branding and advertising methods; however, they expose a plethora of intellectual property to legal protection which eventually leads to unfavourable restrictions on access to IP resources. So long as a sign is distinguishable and non-functional, it should be open to securing Intellectual Property protection. With the emergence of marks which embody a multi-sensorial perception, the visual representation can no longer remain a *sine qua non* for securing trademark rights.[28]

Conclusion

Although the quandary encapsulating protection of non-traditional trademarks is a delicate path to tread, inclination should be towards a flexible and more permissive approach. Through this scheme, legal protection can be liberalized to the extent it retains its safeguards and allows the task of filtering inappropriate signs to be left to the Trademark Offices and the task of regulating the ambit of protection and assessment of infringement claims, to the Courts.[29]

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[27] *Supra* n. 12.

[28] Vatsala Sahay, *Conventionalising Non-Conventional Trademarks of Sounds and Scents: A Cross-jurisdictional Study*, 6 NALSAR STUDENT LAW REVIEW 128 (2011).

[29] *Supra* n. 6, p. 7.

Justice System in India:
A Centenary in Making and Road Ahead

Reetam Singh*

'An ideal society should be mobile,
should be full of channels for conveying
a change taking place in one part to other parts.
In an ideal society, there should be many interests
consciously communicated and shared.'
*— Dr. Bhim Rao Ambedkar***

Introduction

The above quote by the Architect of post-modern India describes dutifully the evolving nature of Indian Constitution and Justice System. That it is a living document which is evolving as per the needs and demands of the society. The Justice System in India is not a simple tool to segregate a right from a wrong or punish the guilty; but it is the means to implement justice in true social, economic and political sense to liberate people as envisioned by the founding fathers and mothers of this great nation. The scope of justice was defined beyond the traditional terms of doing the right, where it was a medium to achieve social liberation from the evils of caste system and class antagonism, to unite people under a scope of equality towards economic emancipation by bringing a country out of poverty and illiteracy, thus leading India to its 'just idea' of an egalitarian society ensuring political power and dignity to all. To that vision of India, outlined in the Preamble of our Constitution, our Justice System is a tool to achieve it.

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** B.R. Ambedkar, *Undelivered Lectures,* ANNIHILATION OF CASTE (1936).

Evolution of Indian Justice System

Summarising the evolution of Indian Judicial System in the past 70 years is a daunting task. Each landmark judgement of the Supreme Court along with legislations passed by Parliament is a stepping stone towards making ours a fully functional democracy where law evolves with time and need of the people. Abolition of Jury Trial (*K.M. Nanavati Case)*[1], Supremacy of Fundamental Rights over Parliamentary Laws (*Golaknath Case*[2] *and Minnerva Mills Case*[3]), Basic Structure Doctrine (*Kesavananda Bharati Case*[4]*)*, Environmental Rights & Public Interest Litigation (*M.C. Mehta* v. *Union of India*[5]), Validation of Reservation (*Indra Sawhney Case*[6]*)*, Restricted powers of the President's Rule (*S.R. Bommai Case*[7]*)*, defining of workplace rules to prevent sexual harassment of women (*Vishakha Case*[8]*)*, Abolition of Sec 377 (*Navtej Singh Johar* v. *Union of India)*[9], Generic Medicine over Patented medicinal rights (*Novartis Case*[10]*)* and the *Nirbhaya Case on need for speedy trial*[11] can be regarded as the cornerstones for evolution of the Indian Judicial System. In terms of Parliament's contribution to the above evolution, evolution, from Consumer Protection Act 1986, Environment Protection Act 1986, Right to Information Act 2005, Mahatma Gandhi National Rural Employment Guaranatee Act 2005, National Food Security Act 2013, Criminal Law Amendment Act 2013 (Nirbhaya Act), and the Transgender Persons (Protection of Rights) Act 2019 can be a few examples of benchmark legislations, defining the course of Indian Jurisprudence. Both the Legislature and Judiciary after deliberate discussions and taking into consideration the countervailing opinions have moved forward to lay the foundation for a progressive India into

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1 1962 SCR Supl. (1) 567.
2 1967 SCR (2) 762.
3 AIR 1980 SC 1789.
4 AIR 1973 SC 1461.
5 1987 SCR (1) 819.
6 AIR 1993 SC 477.
7 1994 SCALE (2)37.
8 J.S. Verma (CJI) in *Vishaka* v. *State of Rajasthan* 1997.
9 Dipak Misra (CJI), A.M. Khanwilkar (J) in in *Navtej Singh Johar* v. *Union of India* WP. (Crl.) No. 76 of 2016, D. No. 14961/2016.
10 Aftab Alam (J) and Ranjana Prakash Desai (J) in *Novartis A.G.* v. *Union of India;* Civil Appeal Nos. 2706-2716 OF 2013.
11 (2017) 2 SCC (Cri) 673.

the 21st century. The paper intends to highlight the efforts undertaken by post-independence India defining the evolving/living/changing nature of the Indian Constitution. And how the conscience and actions of our Judiciary and Legislature worked towards giving structure to that evolving nature. Suggestions and recommendations by various Commissions, issues faced at present, bottlenecks making the system ineffective and solutions to resolve those issues are highlighted in the paragraphs below through the work undertaken by various institutions and organizations working in tandem with the present system in place.

Commission on Constitutional Reforms

It is our duty to not only be inspired by the historical achievements but also lay down the roadmap for future India. And in this context, it is our duty to envision a just, equitable, liberal India for all the individuals who could be proud of the legal tradition inspired by the works of Dr. Bhim Rao Ambedkar and carry his work forward. To brainstorm ideas for constitutional reforms, one needs to peruse through the recommendations made by the *Venkatachaliah Commission Report*[12]. Though an exhaustive piece of Report which was made by a joint committee of Judges and Parliamentarians, the Report never saw any concrete implementation. Certain ideas like the fundamental right to a minimum guaranteed employment of 80 days every year (given under Para 10.3.11/Recommendation No.221 of the Report later evolved into Mahatma Gandhi National Rural Employment Guarantee Act, 2005) with laws of transparency in functioning of Administration (under Para 6.10 of the Report which later evolved in the RTI Act, 2005) along with compulsory education up to the age of 14 years (Para 3.20.2/Recommendation No. 16 of the Report which was later incorporated in the Right to Education Act, 2005) were given statutory implementation through Acts of Parliament. But its incorporation within the Fundamental Rights sections would have given the tooth and arms to the Judiciary to implement minimum basic rights to all citizens and make it the duty of State to provide such facilities, not being implied, but being explicitly minimum guarantee.

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[12] *See*, National Commission to Review the Working of the Constitution, *available at* https://legalaffairs.gov.in/ncrwc-report (last visited December 3, 2020).

The 14th Prime Minister of India, Sri Narendra Modi, on several occasions has laid down the significance to get rid of archaic provisions of Indian Penal Code (IPC) and Criminal Code of Procedure (CrPC)[13]. It is a positive thought over the historical amnesia of Macaulay era of 1860s but along with that several other provisions of Constitution along with British Era laws need to be revisited as well. In this regard, a big step would be striking down Section 124A of IPC (Sedition)[14] which is the most controversial and misused law in present times. Only physical-real *actus* should be seen to be viable excuse for its enforcement not mere speech as on many times it is seen as a tool to suppress free speech. India is a developed functioning democracy which cannot be threatened by mere utterance of words, this law is as draconian as Sec 377 of IPC[15] which was struck down by the Supreme Court, and hence should be repelled.

Judicial Bottlenecks

Pendency of cases is another issue log jamming the efficiency of justice system in India. According to data collected from the National Judicial Data Grid, there are more than 4 Crore cases are pending in India[16]. Of these, 63,393 Cases are pending in the Supreme Court itself[17], 53.49 lakh cases are pending in High Courts[18] while 3.62 Crore cases are pending in the District and Sub-ordinate Courts[19]. Of the latter lower judiciary) cases, 73% are criminal cases and 27% are on civil matters[28]. This calls

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[13] PTI, *Modi Govt resolves to make changes in IPC, CrPC: Amit Shah,* The Economic Times *available at* http://www.ecoti.in/-NLRRY (last visited December 3, 2020).

[14] The Indian Penal Code, 1860, Chapter VI.

[15] The Indian Penal Code, 1860, Chapter XVI.

[16] Department of Justice, Ministry of Law and Justice, National Judicial Data Grid 2020, Ecourts Services, *available at https://ecourts.gov.in/ecourts_home/* (last visited December 3, 2020).

[17] Department of Justice, Ministry of Law and Justice, Statistics;2020: Supreme Court of India, *available at* https://main.sci.gov.in/statistics (last visited December 3, 2020).

[18] Department of Justice, Ministry of Law and Justice, National Judicial Data Grid: High Courts of India 2020, Ecourts Services, *available at* https://njdg.ecourts.gov.in /hcnjdgnew/ (last visited December 3, 2020).

[19] Department of Justice, Ministry of Law and Justice, National Judicial Data Grid: District and Taluka Courts of India 2020, Ecourts Services, *available at* https://njdg.ecourts.gov.in/njdgnew/index.php(last visited December 3, 2020).

for an immediate rehaul of the procedure of judicial system, mainly in lower and subordinate courts which causes for the extensive delay in delivery of Justice.

Another startling fact to consider is that 78% of the pending cases are new (that is, cases which are under 5 years of age) [28]. This increase is mainly due to increase in commercial litigation due to new laws like Insolvency and Bankruptcy code, Commercial Courts Act etc., and due to the awareness of rights by common man-indicating the socio-economic advancement and rise of faith and courage of common people to approach courts of law for delivery of Justice.

Also, another reason for inordinate delay is the deficit in the number of Judges in our Country. In India, we have a total of only 17,424 Judges[20](sanctioned strength is 23,584 of all jurisdiction courts included) which is equivalent to a population ratio of 19 Judges for 10 lakh people. The Law Commission Report of 1987 recommended at least 50 Judges for every 10 lakh people[21] for smooth functioning of Indian Courts. The population has increased by 25 Crore since 1987[22] and this required ratio now has increased significantly. Also, India does not have enough Courts. The budgetary allocation for the whole judiciary is at an abysmal low of 0.08% of the whole budget[23] while high pendency rate, the backlog in the system due to less efficient judiciary imposes an economic burden of 0.5% of GDP on the Indian society[24]. This needs to be increased significantly for modernization of courts including computerization and digitization of proceedings. The focus of the present government should be to overhaul its image as the largest litigant in India were one department is suing another of the Executive,

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[20] PTI, *India has 19 judges per 10 lakh people: Data*, The Hindu Business Line *available at* https://tinyurl.com/y5yjoqa3 (last visited December 3, 2020).

[21] Law Commission of India, *125th Report on Manpower Planning in Judiciary: A Blueprint* (July 1987) p 3. para 9, *available at* https://lawcommissionofindia.nic.in/101-169/Report120.pdf (last visited December 3, 2020).

[22] Office of the Registrar General & Census Commissioner of India *2011 Census of India.*

[23] Tata Trust, *Indian Justice Report* (2019) *available at* https://www.tatatrusts.org/insights/survey-reports/india-justice-report (last visited December 3, 2020).

[24] Daksh India, *Access to Justice Survey* (2016) *available at* https://www.dakshindia.org/wp-content/uploads/2016/05/Daksh-access-to-justice-survey.pdf (last visited December 3, 2020).

leaving the decision-making duty upon the Courts. The All-India Judicial Service was a positive step in this regard where an immediate increase of number of Judges is required from current 21,000 to 40,000 least[25]. Such a prestigious Group-A Service would also ensure the best brains and talented individuals are attracted towards Judiciary.

Establishment of Fast Track Courts, *Lok Adalats* and *Gram Nyayalayas* would further assist the issue of tackling pending cases in an expedited manner.

Mediation & Arbitration as Road Forward

In terms of future prospects of delivering Justice in the area of commercial disputes, the alternative dispute resolution methods like mediation and arbitration have proved to be effective methods. India enacted the Arbitration and Conciliation Act, 1996 to align the procedural law of India in line with the UNCITRAL Model Law on International Arbitration[26], which was the turning point in the arbitration history of India. The 2015 Amendment Act[27], by providing timelines, transparency of arbitration process by mandating self-declaration by arbitrators about the conflicts of interest (in line with IBA Rules on conflict of Arbitration) etc., projected India as country friendly with Arbitration norms. But the 2019 Amendments to the said 1996 Act by prohibiting various types of foreign nationals from sitting as arbitrators in India seated international arbitrations, has resulted in a big setback. Such negative action would discourage foreign parties from choosing India as a seat for their Arbitration.

India envisions to establish itself as the future leading Centre for Arbitration in line with New York, London, Paris and Singapore. The solution lies not only in establishing the New Delhi International Arbitration Centre but also aligning the law in line with the global trends. India recognises only 34 countries under New York Convention on Recognition and Enforcement of Foreign awards, 1958[28], whereas

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[25] CJI T S Thakur, *Extract from the speech of Inaugural session of Joint Conference of Chief Ministers and Chief Justices of High Courts* (April 2016) *available at* https://tinyurl.com/y58bklxn.

[26] *See generally*, The Arbitration and Conciliation Act 1996.

[27] *See generally*, The Arbitration and Conciliation (Amendment) Act, 2015.

[28] *See*, The Arbitration and Conciliation Act 1996, Part-II, Chapter I, ss. 44-52.

progressive arbitration seats like Singapore recognizes all the 183 signatories of the said Convention. Dubai international Finance Center (DIFC) and Qatar Finance Centre (QFC) are favorable arbitration seats because they are special economic zones where the national courts of those countries do not have jurisdiction and there are international courts established to handle commercial matters as per English law. Moreover, post arbitral award litigation like challenging of arbitration awards, enforcement of awards takes long time due to pendency of cases in Courts. Hence a special tribunal should be established to handle arbitration related litigation.

International resolution of commercial disputes by mediation is on the rise. India also has signed Singapore Convention on Mediation 2018[29] but we do not have a proper mediation law to make mediated settlements enforceable. Arbitration and Mediation Centers should be established in all important cities especially in cities like Mumbai, Chennai, Bangalore and Calcutta to encourage resolution through mediation and arbitration. Also, the interference of jurisdictional courts should be very limited, and arbitration related litigation should not be treated as regular civil appeals, the court jurisdiction in such matters is only a supervisory jurisdiction and not appellate jurisdiction. Only then the alternative dispute redressal mechanisms would see a success in India.

As the methods of Alternate Dispute Resolution further develops, certain cases of civil in nature (land acquisition, government contract, royalty settlement) etc., should be resolved through arbitration process only, in order to reduce the burden on traditional courts.

Transforming Indian Criminal Justice System

Another important issue that needs to be tackled is the reforms in the criminal justice system in India. Archaic laws are a small part of the larger issue in concern. The real issue is of botched up investigations and repeated delays in the same which causes further delays in dispensation of justice.

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[29] PIB, *Cabinet approves signing of the UN Convention on International Settlement Agreements Resulting from Mediation by India* (2019) *available at* https://tinyurl.com/y48fg8s9 (last visited December 3, 2020).

India has a conviction rate of just 21.2% of the cognizable offences registered[30]. Countries like Japan and USA have a conviction rate of 99% and 93% respectively[31]. This shows the dismal condition of investigating in India and also highlights the issue that a number of cases are false or mistrials which should have been rejected in the initial investigation itself, somewhere raising a question on the entire machinery responsible for its delivery including investigating agencies. The *Vohra Committee Report of 1993*[32], *Malimath Committee Report of 2003*[33] *and Madhav Menon Committee Report 2007*[34] focused extensively on the issue of reformation of Criminal Justice System. Malimath Committee in fact found that the current justice system weighed in favor of the accused and did not adequately focus on the justice to the victims of the crimes[35]. Hence on multiple occasions we have seen the civil society out on the streets showing their dismay at the outcome of certain cases decided by some courts of law, which under due pressure revise their processes to take the right cause. But such actions should be a simple reminder towards a bigger overhaul required in the justice system. Instead of believing in the maxim of '*proof beyond a reasonable doubt*' as the basis to convict an accused, the Judiciary should rather focus on the rule *if the Court is convinced that it is true*' as the basis for convicting a criminal. For example, in cases of rape, sexual assault, murder or serious bodily injury; the present procedural requirement requires to prove a direct cause and relation of an exact injury on the exact body part with the act of accused (or through a weapon used by the accused). In cases of

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[30] National Crime Records Bureau, *Crimes in India 2019* (2019) *available at* https://ncrb.gov.in/en/crime-india-2019-0 (last visited December 3, 2020).

[31] Ramseyer, J. Mark, and Eric B. Rasmusen, *Why Is the Japanese Conviction Rate so High?* 30(1) JOURNAL OF LEGAL STUDIES 53-88 (2001) *available at* doi:10.1086/468111 (last visited December 3, 2020).

[32] Ministry of Home Affairs, *Vohra Committee Report* (1993) *available at https://adrindia.org/sites/default/files/VOHRA%20COMMITTEE%20REPORT_0.pdf* (last visited December 3, 2020).

[33] Ministry of Home Affairs, *Committee on Reforms of Criminal Justice System* (2003) *available at https://www.mha.gov.in/sites/default/files/criminal_justice_system.pdf* (last visited December 3, 2020)

[34] Ministry of Home Affairs, *Draft National Policy on Criminal Justice* (2007) *available at https://tinyurl.com/y4tkv6l9* (last visited December 3, 2020).

[35] Ministry of Home Affairs, *Committee on Reforms of Criminal Justice System Justice to Victims* (2003) *available at https://www.mha.gov.in/sites/default/files/criminal_justice_system.pdf* (last visited December 3, 2020).

multiple accused individuals, the Defense seldom uses the tactics of confusing the Court by projecting that the direct cause and effect of the accused person *actus* may have not led to the harm upon the victim. Since the evidence could not pinpoint the accused to that alleged act, they are liable to be absolved from the alleged charge. In such cases, victim testimonies and strong circumstantial evidence have lower weightage and the Court under present rules is bound to pronounce a lighter sentence as a tight case by prosecution could not be presented. If such a procedural requirement of 'beyond reasonable doubt' is replaced by 'convinced it to be true' philosophy, where if the Courts believe that the supporting contentions are true, and registers the same in explanation while pronouncing judgement, tighter sentences can be given in cases of heinous crimes in an expedited manner and faith of the people in the criminal justice system can be restored.

Compensation rules need to be overhauled as well where the victims must be given satisfactory compensation as well along with punishment to the guilty. A Victim Compensation Fund on lines of Compensation Scheme for Sexual assault, acid attack victims should be constituted.

Over-crowding of our Prisons is another issue where 67.2% of the total prison population consists of under-trial prisoners only[36]. In cases of non-heinous crimes and non-repeat offenders, bail should be made obligatory along with provisions of house arrest (monitored through geo-tagging), community service and rehabilitation should be made part of the reform system to decongest prisons.

E-Courts & Digitisation of Litigation

Digitisation of courts in India is another target that needs to be achieved in upcoming years. The E-Courts Project, which was conceptualised based on the *National Policy and Action Plan for Implementation of Information and Communication Technology (ICT)*[37] in the Indian Judiciary

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[36] National Crime Records Bureau, *Prison Statistics of India* 11 (2015) Table 1.3 *available at* https://ncrb.gov.in/sites/default/files/PSI-2015-%2018-11-2016_0.pdf (last visited December 3, 2020).

[37] E-COMMITTEE Supreme Court of India New Delhi, *National Policy and Action Plan for Implementation of Information and Communication Technology in the Indian Judiciary* (2005) *available at* https://main.sci.gov.in/pdf/ecommittee/action-plan-ecourt.pdf (last visited December 3, 2020).

by the e-Committee of the Supreme Court, has a vision to transform the Indian Judiciary by ICT enablement of courts --thus drastically changing the ease of access to courts for the common citizens. Paperless courts like electronic filing service helps court to reduce paper trials while a *National Data Grid*[38] could help to hold all information pending on a subject matter in a common database accessible from the lowest court to the highest authorities under the same umbrella, thus simplifying court procedures and save time. This would bring in further transparency and ease of access to citizens.

Courts should start accepting electronic disposition of witness testimonies to save time and ensure witness safety. The COVID19 pandemic did force the judicial system to use the E-COURTS system and virtual courts at a widespread level. The positive learning from such steps should be its implementation in post pandemic times as well. Digitization reduces the dependency on physical paper trail making the process robust and swiftly executable with limited scope of misplacement. But there are still certain areas where betterment could be done. Drafting and pleading of various form of plaints should be standardised across the 3-tier system along the States. Along with that, artificial intelligence could be used to educate citizens about their legal rights in languages they can comprehend, using technology to empower the poor and unprivileged. At present, it is the judicial illiteracy amongst the common masses which makes them approach legal professionals for minute issues and documentations. Once, AI is incorporated in designated workstations across police stations, hospitals, jails, courts, governmental institutions (like citizen charter); general people could easily use technology for simple filing and documentation in languages other than official which could fasten the delivery of documentation to individuals.

Conclusion

Thus, the Indian Justice System and the Indian jurisprudence has evolved gradually over the years transgressing through the contours of time, patiently getting up to the demands of the society. We have a long

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[38] Department of Justice, Ministry of Law and Justice, *National Judicial Data Grid (District and Taluka Courts of India)* (2015) *available at* https://njdg.ecourts.gov.in/ (last visited December 3, 2020).

way forward and multiple targets are still anticipated to be achieved. But the justice system has shed its colonial underpinnings to a great extent, getting a pan-Indica outlook which is studied and appreciated by legal scholars around the world.

We have come a great path forward, had certain detours and diversions in the middle, yet in the present times, we are realigned to the actual cause, which was to have a justice system that guarantees social, economic and political emancipation to all. And that shall be the true testament to the story of this great nation when it completes its centenary holding up the Gandhian-Nehruvian-Ambedkarian ideals into the latter half of 21st Century.

Pedigree of People's Participation in Democratic India: An Analytical Tracing

Bharat[*]
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Introduction

India is the largest Parliamentary Democracy in the world. The parliamentary form of government is also known as a participatory or representative form of government where people have 'right to vote' to exercise their will directly or indirectly in the formation of the government.[1] In other words, the real parliamentary democracy is established when 'the power to govern is derived from the authority of people and based on their consent'[2] through free, fair and regular elections. The exercise of the right to vote[3] is a formal expression of will or opinion of the people.[4] Therefore, no right can be said more precious than exercising the right to vote freely in elections.[5] While observing the

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1 *People's Union for Civil Liberties* v. *Union of India* (2013) 10 SCC 1.

2 Jay Steinmetz, POLITICS, POWER, AND PURPOSE: AN ORIENTATION TO POLITICAL SCIENCE (Fhsu Digital Press), *available at* https://fhsu.pressbooks.pub/orientationpolisci/chapter/chapter-5/ (last visited March 24, 2020).

3 *Supra* n. 1. The Apex Court observed that 'the right to vote at the elections to the House of the People or Legislative Assembly is a constitutional right but not merely a statutory right; freedom of voting as distinct from right to vote is a facet of the fundamental right enshrined in Article 19(1) (a). The casting of vote in favour of one or the other candidate marks the accomplishment of freedom of expression of the voter.'

4 *Lily Thomas* v. *Speaker, Lok Sabha* (1993) 4 SCC 234.

5 Soli J. Sorabjee, *Indian Democracy: Reality or Myth?* 33 INDIAN INTERNATIONAL CENTRE QUARTERLY 83-84 (2006).

importance of the people's participation in the democratic process, Winston Leonard Spencer Churchill remarked:

> 'At the bottom of all the tributes paid to democracy is the little man, walking into the little booth, with a little pencil, making a little cross on a little bit of paper – no amount of rhetoric or voluminous discussion can possibly diminish the overwhelming importance of that point.'[6]

Democracy is meaningless without people's participation; thus, participation through voting is considered as the essence of participatory democracy.[7] The people's participation in the democratic process has two necessary steps, *i.e.* 'making a view point about a candidate and reflection of the same through voting in favour of selected one'.[8] The awareness, vigilance and attentiveness of voter are also important for his effective participation in the formation and functioning of a democratic government. No doubts both the steps have their importance individually as well as collectively. Nevertheless, it is submitted that the first step is meaningless and loses its relevance unless the latter is not taken wisely. If a voter actively participates in debates or express his opinions in view to support or criticise actions of government, but does not cast his vote in elections, his opinion can merely be considered as freedom of speech and expression.[9] Consequently, expression of opinions should be reflected through the exercise of the right to vote. Democracy is not a game of spectators.[10] Hence, the active participation in election process and alertness during the term of government is condition precedent for the success of parliamentary democracy. The citizen's non-expression of opinions through voting is not only affecting the spirit of democracy, but also leads to a non-popular government.

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6 *Supra* n. 5.

7 *Supra* n. 1.

8 *Id*., 'The first step is complementary to the other. Many a voter will be handicapped in formulating the opinion and making a proper choice of the candidate unless the essential information regarding the candidate is available. The voter/citizen should have at least the basic information about the contesting candidate, such as his involvement in serious criminal offences.'

9 *See*, Constitution of India, 1950, art. 19(1)(a).

10 Here term 'spectators' is used for those citizens who only make opinions about the functioning of the government either to support or criticise.

After independence in 1947, the 'right to vote' based on Adult Suffrage was resolved by the makers of the Constitution to establish a parliamentary form of democracy. Adult franchise is granted by virtue of Article 326 under Part XV of the Constitution of India (hereinafter mentioned as the Constitution) dealing with 'Elections'. Through, the above said constitutional provision of adult suffrage every person who is citizen of India is entitled to vote in the elections to the House of the People and to the Legislative Assembly of every State and is not otherwise disqualified under the Constitution or any law made by the appropriate Legislature on the ground of non-residence, unsoundness of mind, crime or corrupt or illegal practice, shall be entitled to be registered as a voter at any such election. However, it was consistently observed that voting turnout in elections depicts low percentage of people's participation in India especially for elections to the House of the People or Lower House (*Lok Sabha*) and to the Legislative Assemblies of States (*Vidhan Sabha*). With the objective of bringing the minimum age of voting at par with most of the other countries of the world and for encouraging enthusiastic participation of youth in the democratic process, Article 326 was amended by the Constitution (Sixty-first Amendment) Act, 1988, as notified and enforced w.e.f. March 28, 1989. The said amendment provided for reducing the minimum age to eighteen years, (as against the then existing age of twenty-one years) to be eligible for exercising the franchise. It was firmly believed that this amendment will provide opportunity to the youth, who are not only literate and enlightened but also politically conscious, to become integral part of the political process as overwhelming people's participation is always impressive in a constitutional democracy. However, no other legal mechanism was provided by the amendment in the Constitution, through which the voters could be statutorily further motivated by going an extra-mile to legally compel them to exercise their right to vote in elections. Although, January 25 was earmarked as 'National Voter's Day' to encourage more young voters to take part in the process since 2011 for shaping the political contours of India.

As a vast majority of advanced democracies do not statutorily compel their citizens to vote and so is India. Due to this lack of statutory force to vote in democratic process the objective of surging the people's participation to strengthen democratic India remained a distant dream,

as evident form the results of immediate next General Elections of 1989, 1991 and 1996. Whereas the Statement of Objects and Reasons to Constitution (Sixty-first Amendment) Act, 1988 legitimately highlighted that the amendment was an attempt to increase the people's participation in the democratic India, but it failed to bring the desired change in the outlook and mindset of the eligible voters. It is also pertinent to mention here that even the Dinesh Goswami Committee, Tarkunde Committee, National Commission to Review the Working of the Constitution and Law Commission of India (255th report) dealt with the issue of introducing compulsory voting in India to increase the people's participation in elections but their recommendations did not find favour for compulsory voting system citing practical difficulties and political impediments. This absence of legal mechanism to compel voting statutorily, enabled the voters with the option to refrain from elections process, consequently parliamentary democracy of India is still waiting for profuse people's participation.

Pedigree of People's Participation in India: Analysis

No doubt that the makers of the Constitution of India formally adopted the Westminster model of Parliamentary Democracy as a form of government in India. However, it does not mean that democratic institutions were unknown to the people of India. In ancient times, the rich culture of democratic institutions in India was popularly known as *Sabha* and *Samiti*.[11] The Presiding Officers or President of the *Sabha* and *Samiti* was called *Sabhapati*, and the members of these *Vedic* assemblies were known as *Sabhasad*. These assemblies enjoyed the prestigious status as sovereign governing bodies, and they even used to elect the King in *Vedic* ages. The members also used to enjoy the freedom of speech and expression during a discussion in the assemblies.[12] The

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[11] K.P. Jayaswal, HINDU POLITY 18 (Bangalore Printing and Publishing Co. Ltd. Bangalore, 1943).

'सभा च मा समितिश्रव्ताम प्रजापतेदुर्हितरो सविदाने,

येना संगछा उपमा स शिक्षाचारु वदानी पितर।'

'May the *Sabha* and the *Samiti*, the two daughters of *Parjapati* concurrently aid me. May whom I shall meet, co-operate with me; may I, O Ye Fathers, speak agreeably who assembled.'

[12] Subhash C. Kashyap, PARLIAMENTARY PROCEDURE 1-2 (Universal Law Publishing Co. Pvt. Ltd., New Delhi, 2006).

members had the right to vote whenever it was required to decide any issue. At the village level, the local administration was governed through elected or nominated representatives which constitute a local unit called *Gram Panchayat* (a unit of five members). At that time village was known as *Gram* and the head of the village called *Gramini*.[13] For joint participation in the formation of the government as well as to decide an issue in *Samiti*, the following prayer gives proper reflection about people's participation:

समानो मन्त्रः समितिः समानी
समानं मनः सह चित्तमेषाम्।
समानं मन्त्रमभिमन्त्रये वः
समानेन वो हविषा जुहोमि।।[14]

The above prayer means that there should be common assembly, common policy, common aim and common state of mind; and we pray to God uniformly to achieve the goal holistically.

During the *Buddha Bhikshu Sangha* period, there were some reflections of the formal voting system by using a ticket called *Shalaka*. Every *Bhikshu* in *Buddha Bhikshu Sangha* had right to vote whenever required. Individual *Bhikshu* is called as *Gana, i.e.,* a unit. The *Shalaka* had non-transferable value, and for its collection and counting, there was an official called *Gana Puraka*. He used to announce the result of voting after counting the *Shalakas*. Gradually, these *Gana Sanghas* transformed into *Ganarajya* (Republic), also called *Ganatantra* (Republic States).[15] The famous and prestigious *Ganatantras*, namely *Lichchavi*, *Mallaks*, *Vrijikas*, *Madrakas*, *Kukrakas*, *Kurus* and *Panchalas*, existed in Indian geography till the fourth century (B.C.).[16]

The Greek writers also quoted the famous democracies of *Ambhastha* and *Patala* in their writings. They mentioned that these two democracies have two chambers, and the administration was governed through elected or nominated representatives. Even they mentioned about the concept of elected King as the head of State.[17] However, after the Gupta

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[13] A.S. Altekar, STATE AND GOVERNMENT IN ANCIENT INDIA 95&98 (Motilal Banarsi Das Publisher and Bookseller, Banaras, 1949).

[14] *Supra* n. 11, p. 13.

[15] *Supra* n. 11, pp. 31-33.

[16] *Supra* n. 11, p. 52.

[17] *Supra* n. 11, p. 74.

period, the *Ganarajya* or *Ganatantra* were taken over by the Kinship rule in the fifth century (A.D.). After that continues invasion by foreigners from the different religious and cultural background was also a contributory factor in the uprooting of *Ganarajya* or *Ganatantra*.[18]

Formal Legislative Process in India

The formal legislative process started by the East India Company as they required a legal system to gain hold in India. Nevertheless, the Indian natives were denied participating in the administration of lawmaking and enforcement. In 1909, the Indian natives got the right to represent in the Councils through the Indian Councils Act, 1909. However, it had a limited representation as the native Indians had no voting rights in the elections. To modify the Act of 1909, the British Parliament passed another statute, *i.e.* the Government of India Act, 1919. Through this Act, the representation of Indian natives was extended, and the dual system of Centre and Province level was structured. The British government again modified this governing system in 1935 by enacting the Government of India Act, 1935. From 1909 to 1935, the voting rights to the native Indian were limited or based on the religion as a separate electorate was given to Hindus and Muslims.

In India, under the Constitution as per Article 324, the election process is administered by the Election Commission of India (ECI) which is an autonomous Constitutional authority. ECI administers all the elections including election to House of the People or Lower House (*Lok Sabha*), Council of States or Upper House (*Rajya Sabha*), State Legislative Assembly (*Vidhan Sabha*), State Legislative Council *Vidhan Parishad*) and the offices of the President and Vice President in the country.

Under Article 326 of the Constitution, the voting right is granted to the citizenry.[19] The qualification and condition to acquire the voting right is further extended by the enactment of statutory provisions, *i.e.* the Representation of People Act, 1950[20] and the Representation of People

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[18] *Supra* n. 6, pp. 33-34.

[19] Constitution of India, 1950, Art. 326. Article 326 provides for Adult Suffrage. Earlier the age for adult suffrage was twenty-one years, but after the Constitution (Sixty-first Amendment) Act, 1988 the age was reduced to eighteen years.

[20] The Representation of People Act, 1950, No. 43, Acts of Parliament, 1950 (India)

Act, 1951.[21] The Representation of People Act of 1950 provides for the defining the limits of the constituencies for the elections of the Parliament and State Legislatures along with to provide for the essential qualifications/disqualifications of voters, preparation and maintenance of electoral roll for the election process. The Representation of People Act of 1951 provides for a process to conduct the election of the Parliament and State Legislatures. The Act also provides for the essential qualifications and disqualifications of the Members of the Parliament and State Legislature along with prevention of corrupt practices, offences and other matters in respect to the conduct of the election.

The constitutional and statutory provisions have ensured and strengthened the people's participation in the democratic process by empowering every citizen with the right to vote and its exercise. However, none of these provisions makes voting compulsory in the elections. In this backdrop, there is a need of a legal mechanism which encourages or ensures maximum participation of voters in elections so that voting right should be connected with delight in contributing in the formation of the government to achieve the ends of democratic dogmas.

People's participation in General Elections (1951-2019)

The founding fathers of the Constitution of India resolved for the parliamentary form of government with the belief that people of India would enjoy a participatory form of democracy where citizens would participate in the election process in order to form a collective and responsible government to achieve the objective of social, economic and political justice as pledged in the Preamble of the Constitution.

In order to understand how Indian citizens participated in the formation of a responsible government, there is a need to examine the election process of General Elections which are usually held in all states and union territories for country's primary legislative body, *i.e.*, Lower House (*Lok Sabha*) since 1951 till 2019 chronologically.

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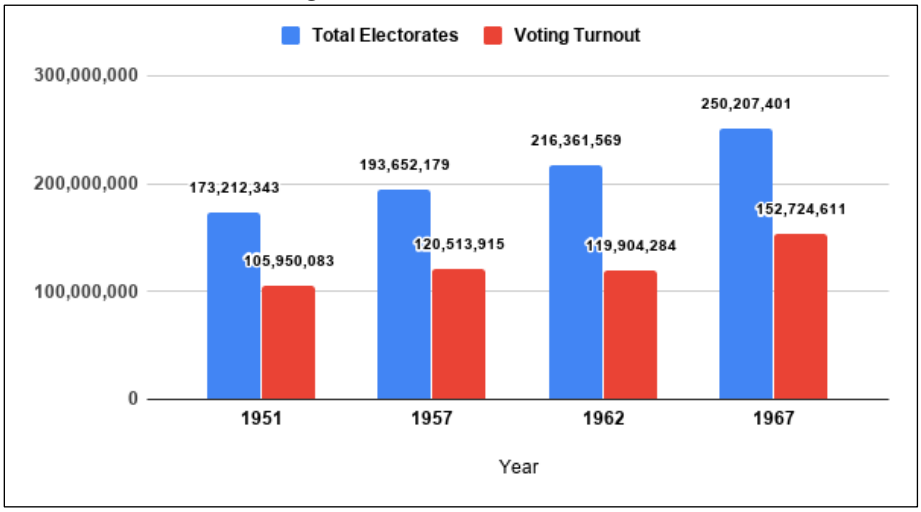
ss. 16-19.

[21] The Representation of People Act, 1951, No. 43, Acts of Parliament, 1951 (India).

To begin, let us examine the first four General Elections held in-between 1951 to 1967 to understand the voter's participation after independence in the formation of a government:

Chart 1: Voting Turnout out of total electorate (1951-67)



The first General Election to the House of the People was initiated in October 1951 and concluded in February 1952. At the time of the election, in India, there were 173,212,343 registered electorates out of which 105,950,083 have cast their votes in the election process which amounted to 44.87% of total eligible voters.[22] The founding fathers of the Constitution neither envisaged this voting turnout, nor did it reflect a collective will. In 1957, the second General Election was conducted, and 120,513,915 voters out of total 193,652,179 eligible registered voters participated in the election process. In this election, 45.44% voting turnout was recorded with a mere 0.57% increase.[23] In the first two General Elections of 1951-52 and 1957, no doubt the people's participation did not meet the expectations of democratic principles. However, the Indian National Congress (INC, often called Congress or the Congress Party) formed the government with 398 and 406 MPs

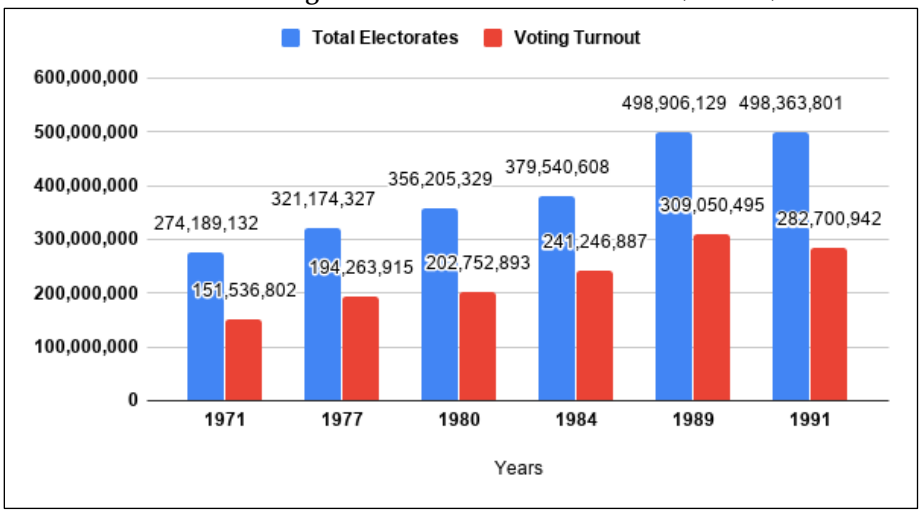
[22] Election Commission of India, *Results and Statistics, available at* https://eci.gov.in /files/file/4111-generalelection-1951-vol-i- ii/ (last visited April 12, 2020).

[23] Election Commission of India, *Results and Statistics, available at* https://eci.gov.in /files/file/4112-general-election-1957-vol-i-ii/ (last visited April 18, 2020).

owing to its dominance in the independence movement, broad base, image of Pt. Jawaharlal Nehru and weak opposition.

Unlike the two previous general elections, each constituency elected a single member in the third General Election held in 1962 with the voting turnout of 55.42%. In this election, 119,904,284 voters out of total 216,361,569 eligible registered voters exercised their franchise which resulted into an increase of 9.98% in voting turnout.[24] In the fourth General Election of 1967, post-1962 China war and 1965 Pakistan war, voting turnout again increased by 5.98%. In this General Election, 152,724,611 out of total 250,207,401 voters marked their presence in the polling booths. It was the maiden election in the history of the Indian democratic process when voter turnout reached 61.04%.[25]

Chart 2: Voting Turnout out of total electorate (1971-91)



However, in fifth General Election of 1971, the voting turnout decreased by 5.77%, and it was a setback to the belief that voters understand the seriousness of participation in the election process, as against the

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[24] Election Commission of India, *Results and Statistics, available at* https://eci.gov.in /files/file/4113-general-election-1962-vol-i-ii/ (last visited April 25, 2020). This time the percentage was calculated with the formula (total vote polled divided by total electorates and multiply by 100. However, in the last two General Elections (1951 and 1957) the percentage was average percentage of voting turnout percentage in different states.

[25] Election Commission of India, *Results and Statistics, available at* https://eci.gov.in /files/file/4114-general-election-1967-vol-i-ii/ (last visited May 2, 2020).

General Election of 1967. In 1971 General Election, 151,536,802 voters out of total 274,189,132 registered voters cast their votes, and 55.27% turnout was recorded.[26] The sixth General Election held post-emergency in 1977 recorded 60.49% voting turnout, once again crossing 60% turnout mark. In these General Elections, 194,263,915 voters out of total 321,174,327 registered voters had participated in the election.[27]

In the seventh General Election of 1980, the voting turnout was decreased by 3.57%. In this election, 202,752,893 electorates out of total 356,205,329 registered electorates have exercised their right to vote, and 56.92% voting turnout was recorded.[28] In the eighth General Election, held in 1984, once again trek in voting turnout by 6.64% was recorded. In this election 241,246,887 electorates out of 379,540,608 registered electorates cast their votes bringing the voting turnout to 63.56%.[29]

But, the ninth General Election, held in 1989, saw a decrease in the voting turnout by 1.61%. In this election, 309,050,495 voters out of total 498,906,129 registered voters exercised their right to vote, and 61.95% voting turnout was recorded.[30] Again in the tenth General Election of 1991, the voting turnout further decreased by 5.22% with no political party, pre/post-poll alliance getting a majority. As a result, a precariously placed minority government headed by Shri P.V. Narasimha Rao was formed with the outside support, although the government was able to carry everyone along to complete its tenure in office. In this election, 282,700,942 electorates of total 498,363,801 registered electorates participated, and 56.73% of voter turnout was recorded.[31] By the 1991 General Election, Indian parliamentary system had an experience of about four decades, witnessing ten General

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[26] Election Commission of India, *Results and Statistics, available at* https://eci.gov.in /files/file/4115-general-election-1971-vol-i-ii/ (last visited May 15, 2020).

[27] Election Commission of India, *Results and Statistics, available at* https://eci.gov.in /files/file/4116-general-election-1977-vol-i-ii/ (last visited May 20, 2020).

[28] Election Commission of India, *Results and Statistics, available at* https://eci.gov.in /files/file/4117-general-election-1980-vol-i-ii/ (last visited June 2, 2020).

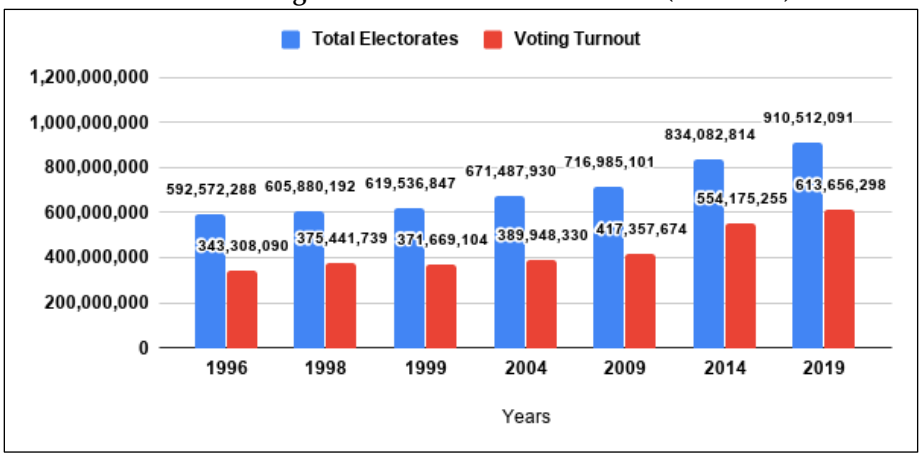
[29] Election Commission of India, *Results and Statistics, available at* https://eci.gov.in /files/file/4118-general-election-1984-vol-i-ii/ (last visited June 16, 2020).

[30] Election Commission of India, *Results and Statistics, available at* https://eci.gov.in /files/file/4120-general-election-1989-vol-i-ii/ (last visited June 18, 2020).

[31] Election Commission of India, *Results and Statistics, available at* https://eci.gov.in /files/file/4121-general- election-1991-vol-i-ii/ (last visited June 26, 2020).

Elections, but voter turnout did not reach 65%. The pedigree of people's participation in General Elections reflects the swings in the voting turnout during the first four decades of post-independent India. Further, the following Chart reflects voting turnout out of total electorates in next seven General Elections held in-between 1996 to 2019:

Chart 3: Voting Turnout out of total electorate (1996-2019)



In the eleventh General Election of 1996, a slight increase of 1.21% in voting turnout was reflected. In this election, 343,308,090 electorates out of total 592,572,288 registered electorates exercised their right to vote, and 57.94% voting turnout was observed.[32] Owing to the hung verdict of eleventh General Elections, the country saw three short-lived governments headed by Shri Atal Bihari Vajpayee, Shri H.D. Deve Gowda and Shri Inder Kumar Gujral in about two years.

Henceforth, no political party, pre/post-poll alliance was able to give a strong and stable government; due to hung parliament, forcing the country to frequent elections in 1998 and 1999. In the twelfth General Election of 1998, the voting turnout increased by 4.03%. In this election, 375,441,739 voters out of total 605,880,192 registered voters had participated in the voting process, and 61.97% voting turnout was recorded.[33] Afterwards, in the thirteenth General Election held in 1999, the voting turnout decreased by 1.98%. In the election, 371,669,104

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[32] Election Commission of India, *Results and Statistics, available at* https://eci.gov.in /files/file/4123-general-election-1996-vol-i-ii/ (last visited June 30, 2020).

[33] Election Commission of India, *Results and Statistics, available at* https://eci.gov.in /files/file/4124-general-election-1998-vol-i-ii/ (last visited July 1, 2020).

electorates out of total 619,536,847 registered electorates had exercised the right to vote with 59.99% of the voting turnout.[34] The voting turnout further decreased by 1.92% in the fourteenth General Election of 2004. In this election, 389,948,330 voters out of total 671,487,930 registered voters marked their choice on the ballot paper, and 58.07% voting turnout was recorded.[35]

The fifteenth General Election of 2009 saw a minimal increase in the margin of 0.14% voting turnout with the voting turnout of 58.21%. In this election, 417,357,674 voters out of total 716,985,101 registered voters exercised their voting right.[36] After commemorating the annual foundation day of ECI through the "National Voter's Day" ever since 2011 the subsequent next sixteenth General Election, held in 2014, witnessed 66.44% voting turnout, which showed an increase of 8.23%. In this election, 554,175,255 voters out of total 834,082,814 registered voters exercised their voting right leading to the sweeping victory of Bharatiya Janata Party (BJP) led by Shri Narendra Damodardas Modi.[37]

Recently, in seventeenth General Election of 2019 again a slight increase by 0.96% in voting turnout was observed, seemingly, due to stalwart leadership qualities of Shri Narendra Modi. In this election, 613,656,298 voters out of 910,512,091 registered voters have participated which resulted in 67.4% voting turnout.[38] Thus, in 2019 Indian parliamentary democracy witnessed the highest percentage of voter turnout since 1951 but still, about 32.6% registered voters did not participate in the election process. To examine the voting percentage in all the General Elections held so far, a comprehensive Chart is given below:

Chart 4: General Election (1951-2019)
Voting Turnout in Percentage

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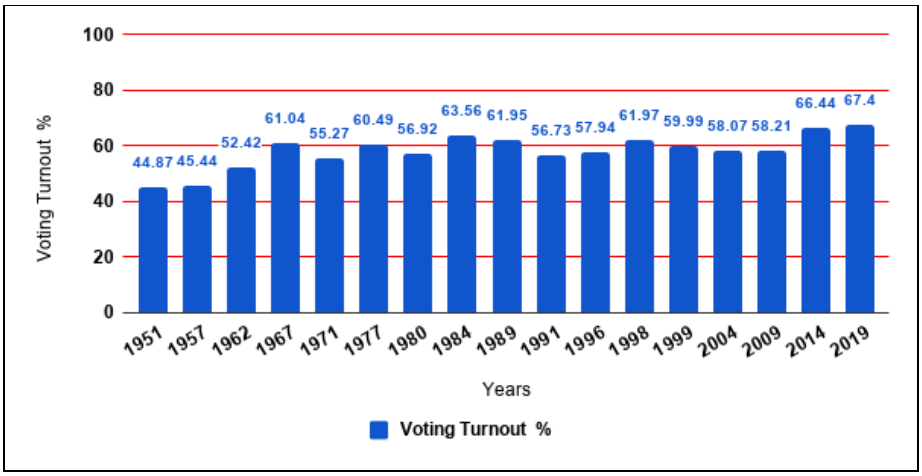
[34] Election Commission of India, *Results and Statistics, available at* https://eci.gov.in /files/file/4125-general-election-1999-vol-i-ii-iii/ (last visited July 10, 2020).

[35] Election Commission of India, *Results and Statistics, available at* https://eci.gov.in /files/file/4126-general-election-2004-vol-i-ii-iii/ (last visited July 14, 2020).

[36] Election Commission of India, *Results and Statistics, available at* https://eci.gov.in /files/category/98-general-election-2009/ (last visited July 15, 2020).

[37] Election Commission of India, *Results and Statistics, available at* https://eci.gov.in /files/file/2837-voters information/ (last visited July 18, 2020).

[38] Election Commission of India, *Results and Statistics, available at* https://eci.gov.in /files/file/10975-10-voters-information/ (last visited July 28, 2020).



The analysis of people's participation in democratic India through voting turnout in General Elections from 1951 till 2019 has shown its lowest percentage in 1951 at 44.87% and highest in 2019 at 67.4%. During this voyage of about 70 years with experience of seventeen General Elections, the statistics of people's participation reflects many ups and downs. However, from the fifteenth General Election held in 2009, the voting turnout is steadily, but indeed increasing.[39] As it was 58.21% in 2009, 66.44% in 2014 and 67.4% in last concluded *i.e.*, 2019 elections. The numbers of passive registered voters are continuously decreasing at its swiftness; therefore, it may be submitted that India is heading towards maturity and mellowness.

Conclusion and Suggestions

Democracy, directly or indirectly, implies to discuss, deliberate and debate for the decisions. The first attribute of the parliamentary form of government is people's participation in the democratic process through voting in elections. In Indian Parliamentary Democracy, the 'right to vote' is provided by the Constitution of India to secure the political justice. Participation in democratic India accentuates the broad participation of people in the action, operation and direction of political structure through voting. After analysis of ancient *Vedic* democratic institutions, *i.e. Sabha, Samiti, Samgha, Panchayats* and Republics as narrated and advocated by the famous historians, K.P. Jayswal and A.S.

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[39] *See*, Chart IV.

Altekar, there is no clouding shadow over the fact that India has a rich culture of democratic institutions where people's opinions and choices had a significant role to play in the establishment of governing structure through participation, either directly or indirectly. The famous jurist and political expert Subhash C. Kashyap not only supported the contentions of K.P. Jayswal and A.S. Altekar regarding *Vedic* democratic institutions, but also quoted them in his intellectual works.

Therefore, it is submitted that it would be an injustice to the wealthy democratic institution of *Vedic* India if the scholars will ignore them while tracing the pedigree of democratic institution by starting from the *Magna Carta Libertatum* (Royal Charter, commonly called as *Magna Carta*) onwards. The *Vedic* assemblies had the oldest origin of a democratic institution on the earth, and this very fact cannot be ruled out through setting a narrative of glorification of western democratic institutions by describing them as formal or more advanced. In this light, there is a need to build a bridge between the principles of *Vedic* and modern democratic institutions for the smooth and successful functioning of participatory democracy in India.

After independence, the Constituent Assembly resolved for a Sovereign, Democratic and Republic India by stating in the Preamble of the Constitution, "We the People of India… secure social, economic and political justice" through the formation of government by people's participation. The founding fathers of the Constitution believed that the citizens of India would participate with enthusiasm as they have travelled a long way, full of struggle and sacrifice, for achieving the much cherished democratic freedom to participate with zeal and zest in formation of an accountable, responsible and transparent government. But in the very initial years of the democratic voyage, it was realized that people's participation in elections is unexpectedly low and accordingly, in order to boost their participation in elections the voting age was reduced from twenty-one years to eighteen years through the Constitutional amendment. But the problem of low voting turnout did not cure. Off late the commemoration of 'National Voter's Day" was evolved sans the legal mechanism to encourage the people's participation. However, the voters continued to undermine the significant significance of 'right to vote' much against the anticipation of the framers of the Constitution.

All the major initiatives in India for recommending electoral reforms including the Dinesh Goswami Committee, Tarkunde Committee, National Commission to Review the working of the Constitution and Law Commission of India (255th report) analysed the possibility of introducing the compulsory voting system in India and recommended for imparting awareness among the voters instead of making voting compulsory as a mode to increase the people's participation.[40] However, awareness alone cannot prove to be a successful instrument in this direction. Owing to absence of legal mechanism and banking solely on awareness, the seventy-year-old Indian democracy is yet to see 70% voting turnout in General Elections.

Sensing that the idea of a compulsory voting will result in a higher degree of political legitimacy and progression of democracy in general, starting afresh, again in July 2019, a private member's Bill titled, 'the Compulsory Voting Bill, 2019" was tabled in the House of the People (*Lok Sabha*) but it could not see the light of day.

However, after analysis of the people's participation in the General Election from 1951 till 2019, it is evident that people's participation has much scope of improvement and further advancement. Only at seven occasions, out of Seventeen General Elections, voting turnout has crossed the 60% turnout which clearly depicts that how serious people are about voting and how they are fulfilling the aspirations of democratic India, by abstaining from the election process. Consequently, on the one hand, there is a need to redress the fundamental electoral inequities and on the other hand, there is need to sensitise the voters to participate in the election process through socio-legal measures and mechanisms. Since voting is a human affair; accordingly, even by way of compulsory voting, 100% turnout cannot be ensured, but still participatory democracy needs much more enthusiasm among the voters for the election process.

No doubt, according to the principle of the first-past-the-post (FPTP) electoral system, the election is won by the candidate who gets the maximum votes and thus the government can be formed even with a less percentage of voting, but it cannot be considered as the

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[40] Law Commission, *Electoral Reform*, Law Com No. 255 (2015).

participation of the people in bona fide sense.[41] Therefore, the absence of near about one-third voters is affecting the etymological pedigree and the cardinal principle of participatory democracy.

As democracy lies on the pedestal of political equality, it is submitted that every individual vote is the centre point of participatory democracy. Therefore, the voters must understand the privilege and the power of their right to vote based on 'one man, one vote and one value' in the formation and function of the government. The challenges of parliamentary democracy like criminalisation of politics, appeasement for vote bank and dynastical politics can be cured through maximum participation of well-informed, vigilant and visionary citizens in the election process. Therefore, on the one hand, there is a need to redress the fundamental electoral inequities by invoking comprehensive legal mechanism, and on the other hand, there is need to sensitise the voters to participate in the election process.

The need of the hour is to change the notion towards voting as 'responsibility' instead of 'right'. When each individual voter starts understanding the importance, value and power of his vote and thus participate in the democratic process with a foresighted vision and mission then 'We the People' will be empowered and India, *i.e. Bharat* will become *Shreshtha Bharat*!

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[41] *What is the First-past-the-post system?* The Hindu, *available at* https://www.thehindu.com/opinion/op-ed/what-is-first-past-the-post-system/article26502467.ece (last visited July 28, 2020).

Mob-Lynching
—New Threat to Rule of Law

Monika Garg*
Kavita**

Introduction

Presently, while the whole world is under the threat and impact of COVID-19, we could not ignore recent heinous act of Palgarh in Maharashtra. Repeatedly incidences of murder by aggravated mob supported by rumours of vehicle carrying cow meat or individual is belonging to child kidnapping gang are noticed and reported[1]. Act is done under the shield of mob as our criminal law is silent somehow as to it. Rumours like child kidnapping, smuggling of human organs or beef spread as Wildfire via various online messaging platform and results into distinct acts of crime at various places[2].

We may access the gravity of act as Chairman of UP State Law Commission, Justice Adityanath Mittal, former judge of Allahabad High Court submitted 7th Law commission report on 10 July 2019 where in committee expressed serious concern over increasing instances of mob lynching via quoting instances of 28 September 2015 in Dadri, Gautam Buddha Nagar and in Bulandshahar on 3rd December 2018 where mob tried to burn the cops live.[3]

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1 L. Correspondent, *Lynchings: Supreme Court seeks response from Centre, NHRC, States*, The Hindu (New Delhi, 26th June, 2019).

2 N. Desk, *Tracking Mob Lynching*, The Hindu (New Delhi, 3rd July, 2018).

3 State Law Commission, *Mob Lynching*, Law Com No. 7(2019) pp 1-128.

On 26 June 2019 Hon'ble Prime Minister, Shri Narendra Modi slammed on '*GauRakshak*' that 'killing of human beings, injury to public or private property in the name of *Gau Raksha* is not allowed and would not be tolerated by the government in any way'.

Justice Dr. A.K. Sikri, in *Cardamom Marketing Corporation* v. *State of Kerala*[4], observed that: 'When we talk of sound and stable system of administration of justice, all the stakeholders in the said legal system need to be taken care of. The Rule of Law reflects a man's sense of order and justice. There can be no Government without order; there can be no order without law…'. Here the question arose whether criminal justice system has sufficient penal laws to curb it.

Mob Violence in India

According to the Oxford English dictionary, lynching refers to 'the act of killing/s done by a mob without any legal authority or process involved. Earlier, these acts of lynching used to involve hanging a person to death. The mob usually killed someone accused of a wrongdoing based on their suspicion and without looking into available evidence. Lynching is considered as a major crime like murder or rape. The mob serving as 'judge, jury and executioner' would carry out their spontaneous or pre-planned act of killing with absolute impunity and without any fear of law[5].'

Therefore, it is homicide, i.e., killing human being by specified office without exception. Gradually it has emerged as hate crime to target minorities or specified communities[6]. It is pre-mediated violence in the name of public outrage. Our criminal justice system consists of various institutions at different level from police to prison[7].

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4 (2017) 5 SCC. 255.

5 *Supra* n.3.

6 M.K. Pathak & S. Rai, *Mob Lynching: A New Form of Hate Crime,* 20 Medico-legal Update,127(July-September, 2020).

7 Shoaib Daniyal,*The Modi Years: What has fuelled rising mob violence in India,* Scroll.in (Feb 23, 2019) *available at* https://scroll.in/article/912533/the-modi-years-what-has-fuelled-rising-mob-violence-in-india (last visited December 3, 2020).

It is apathy that our system provides haven to the conspirators of such a heinous mobocracy[8].

- Restricted and conditional police power, critical mass and bureaucracy to support.
- Political interference helps offenders to go scot free
- Negligent or irresponsible police attitude gives various names like cow slaughtering, smuggling, road rage or rest driving etc.
- Even insult add to injury when case is registered against the victim himself
- Unmatched timings of offence and police arrival aggravate the situation.[9]

Since 2012, the incidents of mob-lynching have only increased.

The author does not have data of 2020, except few instances as on 31 July 2020, 25 years aged Lukman Khan was beaten brutally by self-assumed 'cow protector' group in presence of cop and forced to chant '*Jai Shri Ram*' in Gurugram, Haryana. The whole episode was captured in videos, but only 1 accused was arrested. In another instance 52 years aged Gapphar Ahmad, an auto rickshaw driver was assaulted Sikar district of Rajasthan by mob[10].

Curbing the Menace

On July1, 2017, then President Hon'ble Mr. Pranab Mukherjee commented that 'mob frenzy becomes so high and irrational, uncontrollable', people 'have to pause and reflect' and be proactively 'vigilant' to 'save the basic tenets of our country'. Mobocracy falls under the preview of following legal provisions-

In all below given provisions mobocracy or mob lynching is neither defined nor punished. It is by virtue of legal interpretation that cases are registered under above mentioned provisions.

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[8] A. Singh, *Mob Lynchings in India*, Jurist (May 9, 2020) *available at* https://www.jurist.org/commentary/2020/05/ashutosh-singh-palghar-lynchings (last visited December 3, 2020).

[9] *Supra* n. 2, p.1.

[10] *See*, https://thewire.in/rights/two-years-since-sc-judgment-the-spectre-of-mob-violence-continues-to-loom-large (last visited December 3, 2020).

Constitution of India	Article 21	Protection of life and personal liberty
Indian Penal Code	Sec 141	Unlawful assembly
	Sec 147	Punishment for rioting
	Sec 148	Rioting, armed with deadly weapon
	Sec 149	Every member of unlawful assembly guilty of offence committed in prosecution of common object
	Sec 323	Punishment for voluntary causing hurt
	Sec 324	Voluntary causing hurt by dangerous weapon
	Sec 325	Punishment for voluntarily causing grievous hurt.
	Sec 326	Voluntary causing grievous hurt by dangerous weapon or means.
	Sec 302	Punishment for murder
	Sec 307	Attempt to murder
	Sec436	Mischief by fire or explosive substance with intent to destroy house, etc
Criminal Procedure Code	Sec 223	What persons may be charged jointly

In the case of *Tehseen S. Poonawalla* v. *Union of India and others*[11] on dated 17.07.2018 Hon'ble S.C held that 'lynching and mob violence are creeping threats that may gradually take the shape of a typhoon like monster. It is a colourable way to commit the crime in the name of mob. It is really threat to democracy that people are losing faith and tolerance to sustain a diverse culture.

There is no dispute that the act of lynching is unlawful, and this sweeping phenomenon has far-reaching impact. It is our constitutional duty to protect lives and human rights. No right is above the right to life with dignity and to be treated with humanness. what the law provides may be taken away by lawful means that was the fundamental concept of law. No one is entitled to shake the said

[11] (2018) 9 SCC 501.

foundation. No citizen could assault the human dignity of another, for such an action would comatose the majesty of law. In a civilised society, it was the fear of law that prevents crime. Commencing from legal space of democratic Athens till the legal system of modern societies today, the lawmakers try to prevent crimes and make the people aware of same but some people who develop masterly skill to transgress the law jostle in the streets that eventually leads to an atmosphere which witnesses bloodshed and tears. Steps to be taken at every stage for implementation of law are extremely important. Hence, the guidelines are necessary to be prescribed.'

Looking into the gravity of offence, the Hon'ble apex Court gave 11 guidelines to control the menace. These guidelines are based on preventive, remedial and punitive theory of crime. 'Police' and 'public order' is state subject as per 7th schedule. Therefore, maintenance of law and order, Protection of life and property of its residents and controlled crime rate is the responsibility of concern state. State has power to enact, adopt and enforce legislative provisions to curb crime in its territory. On August 9, 2016 advisory guidelines were issued to control the pre-planned crime in the name of protection of cows[12].

These guidelines are comprehensive covering major areas in which the menace could be overthrown. Since appointment of senior police officer as nodal officer and assistance staff to identify suspected areas in a time bound duration along with frequent patrolling and awareness programmes are major administrative steps to trap the offenders.

Another set of guidelines are remedial measures wherein immediate registration of FIR, reporting to nodal officer along with protection of family members of victim and provisions of speedy trial are there. Both deterrent and preventive steps are taken wherein personal responsibility of cops is imposed including charge of negligence and penal consequences.

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[12] A. Bagriya, *To End Mob Lynching, Supreme Court gives an 11-Point Prescription,* Hindustan Times (New Delhi, 17th July, 2018).

Guidelines Given by Apex Court

1. In each district, States are directed to appoint/ dispute nodal officer who shall be senior police officer and must note below rank of Superintendent of Police.
2. Nodal Officer shall be assisted by task force including DSP rank officer. Their prime responsibility is to take timely and effective measures to avoid mob lynching, collect intelligence report on the possibility of occurrence and check over leaking of hate speeches or provoking fake news.
3. Based on previous records identification of suspected areas in districts or villages within three weeks.
4. Monthly meeting of nodal Officer with local intelligence units in each district to evaluate and check tendencies and frequency of the offence.
5. Regular review meeting of DGP with nodal Officer and heads of the state police intelligence.
6. Dispersal of mob is prime responsibility of each police officer.
7. In order to prevent caste or community lynching, Each State and Union Government will work together in coordination to identify measures to be taken to prevent repetition.
8. Frequent police patrolling by SP team (as per circular of DGP) in sensitive areas.
9. Appropriate Government shall ensure awareness or threat warning via means of mass communication like Radio, T.V and official website of home department and police along with the other social media platforms that involving in mob violence would lead to serious consequences.
10. It is the primary responsibility of Centre and the State machinery to stop or dissemination of hate messages, videos, photos or other content via any social media app or site.
11. FIR should be lodged under section 153A IPC, i.e promoting enmity among people or other relevant provision.
12. Centre being guardian of state may issue guidelines to the States in grave situations to manage or control the gravity.[13]

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[13] L. Correspondent, *SC lays down Guidelines to Curb Lynching*, The Telegraph online (E paper, 17th December, 2020).

Remedial Measures suggested in *Tehseen S. Poonawalla* v. *Union of India* [14]

1. Respite all preventive steps, if any incidence is reported then PS within whose local jurisdiction the matter arose would take immediate steps after lodging of FIR.
2. SHO would report immediately to the district nodal officer on one side and give protection to the family of victim further harassment.
3. Nodal officer shall himself supervise the whole matter and is personally bound to ensure lawful investigation in effective manner. Charge-sheet shall be filed within the limitation time period.
4. In order to compensate victims state government shall issue various schemes. Due consideration as to the nature of psychological and physical injury, impairment of Sight or hearing and involved legal as well as medical expenses should be kept in mind.
5. Matter should be tried in special designated court in each district on daily basis and judgment should be pronounced within six months of occurrence of offence.

CJI Sh. Dipak Mishra commented that 'we may hasten to add that these directions shall apply to even pending cases'.[15]

Deterrent Punishment

Maximum sentence by trial court must be awarded ordinarily.

1. In order to conceal the whereabouts of witnesses, on written request of PP or such witness, effective steps can be taken.
2. Proper notice as per rules of CPC should be served to victim or a deseased.
3. Free legal aid to the victim as the fundamental right (if claims) be ensured.[16]

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[14] *Supra* n. 11.

[15] *Id.,* p. 10.

[16] *Supra* n. 13.

Preventive Measures

In house departmental inquiry against the defaulting police or district officer should be done under deliberate grave negligence or misconduct provisions. Moreover, it should be completed within six months with appropriate action.

In the case of ***Kodungallur Film Society and Ors.* v. *Union of India*[17] *(UOI) and Ors*** **(1.10.2018 SC)** the writ petition was allowed to entertain due to damage to the public and private property by the act of mob violence, protest and demonstrations based on directive guidelines of apex court in the case of **Destruction of public and private property versus Government of Andhra Pradesh**[18], where in the court directed that 'there might be different reasons of self-resume protector of public morality but common idea was to exercise unlawful power without sanction of state and create fear in the mind of viewers.'

In the case of ***Sulfikar Nasir* v. *State of Uttar Pradesh*** [19] **(31.10.2018)** Delhi H.C observed that all the matters of mob lynching prior meeting of mind along with the planning to commit murder is there. Therefore, all accused are liable under section 120 B IPC, 364 IPC, 302 IPC r/w 201 IPC without reasonable doubt. In this matter the court took strict view to set an example against repeated instances of murder colourable with mob lynching.

Reasons why Mob Lynching Continues Unabated

Common cause, an NGO and CSDS[20] researched into the reasons why in spite of the Supreme Court guidelines, the issue of mob lynching has not resolved. The report claims that '35% of interviewed police officers think that it is natural for a mob to punish the 'culprit' in

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[17] (2018)10 SCC 713.

[18] (2006) 8 SCC 161.

[19] MANU/DE/3960/2018.

[20] The Centre for the Study of Developing Societies (CSDS) is an Indian research institute for the social sciences and humanities. It was founded in 1963 by Rajni Kothari and is largely funded by the Indian Council of Social Science Research Govt of India. It is in New Delhi.

cases of cow slaughter, and 43% think it is natural for a mob to punish someone accused of rape.'[21]

Our society always demands instant justice. People take law and order in their hands even without looking into the gravity of the issue. Lynching usually happens by gathering of a mob and illusive self-presumed responsibility of people towards the society, coupled with lost faith over administration of Justice.

Major contributory factor is the notion of 'Justice delayed is Justice denied'. One must accept that the nature of instant justice leads to another heinous offence and one offence can never be punished by committing another.

Way Forward

In the case of *National Human Rights Commission* v. *State of Gujrat and others*[22], the Hon'ble Apex Court observed, 'communal harmony is the hallmark of a democracy. No religion teaches hatred. If in the name of religion, people are killed, that is essentially a slur and blot on the society governed by the rule of law. The Constitution of India, in its Preamble refers to secularism. Religious fanatics really do not belong to any religion; they are 'no better than terrorists who kill innocent people for no rhyme or reason in a society which as noted above is governed by the rule of law.'

In order to ensure administration of justice and rule of law, there is a need to strict comply with SC guidelines in *Prakash Singh case*[23]as to functional autonomy of police and direct accountability towards public.

A separate police board should be constituted to ensure internal transparency and accountability.

Report of Malimath committee[24] as to criminal justice system in India should be followed.

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[21] Mahtab Alam, *Why Do Mob Lynchings Still Continue Unabated*, The Wire (Sep. 7, 2019).

[22] (2009) 6 SCC 342.

[23] *Prakash Singh* v. *Union of India*, 2006(8) SCC 1.

[24] Malimath Committee headed by Justice V.S. Malimath, former CJ Karnataka and Kerala HC was constituted by the Home Ministry, GOI.

Police and administration should have access to latest means of monitoring devices like Drones in sensitive areas.

In order to meet emergent situations, the police personnel should be given power to take immediate punitive action against accused.

Political interference and bureaucracy should be minimised to zero tolerance.

Finally, there is a need to redefine the role and interference of media.

Sri K.T.S. Tulsi, Senior Advocate and Member of Rajya Sabha, had introduced 'Protection from Lynching Bill, 2017[25]' in the Rajya Sabha on 29th December, 2017 but the Bill has not yet been passed. 7th Schedule of the Constitution of India imposes competence on the State Governments to frame law on the point of mob lynching. Therefore, it is submitted that the State Governments should take immediate steps to develop a law to combat mob lynching. It is pertinent to mention here that Manipur is the first state and Rajasthan comes second in the list of states to have framed its own Anti Mob lynching Bills. It is submitted that there is a dire need for other states follow suit.

[25] Bill No. 44 of 2017.

Intellectual Property Rights Violations and Suitability of Civil versus Criminal Remedies: An Analysis

Sukriti Yagyasen [*]
Adwitiya Prakash Tiwari[**]

Importance of Intellectual Property Rights

Land institutions ultimately form a society. Such legal relations are difficult to justify between individuals with different artifacts and the state. This is especially true with respect to intellectual property (IP). It's already hard to understand the suitable types of proprietorship of corporeal stuffs, and it's harder to understand that what category of ownership we should allow for non-corporeal, intellectual matters like writings, inventions, and 'secret' business information.[1] This problem is reflected in complexity of IP law.[2] IP is major form of proprietorship. It has been noted that the coming of the 'post-industrial society' in which the production and handling of physical goods gives way to information making and use. The consequence has caused strain on our intellectual property legal regulation.

Law, Economy and their Relationship with IPRs

The aim of awarding property rights is for ensuring owners of intangible assets to exclude other parties from utilising it without consent of the owner. If such protection would not be provided then it

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[1] Jose Bellido, *Concepts of Property in Intellectual Property Law*, 2 BIRKBECK L. REV.147 (2014).

[2] Because 'patents are the heart and centre of property rights, and once they are lost, the loss of all other property rights will automatically follow as a brief post-script'.

could result in anyone using the by-product of such right without due knowledge of the owner.

The introduction of IP as one of the trade disciplines was to be finalized in Uruguay Round of 1986 that eventually formed an agreement known as Trade Related Aspects of Intellectual Property Rights[3] and it came into existence since 1994[4]. Intellectual property law governs the legal rights linked with creativity, commercial reputation, and goodwill.[5] IPRs are considered as reward for creators and it prohibits others from copying without due acknowledgement or taking unfair advantage, it also provides remedies for infringements.[6] Some varieties of intellectual property rights need registration while others are sheltered automatically.

Innovation as well as creation can be regarded as the main component of growth and expansion of competitive free-market economy. For the successful continuation of this economic model, individuals need to be encouraged to innovate and create in order to enhance productivity. However, if all will be given permission to practice the results of innovation and creativity without restrictions, creators might not engage in innovation or creativity.[7] This free riding behaviour would place creators at competitive drawback. Further all the competitors will wait for others to make their initial investment.[8] Awarding property rights for intangible assets dissipates this imbalance and creates an environment much more palatable to invention and creation. The expectation of property rights operates as an incentive that encourages businesspersons, performers, organisations, and stockholders to

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[3] The Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPS Agreement) requires a balancing of rights and obligations (Art. 7)-The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of 'technological' knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligation.

[4] Francis Gurry, *Globalisation, Development, and Intellectual Property: New Challenges and New Opportunities*, 99 AM. SOCIETY INTERNATIONAL. L. PROC. 291 (2005).

[5] David Bainbridge, INTELLECTUAL PROPERTY (Pitman, 4th edn.,1999)

[6] *Id.*

[7] Jon Holyoak & Paul Torremans, INTELLECTUAL PROPERTY LAW (Butterworths, 1995).

[8] *Id.*

commit the essential resources to research and progress. Thus, the existence of IPRs promotes return for investments if the creation is successful.

The creation of legally enforceable monopolistic property rights for tangible assets is essential for fostering innovation and creativity and supporting economic development. However, the creation of monopoly rights might appear to conflict with a basic characteristic of the free-market economy, namely; perfect competition. On one hand, for competition rules to perform their regulatory functions in a free-market economy there must be competitive manufacturing of goods, services etc. Property rights incentivise competitive manufacturing of goods, services and thus bolstering the economic development of societies. On the other hand, given that the market comprises of different levels, competitive restrictions in one level might be needed to enhance competition in other levels.[9] Three levels in the market can be distinguished--production, consumption, and innovation.[10] Free competition can only exist when certain restrictions in furtherance of competition are accepted. Further, the monopoly effects of IPRs are curtailed by imposition of numerous limitations on ownership of these rights.[11]

Infringement of IPRs and Consequences

Innovation and innovation are essential components of the free-market economy's growth and progress. Individuals need to be motivated to innovate and create in order to improve efficiency for the productive continuation of this economic model. However, if everyone were allowed to freely use the outcomes of innovation and creativity, creators might not engage in innovation or creativity. This free riding behavior would put creators at a competitive disadvantage. Therefore, protection of IPRs has become very important and there are remedies available but whether these remedies are sufficient--that is the question one needs to look into.

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[9] *Id.*

[10] *Id.*

[11] For instance, the monopoly is not perpetual, but is limited in time and upon expiration of the term of protection, the public can use the work freely.

Remedies Available and Efficacy of Remedies

Due to the value attached to intangible assets, the defense of IPRs has gained amplified attention and is also the subject of global trade policy. The adequacy of IPR security solutions has been intensively debated in multilateral forums and the available tools have been continuously scrutinized. The rationale of awarding property rights to intellectual property owners is so that they could enforce the rights in cases of infringement to protect their interests. For fact, if the property rights were not enforceable, then the rights would be null. Therefore, in order to be relevant and beneficial for economic development, intellectual property rights need efficient and usable legal remedies for right-holders to protect their rights. Defensive remedies play a very fundamental role in any discussion of IPRs. The types of remedies include civil action, administrative procedures and criminal prosecutions.

In contrast, the advent of criminal proceedings is assessed as a suitable solution for the safeguard of IPRs. However, the use of criminal law to protect IPRs has not been accepted and supported by everyone. It is therefore pointed out that there are still questions about the legality of using criminal law to protect IPRs.[12]

In the backdrop of the discussed infringements and IP crime, it could be understood that there is need to protect IPRs otherwise the infringements would result in huge economic loss of any State.

Criminal Sanctions versus Liberty

Criminal law is not a 'regulatory' tool that could be used loosely by the State whenever it feels so. As a 'regulatory device', it is a bluntly coercive and a morally loaded tool; something to be used sparingly and with 'care'.[13] Further, since coercion is an intrinsic component of criminal law, it follows that when the state creates a criminal statute, it directly intrudes upon the liberty of its citizens. The criminal law sanction represents the most severe infringement of a person's liberty in a society, and, as such, should be available only where there is clear

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[12] Earlier protection of IPRs was an area of law that came within the domain of civil law, implying only involving private interests.

[13] Simester and Sullivan, CRIMINAL LAW: THEORY AND DOCTRINE 581 (Hart Publications, Oxford 2007).

social justification.[14] Thus, although it may appear to be appropriate to deal with a particular situation with criminal prohibitions, lawmakers should always be careful not to over-extend the iron arm of criminal law and thereby intrude upon the citizen's right to free choice and individual liberty. Legal scholars have debated this issue extensively based on moral and political theory. Sometimes, more than the necessity, the disagreements have concentrated on the priority liberty should receive when regulating the conduct of citizens in society. Defining the theory of liberty in relation to human actions, James Fitzjames Stephen explained that:

> 'All voluntary acts are caused by motives. All motives may be placed in one of two categories - hope and fear, pleasure and pain. Voluntary acts of which hope is the motive are said to be free. Voluntary acts of which fear is the motive are said to be done under compulsion or omitted under restraint.'[15]

As such, he is of the view that no one is ever 'justified' in trying to affect anyones' conduct by exciting his fears, except under certain cases. While it is easy to overemphasise the value of liberty, since it represents individual freedom as against repression of the majority, there is no denying its necessity; and for that reason, many writers have endorsed a kind of 'presumption in favour of liberty'. In this regard, John Stuart Mill elaborates the importance of individual liberty by stating that, 'Mankind are greater gainers by suffering each other to live as seemed good to themselves, than by compelling each to live as seemed good to the rest'.[16] Joel Feinberg also endorses this view when he writes: Loss of liberty both in individuals and in societies entails loss of flexibility and greater vulnerability to unforeseen contingencies. Free citizens are likelier to be highly capable and creative persons through the constant exercise of their capacities to choose, make decisions, and assume responsibilities.[17] Lord Denning elaborates the responsibility of courts to safeguard liberty instating:

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[14] *Id.*

[15] James Fitzjames Stephen, LIBERTY, EQUALITY, FRATERNITY *57* (Cambridge University Press, 2nd edn., 1967).

[16] John Stuart Mill, ON LIBERTY 27 (Oxford University Press, 1869).

[17] Joel Feinberg, HARM TO OTHERS 9 (Oxford University Press, 1984).

> 'the fundamental principle in our courts that, where there is any conflict between the freedom of the individual and any other rights or interests, then no matter how great or powerful those others may be, the freedom of the humblest citizen shall prevail.'[18]

It is perceptible from the above sentiments of legal philosophers that liberty is expected to prevail as the norm in society and that coercion, by any means, should always require some special justification. In other words, when the legislature contemplates extending the latitudes of criminal law to prohibit a new type of action, it should be satisfied that the presumptive case for liberty could be overridden by the reasons in favour of coercion (prohibition).Therefore, in answering the question whether criminalising violations of intellectual property rights is justifiable, the primary issue that needs to be addressed is whether sufficient and cogent reasons exist to outweigh the presumptive case for liberty.

In addressing this issue, the types of criteria that the legislature needs to take into consideration when extending criminal law to regulate conduct in general are identified and then used to demonstrate, on a parity of reasoning, whether violations of intellectual property rights would satisfy the commonly accepted criteria.

Effect of Criminal Remedies against Intellectual Property Rights' Infringements

One of the fundamental features of the criminal process is the conviction itself - the type of judgement that the court may make in a criminal trial. In particular, while it also, licences the imposition of sanctions, a criminal conviction is regarded as a penalty in its own right, both by legal officials such as judges and by the public.[19] A criminal conviction stamps a label on the wrongdoer that he has failed to conduct himself according to the chosen way of life of the society. A conviction makes a public condemnatory statement about the defendant: that he is

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[18] Lord Denning, quoted in Sir. Norman Anderson, LIBERTY, LAW AND JUSTICE (Stevens &Sons, 1978).

[19] Simester and Sullivan, CRIMINAL LAW: THEORY AND DOCTRINE 581 (Hart Publications, Oxford 2007).

blameworthy for doing the prohibited action.[20] This form of labelling of a wrongdoer as a 'criminal' acts as a deterrent to the wrongdoer individually and to the public in general. It sends a strong signal to the society at large to refrain from doing similar wrongs in the future. As Professor George Gardner explains:

> 'The essence of 'punishment for moral delinquency lies in the criminal conviction itself. One may lose more money on the stock market than in a courtroom; a prisoner of war camp may well provide a harsher environment than a state prison; death on the field of battle has the same physical characteristics as death by sentence of law. It is the expression of the community's hatred, fear, or contempt for the convict, which alone characterises physical hardship as punishment.'[21]

This process expresses the general opinion of the society, that the offender's actions are blameworthy. Thus, criminal law has a 'communicative function, which the civil law does not, and its judgements against the accused have a symbolic significance that civil judgements lack.'[22] As explained by Richard Posner, 'Almost every criminal punishment imposes some non-pecuniary disutility in the form of stigma, enhanced by such rules as forbidding a convicted criminal to vote. There is no corresponding stigma to tort judgement.' Therefore, the fear of conviction, in case of infringement of intellectual property rights, can create a strong sentiment among the public at large to respect another's intellectual property rights. In this regard, the threat of conviction posed by criminal law can provide a valuable tool for protecting intellectual property rights.

Further, the method of criminal law involves something more than the threat of community condemnation of antisocial conduct. It involves, in addition, the threat of unpleasant physical consequences that is punishment. It is indeed, an indispensable feature of criminal prohibition. 'If actual punishment never or very rarely followed

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[20] *Id*.

[21] George Gardner, *Bailey v. Richardson and the Constitution of the United States*, 33 BOSTON UNIVERSITY LAW REVIEW 193.

[22] ICC, *Massive Loss of Tax Revenue in Indonesia* (Business Action to Stop Counterfeiting and Piracy) *available at* http://www.icc-ccs.co.uk/bascap/Extracts/Loss_of_Tax.html (last visited Oct. 20, 2020).

threatened punishment, the threat would lose significance. Thus, punishment is a practical necessity for any system in which threats of punishment are to be taken seriously; and to that extent, the justification of punishment is inseparable from the justification of threats of punishment.'[23]

Parliament does not say, 'Do not assault other people please'. That would not be a law at all. Rather, the law declares, 'Do not assault other people, or else.'[24] It is generally understood by the public that a criminal conviction would entail a punishment in the form of an imprisonment or a fine. Imposition of punishment than mere tortuous remedies such as damages or account of profits would be much more of a deterrent force to potential offenders in the commercial world.

As mentioned earlier, persons responsible for large-scale intellectual property infringements are mostly adventurous entrepreneurs who have taken advantage of the weaknesses of the system and exploited the avenues with least resistance in making quick profits. Therefore, mere imposition of civil sanctions, which are compensatory and not punitive, may not discourage such individuals from committing further infringements. Thus, fear of imprisonment or fine, in the event of criminal action, can create concrete effects among potential violators in the commercial world.

Nevertheless, the effectiveness of deterrence brought about by criminal conviction and punishment has received mixed sentiments from legal scholars and research. Anthony Doob and Marie Webster report on a study based on interviews with sixty experienced, and presently incarcerated, burglars and armed robbers and state that, 'The respondents were blunt in reporting neither they nor other thieves whom they knew considered legal consequences when planning crimes. Thoughts about getting caught were put out of their minds.'[25] On this account, if offenders do not fear consequences of criminal punishment and wilfully refuse even to consider them, the arguments in favour of

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[23] Simester and Sullivan, CRIMINAL LAW: THEORY AND DOCTRINE 581 (Hart Publications, Oxford 2007).

[24] *Id*

[25] Anthony Doob and Marie Webster, *Sentence Severity and Crime: Accepting the Null Hypothesis*, in Michael Tonry, CRIME AND JUSTICE: A REVIEW OF RESEARCH 30 (University of Chicago Press, 2003).

criminal sanctions based on deterrence are without merit. Further, even institutions responsible for enforcing law have felt at times that the concept of deterrence does not work in practice.

'The United Kingdom Home office wrote in 1990: much crime is committed on impulse and it is committed by offenders who live from moment to moment. It is unrealistic to construct sentencing arrangements on the assumption that most offenders will weigh up possibilities in advance and base their conduct on rational calculation.[26]

However, the utility of criminal sanctions based on deterrence has received support from some schools of legal scholarship. Jeremy Bentham argues that deterrent effect could be developed if there was both a degree of clarity and predictability in sentencing along with proportionality between the crime and the punishment.[27] As a utilitarian he supposed that criminals, along with everybody else, were rational and self-interested and could calculate when the cost of punishment would out-weigh the potential benefits of crime. Although Bentham espoused his theory in the late 18th century, even in the recent past some researchers have supported the deterrence effect of criminal sanctions.

In this regard, Philip Cook claims 'that deterrence studies support the idea that punishment works for some crimes.'[28] Cook argues further that, 'the criminal justice system, ineffective though it may seem in many areas, has an overall crime deterrent effect of great magnitude.'[29] In this light, arguments supporting and discrediting the deterrent effect of criminal sanctions directly contradict one another.

Nevertheless, a consensus validating both sides of the argument could be reached if the types of criminal activity are distinguished and the

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[26] Home Office (1990): CRIME JUSTICE AND PROTECTING THE PUBLIC, London: HM Stationary Office, para. 2.8. quoted in M. Tonry and D. Farrington (eds), BUILDING A SAFER SOCIETY: STRATEGIC APPROACHES TO CRIME PREVENTION7 (University of Chicago Press, 1995).

[27] Jeremy Bentham, THE RATIONALE OF PUNISHMENT, quoted in Freedman, Lawrence, DETERRENCE 8 (Polity Press, 2004).

[28] *Id*

[29] Philip Cook, *Research in Criminal Deterrence: Laying the Groundwork for the Second Decade* in Norval Morris and Michael Tonry (eds), AN ANNUAL REVIEW OF RESEARCH (VOL 2) 213 (University of Chicago Press, 1980).

deterrent effect of criminal sanctions on each type is considered individually. For instance, on one hand, the finding of the study conducted by Anthony Doob and Marie Webster may be accurate regarding violent crime, where the crimes are committed either on impulse or by criminals who live for the day. On the other hand, Jeremy Bentham's analysis of deterrence may hold ground when it comes to 'white-collar crimes', which are generally committed by self-interested individuals with some standing in the society. John Gallo, a former United States prosecutor, supports the above position with his practical experience. He writes, 'My experience has been that law-enforcement has had an impact in deterring and/or reducing criminal activity, but that the type of deterrence generally varies depending on the nature of the criminal activity. Specifically, in the case of white-collar crime, where the actors are generally rational, informed individuals, enforcement of criminal law generally deters additional criminal conduct of the kind at issue. On the other hand, in the case of violent crime, the prosecution of an individual is far less likely to deter others from engaging in the same criminal conduct, either because such actors do not act rationally or because they are unaware of the punishment for their conduct'.[30]

Out of the above-mentioned two categories of criminal activity, intellectual property rights' violations could easily find its place in the category of white-collar crimes. Intellectual property violations are generally committed with exhaustive premeditation and meticulous preparation by audacious entrepreneurs for financial gain. In order to commence a counterfeiting or pirating business, first, a substantial financial investment is required to manufacture or trade goods capable of passing-off as genuine goods. Secondly, establishment of a sound network is needed to introduce counterfeit or pirated goods to consumer chains.

This means that the persons who violate intellectual property rights cannot simply commit the offence on impulse and it cannot be executed by offenders living for the moment. The category of offenders involved in counterfeiting and piracy are financial risk takers who attempt to ride on the reputation of others. In other words, they are entrepreneurs

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[30] John Gallo, *Effective Law Enforcement Techniques for Reducing Crime* 88 THE JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY 1475(1998).

willing to take financial risks. Thus, a criminal conviction can have the effect of labelling such an entrepreneur as a criminal and ending his business orientations for quite some time. Therefore, it is argued here that, if intellectual property rights' violations are criminalised; the prosecution of one wrongdoer will undoubtedly have the effect of deterring others from committing similar violations.

Another important feature of criminal law is the availability of the resources and the expertise of the state law enforcing authorities in the event of criminal investigations. In civil cases, private parties would have to obtain the assistance of the state law enforcing agencies such as the police, by application to court. Generally, 'significant public/private sector interaction is required at the

Investigation stage for the identification of pirated or counterfeit goods, and similarly for the collection and presentation of appropriate evidence in a subsequent criminal prosecution'.[31]

Conclusion

Because infringers could discard pirated or counterfeited articles with very short notice, the additional time taken in the civil law process could make detection difficult. In this regard, the criminal investigation process could provide a powerful tool to secure access to material evidence through police powers of search and seizure. Where police action is undertaken, significant investigative resources including search warrants, powers of arrest, covert surveillance and even controlled deliveries may be deployed. This could mean breaking into clandestine factories manufacturing counterfeit material, breaking into warehouses where infringing materials are stored or seizure of material in transit and arresting the perpetrators involved. It is needless to emphasise the utility of police powers in such situations, especially when countering clandestine outfits operated by organised criminal gangs having links with notorious terrorist organisations.

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[31] Gregor Urbas, *Criminal Enforcement of Intellectual Property Rights: Interaction Between public Authorities and Private Interests* in Christopher Heath and Kamperman Sanders edition, NEW FRONTIERS OF INTELLECTUAL PROPERTY LAW5 (Hart Publishing, 2005).

In addition, in the sphere of intellectual property misappropriation, not all victims may have adequate resources to counter organised criminal outfits engaged in large-scale infringements with world-wide networks. In this light, a criminal prosecution may relieve a victim of the burden of investigation and the subsequent legal proceedings. Therefore, the use of the criminal investigation process also could provide an effective means of challenging intellectual property infringements.

Book Review
'The Cases that India Forgot'

Authored by Chintan Chandrachud; Published by Juggernaut Books, New Delhi, 2019, price Rs. 599 (Hardcover)

Krishna Sharma*

'The cases that India forgot' is a non-fictional book authored by Chintan Chandrachud, a legal scholar and writer. The book is a remarkable attempt by the author to bring a catalogue of important cases that are significant in order to understand the working and role of Courts in Indian Democracy. The court has always been a focal point in public discourse and consciousness. The court decides every legal and constitutional question that arises for judicial decision. In recent times, the Supreme Court of India has come under an unprecedented chorus of criticism which raised some questions about its future. The book becomes quite relevant in order to understand the journey of the Supreme Court of India. The author underscores two points in his book that the court has often not only been fallible, or wrong, but the Supreme Court is not even final.

In these past seventy years, the Supreme Court has made some path breaking judgments. In this book, the author narrates ten cases of the Supreme Court of India from the past 70 years. Some of these judgments are in public memory because of their significance from legal, social and political perspective. For example, in the *Kesavananda Bharti* case[1], where the Apex Court evolved the Doctrine of Basic Structure, *Shah Bano Case*[2], where the court fought for Muslim women against religious

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1 AIR 1973 SC 1461.

2 AIR 1985 SC 945.

fundamentalism, *Vishaka Case*[3] where the court came up with guidelines to prevent sexual harassment at workplace. Because of these judicial efforts, these cases are still fresh in public memories. The entire book volumes the above mentioned cases, which are analysed and dissected threadbare.

The book contains 10 chapters focusing on the broad areas of politics, gender, religion and national security, running into 227 pages.

The intriguing part of the book is that it deviates from the normal path of discussing the occasions when the court gave landmark judgments which had a profound impact; rather the book talks about those forgotten yet significant cases which are not in the public memory anymore. The book throws light on those cases where the Indian Supreme Court and High Courts have remained silent and failed to prevent those misadventures carried by Parliament and the government. The book unfolds interesting accounts and untold stories from these forgotten cases.

The book has been written in a very lively approach which makes it comprehensible for readers even the readers from non-legal fields.

The selection of cases which the author calls a bugbear is completely understandable considering the landmark cases in shaping the constitutional law of India. As already mentioned, the book is divided into four major themes; the first theme of the book is Politics which consist of three cases, second theme of the book is Gender which consists of two cases, third theme of the book is Religion which consists of two cases and fourth theme of the book is National Security which consists of three cases. Interestingly, each 'forgotten case' is unique in terms of its legal, social and political significance. Given below are the cases which this book covers-

1 ***Keshav Singh*** **Case**[4] – Once a landmark case when legislators demanded High Court judges to be arrested. This case led to a tussle between the State Assembly of Uttar Pradesh and the Allahabad High Court.

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[3] AIR 1997 SC 3011.

[4] In Re Article 143 of the Constitution AIR 1965 SC 745.

2. ***Minerva Mills* v. *Union of India***[5] – This case is as important as Kesavananda Bharati case[6].It set the tone for the future of the basic structure doctrine in India. The Book also narrates how India's foremost constitutional lawyer, Nani Palkhivala used this case as a platform to challenge another Emergency-Era amendment to the Constitution. This chapter also contains accounts of a personal spat, of sorts, between two leading judges, Justice Chandrachud and Bhagwati, at the time of deciding this landmark case.

3. ***Rameshwar Prasad* v. *Union of India***[7] – The book narrates the high political drama involved in Bihar election. The power of the governor and president came into question. Shockingly, the president was APJ Abdul Kalam, one of the most admired public figures of India.

4. ***Tukaram* v. *State of Maharashtra***[8] – This case is also known as *Mathura Rape Case*. The case which led to amendment to rape law in India, it was four decades before *Nirbhaya*. This case is an example of great failure of public institutions- not only police and government but also the judiciary, from lower judiciary to the Supreme Court.

5. ***R.D. Bajaj* v. *K.P.S. Gill***[9] – This is one of the most high-profile cases in India where a retired IAS officer Rupan Deol Bajaj stood alone for her quest for justice and struggled for 17 years to punish K.P.S Gill who sexually harassed her.

6. ***State of Madras* v. *Champakam Dorairajan***[10] – This case is a landmark judgment which led to the first amendment to the Constitution, but in this book readers will come to know some unknown stories behind it.

7. ***State of Bombay* v. *Narasu Appa Mali***[11] – This case is unique in this book because this is the only case out of all ten cases which is

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5 AIR 1980 SC 1789.

6 *Supra* n.2.

7 AIR 2006 SC 980.

8 *Tukaram* v. *State of Maharashtra* (1979) 2 SCC 143.

9 *K.P.S Gill* v. *B.R. Bajaj* MANU/PH/0982/1989.

10 *Champakam Dorairajan* v. *State of Madras* AIR 1951 Mad 120.

11 *State of Bombay* v. *Narasu Appa Mali* AIR 1952 Bom 84.

decided by the Bombay High Court. This case lays down the extent to which personal laws can be subject to fundamental rights.

8. ***Kartar Singh* v. *State of Punjab*[12]** – This case relates to the Terrorists and Disruptive Activities Act (TADA) and oppression in the name of 'National security and threat' by the government. This is also an example where the Supreme Court acknowledged the problems with TADA law but did not correct them. It remained silent and failed to prevent the misadventure. Interestingly, readers will also come to know how the National Human Right Commission (NHRC) was created.
9. ***Naga People's Movement of Human Rights* v. *Union of India*[13]** – This case relates to Armed Forces Special Power Act (AFSPA). This case adds one more in the list where the Court abdicated its responsibility to protect fundamental rights when the government played the 'National Security Card'.
10. ***Nandini Sundar* v. *State of Chhattisgarh*[14]** – This case relates to state sanctioned armed civilian movement (Operation Salwa-Judum) to counter-insurgency movement in Chhattisgarh 2005. In this case, the reader would get to know about the colossal failure by the Supreme Court to meaningfully implement its decision.

The themes such as National Security, Gender, Politics and Religion are quite relevant in contemporary times. The book through these forgotten cases brings an engrossing picture of the Indian Judiciary that the courts are not always on the right side of justice and how the courts' words are not always final. The book unfolds accounts from past not only of the Courts but also about Parliament and government, where constitutional amendments were initiated to overturn the court's decision[15], it can be several steps that the government decides to take in order to sidestep compliance with the court's decision[16]. The author is equally intriguing as the title of the book- 'The Cases that India Forgot'.

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[12] *Kartar Singh* v. *State of Punjab* (1994) 3 SCC 569.

[13] *Naga People's Movement of Human Rights* v. *Union of India* (1998) 2 SCC 109.

[14] *Nandini Sundar* v. *State of Chhattisgarh* AIR 2011 SC 2839.

[15] *Supra* n. 6.

[16] *Supra* n. 10.

One must agree with the words written by Zia Mody, a corporate lawyer and co-founder of AZB & partners praising the book-

'*This book narrates ten captivating stories about India's forgotten cases. Chandrachud's writing is simple for the lay reader and yet holds the attention of both the lawyers and legal scholars. The book ignites interest in the law and in our Constitution and is also a must-read for those who are in the legal profession. Chandrachud's book is eminently readable. You will enjoy it thoroughly.*'

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Contents

Articles

FORECASTING OF RATE OF CRIME AGAINST GIRL CHILD IN 2030: LOGISTIC REGRESSION GROWTH MODEL ANALYSIS OF CRIME STATISTICS IN INDIA

Michael L. Valan* and George E. Richards**

ABSTRACT

Despite reformative measures such as enacting new laws, strengthening of existing legislation, adoption of various rehabilitation programs introduced by the government, and initiatives taken by non-government agencies, crimes committed against female children in India has consistently increased. Most of the crime committed against girl children is getting reported but it's estimated that significant number of cases remain to be dark figure. This paper is an analysis of this trend using data obtained from Crime in India for the years 2009 to 2019. Logistic Regression Growth Model was adopted to estimate the growth rate of reported incidents and their disposal rates.

KEY WORDS

Crime in India, Semi-logic Growth Model, Crime data, Female children.

Background

The child as a victim is not a new consideration in the annals of criminal justice. It is a common contention that children tend to be victims of certain crimes compared to those from other age groups (Lewis & Baker, 1996; Finkelhor, Ormrod, & Turner, 2005; Finkelhor, 2011; Van Dijk, 2016). Victimization, according to Lewis and Baker (1996), occurs when the child endures involuntary injuries or threats of such injuries. It is further argued children, similarly to the elderly, suffer victimization due to their physical inability to defend themselves and their dependence upon those who may be ones victimizing them. In line with this, Pinheiro also defined violence against children as

"The intentional use of physical force or power, threatened or actual, against a child, by an individual or group, that either results in or has a high likelihood of resulting in actual or potential harm to the child's health, survival, development or dignity" (Pinheiro, 2006, p. 4).

The criminal victimization of children is not easily encapsulated under one rubric. Finkelhor (2011) maintained the victimization of children can be articulated in three parts: The first is demonstrated through conventional criminal victimization, in particular assault, sexual assault, and robbery. The second addresses those acts that violate the welfare of children such as criminal neglect. Crimes by children against children are the third component of Finkelhor's model.

After the enactment of the *United Nations Convention on the Rights of the Child* in 1989, global efforts to recognize the necessity of child protection and determine effective interventions to reduce victimization (Brown & Bzostek, 2003; Finkelhor & Hashima, 2001). Lewis and Baker (1996) argued the integration of research on child abuse; kidnapping and other forms of violence make it possible to identify relationships among these types of victimization. Further, they contend this

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understanding helps to design appropriate intervention strategies.

Pinheiro conducted a research across the globe among children have found that violence against children is in the alarming state cutting across boundaries of culture, class, education, gender, income, race and age. He further found that gender plays a vital role when comes to violence. He asserted that "as girls and boys are at different risk for different kinds of violence" (Pinheiro, 2006, p. 13). He also found that when it comes to reporting only the grave cases such as sexual exploitation, trafficking and armed conflict are getting reported. Whereas, those take place within the home and family setting is being ignored due to fear and stigma.

Though there is dearth of literature pertaining to the criminal victimization of children, the bulk of studies have focused on sexual abuse, bullying, parental violence, community violence, or witnessing of domestic violence. The studies that focus on community violence generally fail to mention other forms of maltreatment such as neglect and emotional abuse. (Finkelhor, Ormrod, & Turner, 2005). Crimes against children are also not limited to a single occurrence. Multiple and various forms of victimization at the hands of a single perpetrator are frequent. Nansel, Overpeck, Haynie, *et. al.* (2003) maintain bullying may lead to more severe forms of physical assault and sexual harassment.

In their study of children and teens in the United States, Finkelhor, Ormrod, & Turner (2005) determined more than half have experienced physical assault, roughly 25 percent have experienced property crime victimization, and one in eight have endured child maltreatment. The authors found one-third had witnessed violence or other forms of victimization. Their findings were substantiated globally from other studies that found children were regularly subjected to various forms of abuse (Brown & Bzostek, 2003; Finkelhor & Hashima, 2001; Nansel, Overpeck, Pilla, *et. al.*, 2001; Nansel, Overpeck, Haynie, Ruan, & Scheidt, 2003; Bell & Jenkins, 1993; Gorman-Smith & Tolan, 1998; Hill & Jones, 1997).

When discussing the criminal victimization of children in the Republic of India, the official criminal statistics found in *Crime in India* clearly demonstrate it is on the rise. In 2001, the total number of crimes committed against children numbered 5,023, In 2016, the number increased to 1,06,958 (National Crime Records Bureau, 2001 & 2017). Female children and teens are most likely to become victims than males of the same age (Department of Justice, 1992; McIvor & Nahanee, 1998; Finkelhor & Kendall-Tackett, 1997; Hughes & Barad, 1983; Jaffe, *et. al.*, 1986; Michael & Srinivasan, 2016). Among the types of crimes juvenile females are likely to experience are sex trafficking, rape, child marriage, and maltreatment. Consequences of victimization of female children who have past experience of abuse and violence may lead depression, eating disorders, suicide, andissues with socialization (Status of Women in Canada, 1999).

Changes in Indian criminal law such as the *Protection of Children from Sexual Offenses Act* 2012 and the *Juvenile Justice Care and Protection Act* 2015 have led to increased citizen reporting. However, even with recent changes to the *Indian Penal Code*, 1860, the rate of convictions remains low. Explanations for low conviction rates include:

- little cooperation among actors in the criminal justice system,
- an overall lack of technical support in investigations,
- an overly complicated and lengthy judicial process with no fixed time frame of the disposal of cases,
- an offender-oriented justice system,
- a dearth of victim services,
- little interest regarding child rights,

- lack of judicial review,
- and no witness protection programs (Srinivasan, 2012; Kumar, 2012; Rajan & Khan, 1982).

Compounding these challenges is the lack of coordinated data collection regarding child victimization among public entities. Data that is lacking from reports are the number of reported instances, status of pending cases, withdrawal of cases, conviction rates, acquittal rates, reasons for delay of adjudication, and punishment administered to offenders.

When it comes to crime statistics as opined by Bacon (2013) the rate of violent and property crimes are declining around the globe. Based on the official report both people and properties are currently experiencing lesser victimization compared to 1970s. Whereas when comparing crimes relating to drugs, violence against children is on rise.

As far as forecasting of crime rate is concerned, from the review of literature, it was found that there is a dearth of studies to predict future crime rates based on the present crime rate. Scholars around the world have been using assorted methods such as application of linear regression model, multinomial linear regression model, Artificial Intelligence, Data Mining and other Machine Learning methods (Kim and Jeong, 2021; Rajadevei, *et. al.* 2020; Das and Das, 2019; Ahishakiye *et. al.*, 2017; (Antolos, *et. al.*, 2013). For instance, in the year 2013 (Antolos *et. al.*, 2013) have applied logistic regression method to predict the burglary crime in Florida, USA. They have collected burglary crime report of the year 2010 and analyzed. They have investigated the association between several predicting factors such as 'time and date of the offense, approximate start and finish time of the offense, repeated victimization, and the street address' and the probability of burglary occurrence with respect to epicenter. The results of their research revealed that burglary crime is predictable using this model as they have found significance in terms of predicting the occurrence within difference ranges from the epicenter. In India too computer science scholars have used MV algorithm and Apriori algorithm method to predict crime rate in India. They have predicted crime for the year 2010 using a data from 2001 to 2008. They have predicted that in the year 2009 total number of crimes includes murder, rape, sexual harassment and riot in the state of Tamil Nadu as 6800, whereas as per the report of the State Crime Records Bureau of the state of Tamil Nadu, in the same year number of cases reported was 7650 which makes 86 percentage accuracy of the crime predicted by the algorithm (Malathi and Baboo, 2011).

This study will give a clearer and more substantive picture of crimes perpetrated against female children in India that are shrouded in the "Dark Figure of Crime." It will also address the status of cases. It is one of the first attempts to analyze crimes against female juveniles compiled in the *Crime in India* reports. To assist actors in the Indian criminal justice system in mitigating these crimes, this study will endeavor to forecast crime levels against female children through the application of the Logistic Regression Growth Model. In statistics, regression analysis is generally used to prediction of data changing over time, effects and casual modeling. Logistic regression analysis is a statistical technique which is used to analyze the causal relationship between independent and dependent variables, and is especially used when the dependent variable has only binary categories (Baek, 2013). Further, logistic regression analysis can also be used to estimate the relationship between dependent variables having bi-variate values such as nominal scales and independent variables. Logistic regression analysis is mainly used to model a model that predicts and analyzes to which group individual observations can be classified when objects are divided into two or more groups (Park, 2014). Apart from this, as stated elsewhere, many researchers around

the world have used this technique to predict the crime level.

Method

We are seeking to synthesize available official data on criminal acts perpetrated against female children. In doing this, we are analyzing:

- rape,
- feticide,
- procuration of minors,
- prostitution (both buying and selling), and
- child marriage.

We have two reasons for selecting these crimes. First, crimes known to Indian police are compiled annually in the *Crime in India* report. Among the statistical information included in this report is data for twenty different types of crime committed against children. Six of these crimes can be related to female victims. Second, of the twenty crimes that address children, the ones we selected have minimal reporting (with the exception of rape) and low conviction rates. Our data set was drawn from the 2009 to 2019 *Crime in India* reports. This analysis of existing data was conducted through the application of the Logistic Regression Growth Model to estimate the rate of growth of reported incidents from 2009 to 2019 and predicting the incidence to till 2030. The analysis was carried out using the Statistical Package for Social Sciences software version 21.0.

Analysis

Table 1: Incidences and Projections of Child Rape 2009-2030

Year	Incidence	Predicted value	p-value	R2	F	Growth Rate (%)
2009	5368	5162	0.000	0.90	97.53	17.9
2010	5484	6230				
2011	7112	8097				
2012	8541	9364				
2013	12363*	12431				
2014	17925*	15136				
2015	17577*	17565				
2016	19765*	18936				
2017	17757*	19700				
2018	21401*	22767				
2019	26192	24830				
2020		26901				
2025		37237				
2028		43438				
2030		47572				

We found in 2007 that the total number of child rape cases was 5045 compared to the predicted number of 2982. This accounted for a 69.2 percent increase in reporting than was anticipated. In 2014, the number of reported cases was 13,766. The predicted rate was 12,926. Compared to 2007, the number of reported cases was higher than predicted by a smaller margin of 6.5 percent. We found in 2017 data a predicted growth rate of 291.7 percent when compared to 2007 prediction of anticipated cases. It is predicted that in the year 2030 a number of 47,572 cases may be reported under the head child rape. It was found a significant relationship between the actual number of cases and predicted cases. This model was explained by 90 percentage ($R^2 = 0.90$).

Table 2: Status of Cases – Child Rape 2007-2017

Year	Declared false	Charge-sheeted	Pending trial at the end of the year	Cases convicted	Cases acquitted
2007	166	4418	12261	942	1806
2008	265	4703	13985	945	2025
2009	216	4763	15638	944	2129
2010	234	4971	17187	1017	2381
2011	256	6002	19334	1196	2558
2012	272	7579	22812	1158	2949
2013	NA	NA	28171	1611	3502
2014	NA	15500	31976	2015	4443
2015	NA	12075	36271	1843	3518
2016	NA	21944	57454	1869	4757
2017	NA	NA	20613	1180	2570

Figures relating to the status of cases includes those cases declared false, charge-sheeted, pending trial, convictions, and cases acquitted. In 2007, data revealed 166 cases of child rape were declared false and 950 ended in a conviction. In that same year, 1800 cases were acquitted. This is derived from a total of 12,261 cases reported. The number of cases in 2008 revealed an increase in the number of cases reported. 5446 cases of child rape were reported in 2008. Of these, 945 ended in conviction and 2025 cases were acquitted. In the last year of available data, 2017 17,382 cases were reported. 2570 ended in conviction. The data within this table reveal the conviction rates drastically increased from 5.3 percent in 2007 to 34.2 percent in 2017. This reveals the effectiveness of the present criminal justice system of India.

Table 3: Incidences and Projections of Female Feticide 2007-2030

Year	Incidence	Predicted value	p-value	R2	F	Growth Rate (%)
2007	96	106				
2008	73	112				
2009	123	117				
2010	111	123				
2011	132	129				
2012	210	134				
2013	221	140				
2014	107	145				
2015	97	151				
2016	144	157	0.32	0.62	1.117	50
2017	115	162				
2018	142	168				
2019	131	174				
2020		179				
2021		185				
2022		190				
2025		205				
2028		245				
2030		270				

Feticide is defined as the destruction of a fetus or a causing an abortion of fetus. While abortions are legal in India under certain circumstances, the criminal consequences to those participating are considerably more stringent when compared to other countries such as the United States. Table 3 represents the predicted and actual values of female feticide. In the number of cases between 2007 and 2017, trends show fluctuation. In 2007, 96 cases were reported compared to 107 being predicted. The number of case reported dropped to 73 in 2008. Reported incidences of feticide were highest in 2010 with 212 reports. When compared with 2007, reports in 2012 were 50 percent higher.

In the ten years data was collected, 1,134 cases were reported to police. Of these 62 (5 percent) resulted in convictions and 193 defendants were acquitted. We believe it is not unreasonable to speculate, given the penalties for convictions and societal stigma attached, the majority of feticides reside in the "Dark Figure of Crime." Thus, we suspect, but do not know.

Table 4: Status of Cases – Female Feticide 2007-2017

Year	Declared false	Charge-sheeted	Pending trial at the end of the year	Cases convicted	Cases acquitted
2007	6	54	88	3	14
2008	10	23	84	10	16
2009	15	31	84	9	22
2010	10	34	97	5	15
2011	12	30	101	7	18
2012	13	48	129	5	15
2013	NA	NA	158	12	11
2014	NA	48	111	7	54
2015	NA	46	127	2	12
2016	NA	77	164	2	16
2017	NA	NA	121	3	09

In an effort to reduce the female feticide rate, the Indian government devised the *Pre-Natal Diagnostic Techniques Act* of 1994. This was amended in 2003 to prohibit the determination of the gender of the fetus. Convictions may result in incarceration from three to five years with fines ranging from Rs. 10,000 to Rs. 50,000. The effectiveness of the *Pre-Natal Diagnostics Technique Act* is questionable. There were 93 cases reported in 2016 with 23 reported to authorities in 2015. It is predicted that in the year 2030 a number of 47,572 cases may be reported under the head child rape. It was found a significant relationship between the actual number of cases and predicted cases. This model was explained by 90 percentage (R2 = 0.90).

Table 5: Incidences and Projections of Procuration of Female Minors 2007-2017

Year	Incidence	Predicted value	p-value	R2	F	Growth Rate (%)
2007	253	190	0.000	.84	42.9	874.3
2008	224	116				
2009	237	422				
2010	679	727				
2011	862	1033				
2012	809	1339				
2013	1224	1645				
2014	2020	1950				

Year	Incidence	Predicted value	p-value	R2	F	Growth Rate (%)
2015	3087	2256				
2016	2465	2562				
2017	3382	2868				
2018	3452	3173				
2019	3314	3479				
2020		3785	0.000	.84	42.9	874.3
2021		4090				
2022		4125				
2025		5559				
2028		6556				
2030		7221				

Table 6: Status of Cases – Procuration of Minor Girls 2007 – 2017

Year	Declared false	Charge-sheeted	Pending trial at the end of the year	Cases convicted	Cases acquitted
2007	18	160	439	17	90
2008	29	142	495	18	61
2009	25	140	526	18	77
2010	53	338	682	24	156
2011	93	652	1101	54	179
2012	49	535	1318	25	250
2013	NA	NA	1778	18	220
2014	NA	1476	2535	33	254
2015	NA	1520	3454	37	297
2016	NA	2002	4500	21	453
2017	NA	NA	4818	81	484

Concerning crimes against females under age, procuration may be considered acquiring females for immoral purposes. Section 366A of *Indian Penal Code* defines "Procuration of minor girl - Whoever, by any means whatsoever, induces any minor girl under the age of eighteen years to go from any place or to do any act with intent that such girl may

be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall be punishable with imprisonment which may extend to ten years, and shall also be liable to fine." The data shown in Tables 5 and 6 reveal reports of procuration grew from 253 reports in 2007 to 3,382 in 2017. This is a growth rate of 874.3 percent. The Semi-Logic Growth Model predicts that the rate will increase to 4,100 (R^2 = 84).

Table 6 shows the conviction remaining low compared to the number of reports. With the exception of 2011, the number of cases reported averages between 20 to 30 annually. From 2007 to 2017, 15,242 cases were reported of which 346 cases ended in convictions (2.27 percent). Although not as significant number, acquittals from 2007 (90) to 2017 (484) increased by 17.8 percent.

Table 7: Incidences and Projections of Soliciting Female Children for Prostitution 2007–2030

Year	Incidence	Predicted value	p-value	R2	F	Growth Rate (%)
2007	40	46				
2008	30	42				
2009	32	30				
2010	78	37				
2011	27	39				
2012	15	29				
2013	06	21				
2014	14	18				
2015	11	19				
2016	07	11	0.04	.43	5.40	-82.5
2017	04	11				
2018		10				
2019		8				
2020		*				
2021		*				
2022		*				
2025		*				
2028		*				
2030		*				

*** -** *Negative value*

Table 8: Status of Cases – Soliciting Female Children for Prostitution 2007-2017

Year	Declared false	Charge-sheeted	Pending trial at the end of the year	Cases convicted	Cases acquitted
2007	0	45	73	0	14
2008	0	27	87	1	12
2009	0	34	110	1	10
2010	0	47	129	4	24
2011	0	26	140	2	12
2012	0	12	140	1	11
2013	NA	NA	145	0	7
2014	NA	15	153	0	0
2015	NA	15	162	1	0
2016	NA	25	175	2	0
2017	NA	NA	39	0	0

Table 7 explains the actual and predicted values from 2007 to 2017 of the solicitation of female children. There was a drop of 17.5 percent in solicitation reports from 2007 (n = 7) to 2016 (n = 40). Data was only available from 2007 to 2012 regarding cases declared false. While none were declared false, the conviction rates were considerably low. Of the 260 cases reported, only 12 resulted in convictions (4.62 percent).

Table 9: Incidences and Projections of Selling of Female Children for Prostitution 2007–2030

Year	Incidence	Predicted value	p-value	R2	F	Growth Rate (%)
2007	69	68				
2008	49	74				
2009	57	80				
2010	130	86				
2011	113	91	0.06	.57	4.83	76.8
2012	108	97				
2013	100	103				
2014	82	108				
2015	111	114				

Year	Incidence	Predicted value	p-value	R2	F	Growth Rate (%)
2016	122	120	0.06	.57	4.83	76.8
2017	80	125				
2018	105	131				
2019	142	137				
2020		143				
2021		148				
2022		165				
2025		174				
2028		183				
2030		196				

Table 10: Status of Cases of Selling of Girls for Prostitution 2007-2017

Year	Declared false	Charge-sheeted	Pending trial at the end of the year	Cases convicted	Cases acquitted
2007	0	47	114	3	17
2008	2	34	133	2	12
2009	0	25	145	0	13
2010	0	64	193	2	13
2011	5	58	237	3	11
2012	5	76	285	4	22
2013	NA	NA	353	17	23
2014	NA	115	404	5	27
2015	NA	157	498	9	16
2016	NA	114	564	0	8
2017	NA	NA	521	0	13

Table 9 indicates actual versus predicted incidents are comparable. In 2007, there were 69 reports of selling underage females into sex. The predicted value for the same year was 68. Findings for 2016 followed the same pattern: 122 cases were reported and predicted value was 120. Table 10 shows that the status of delayed cases has risen consistently. 117 cases were delayed in 2007. In 2016, it was 564 cases which is a 382 percent increase.

Table 11: Incidences and Projections of Child Marriage 2007–2030

Year	Incidence	Predicted value	p-value	R2	F	Growth Rate (%)
2007	96	22				
2008	104	54				
2009	03	86				
2010	60	118				
2011	113	150				
2012	169	183				
2013	222	215				
2014	280	247				
2015	293	279				
2016	326	312	0.000	.77	31.97	239.6
2017	395	344				
2018	425	376				
2019	530	408				
2020		441				
2021		473				
2022		534				
2025		721				
2028		856				
2030		1071				

Table 12: Status of Cases – Child Marriage 2007-2017

Year	Declared false	Charge-sheeted	Pending trial at the end of the year	Cases convicted	Cases acquitted
2007	7	80	405	21	42
2008	10	90	404	19	56
2009	3	17	413	18	45
2010	11	67	344	8	46
2011	7	85	341	18	33
2012	17	113	369	9	40
2013	9	176	424	5	44
2014	6	194	550	15	88
2015	9	222	629	11	75
2016	11	236	788	10	58
2017	NA	NA	1055	08	92

The growth rate of reports for child marriage have grown significantly since 2007 with an increase over the ten-year reporting period of 239.6 percent. Initial reports (n = 96) compared with predicted reports (n = 22) were 336.4 percent higher, only Reports for 2016 were more static. In 2009 surprisingly only 03 cases were reported which raise a serious concern over credibility of the data. 326 cases were reported compared to the 312 cases that were predicted. 2021 estimated reports of child marriage are believed to be approximately 475. This would represent a 52.24 percent increase since 2016.

The number of pending cases has generally risen consistently. In 2007, 405 cases were pending. It dropped to 342 in 2010. The last year of data (2017) collected showed an increase of 136 percent from 2007. It is predicted that in the year 2030 a number of 1,071 cases may be reported under the head child marriage. It was found a significant relationship between the actual number of cases and predicted cases. This model was explained by 77% (R2 = 0.77).

Reasons for this may be the lack of cooperation among stakeholders in the criminal justice system, inconsistency in enforcing laws, legal complexity, lack of a witness and witness protection program, procedural complexity, no fixed timeframe for case disposal, judge/ population ratio, and various investigation difficulties (Srinivasan, 2012; Kumar 2012; Rajan & Khan, 1982).

Conclusion

The criminal acts selected by us to be those female children are likely to be victims of have little variation in regards to conviction rate. The severity of the act has little impact on the convictions of those accused. From the year 2009 -2019 period studied, child rape has seen a consistent increase in reporting. Reports are predicted to reach 23,000 by 2021 from 5,045 in 2007 for an increase of 355.9 percent. The other crimes we discussed also saw increases although some not as dramatic as the increase in reporting. As stated elsewhere, forecasting of crime rate is concerned, from the review of literature, it was found that there is a dearth of studies to predict future crime rates based on the present crime rate. Scholars around the world have been using assorted methods such as application of linear regression model, multinomial linear regression model, Artificial Intelligence, Data Mining and other Machine Learning methods (Kim and Jeong, 2021; Rajadevei, *et. al.* 2020; Das and Das, 2019; Ahishakiye *et. al.*, 2017). It can also be understood that most of the scholars are predicting crime rate around 80-90 percentage (Antolos, *et. al.*, 2013; Malathi and Baboo, 2011). Hence, it can be concluded that, crime can also be predicted with some extent depends on the availability of assorted factors.

As far as crime rates in globally in concerned, comparing to the Western and European countries crime in India is on rise dramatically (Blumstein & Rosenfeld, 2008 and Van Dijk *et. al.*, 2012). It can also be taken into consideration that most of the cases in India is remains a dark figure. For instance Valan (2020) have conducted a study to find out the prevalence of reported sexual harassment among women travelling (n=530) in public transportation. He has found that, 34 percentage of the respondents have reported that they have faced one or other forms of sexual harassment while travelling. When it comes to reporting it was found that only 2% of the respondents have reported to the police. This clearly shows that most of the cases in India remain unreported. In India, dark figures can only be revealed upon conducting the victimization surveys. The anticipated numbers will be much higher than the actual. Hence, in the light of the present research it can be concluded that, only with the available Crime in India statistics, future crime may be predictable only up to certain level using Logistic Regression Model. However, Crime rate is influenced by several factors such as Socio, political, psychological, cultural,

environmental and geographical. From the Crime In India data, it was observed that with regard to the conviction rate for crime against children and women it is very clear that from 2009 to 2017 the average rate of conviction stands at 40 percentage. Because of this lower conviction rate, victims hesitate to lodge a complaint. This may be one of the limitations of the adversarial judicial system. Countries having inquisitorial system is able to achieve higher conviction rate. Therefore, it is suggested that if India bring such system or another system in par with inquisitorial judicial system, the conviction rate may increase. Further, it is suggested that a scientific examination need to be carried out in finding the assorted factors behind less number of reporting of such crimes.

One of the limitations of the study is, since 2015 onwards there is no clarity in the data pertaining to trial rate, conviction rate etc. However, it is witnessed from the data over the last 10 years that, the officials have started incorporating assorted changes in connection with classifications in the data. Hence, it's very difficult to compare data for a long period of time. We recommend that further studies need to be conducted that address the reasons for the number of pending cases and acquittal rates. Apart from this data, there may be other factors which can influence the actual rate and prediction is political, social and economical status of the country. Finally it is concluded that, predicting future crimes using the available data may help the law enforcement officials to take measures to mitigate the crime rate in the society. Hence, in the light of the present research it can be concluded that, only with the available Crime in India statistics, future crime may be predictable only up to certain level (70-80%) using Logistic Regression Model.

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FORENSIC ANALYSIS OF COSMETIC – EXPOSITION OF SIGNIFICANCE, LIMITATIONS AND CHALLENGES

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ABSTRACT

Cosmetics have been used since ancient times to beautify and decorate the skin. They are an integral part of human culture and symbolizes different things in different cultures. Different skin diseases are caused because of the toxicological effects of cosmetics as well as they are encountered as trace evidence in various forensic cases. In such cases, it is important to extract useful information which can link the suspect, victim, and crime scene by analyzing the cosmetic traces. As the transferability of cosmetic traces has reduced because of the production of more persistent cosmetics, their evidentiary value has decreased consistently. The cosmetic traces are often very contaminated and therefore, the evidentiary value of cosmetic traces is further diminished because of strong interferences caused because of both samples and substrates. The interferences result in a reduced signal to noise ratio and in misinterpretation of results. In the present review, an attempt has been made to identify and discuss the forensic significance of cosmetic traces and the problems faced during the analysis of cosmetic traces. It is imperative that these limitations must be taken into consideration while researching into the analysis of cosmetics.

KEY WORDS

Cosmetic analysis; Trace analysis; Interferences; Transferability; Evidentiary value.

Introduction

Forms of body decoration exist in all human cultures and cosmetics are the agents often used to decorate various parts of the body, especially facial cosmetics used to beautify the facial feature. Modification of the body with dyes, paints, and other pigments is among the most universal of human behaviors, present in all cultures. Using cosmetics may be because of a variety of reasons including anxiety about facial appearance, conformity to social norms, and public self-consciousness to appear more sociable and assertive to others (Jones and Kramer, 2016). The human fascination with this beautification is ancient. However, as time progressed the man became more cautious and aware of the quality of cosmetics and the effects these cosmetics have on our bodies.

Cosmetics can be classified into four categories (figure 1) comprising a) skin related products, b) hair and scalp related products, c) oral care cosmetics, and d) fragrances. Skin related cosmetics include skincare cosmetics (cleanser, conditioners, and protectors), makeup cosmetics (base makeups, point makeups, and nail care products), and body cosmetics (bath products, sunscreen and suntans, antiperspirants and deodorants, and insect repellants). Hair and scalp products include hair care cosmetics (cleansers, treatment products, styling products, permanent waxes, hair colors, and bleaches), and scalp care cosmetics (hair growth promoters, and scalp treatment products). Oral care products include toothpaste and mouthwashes. There are five problems that need to be addressed in the cosmetic industry for

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quality assurance (Fairchild, 1967). These include a) finding correlations between a parameter and product performance, b) identification and quantitation of one or more components in a mixture, c) development of test procedures for active ingredients in cosmetics, pharmaceuticals, and toiletries, d) establishment of specifications for raw materials, and e) analytical services for product development groups. From the forensic point of view also the skin-related products are very significant and are most frequently encountered as trace evidence. In skincare products, facial products such as lipsticks, face powders, kajal, eyeliners. along with nail paints and other nail enhancement cosmetics are most commonly encountered in forensic cases (Fairchild, 1967; T. B. T.-N. C. S. Mitsui, 1997; T. Mitsui, 1997).

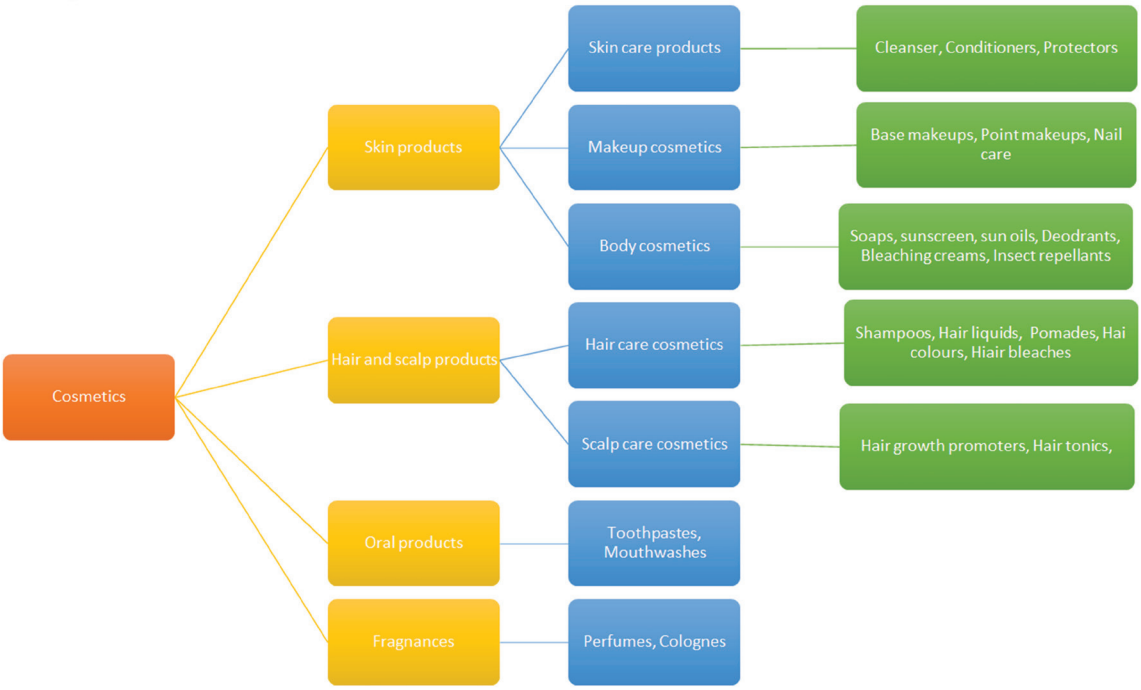

Figure 1: Classification of Cosmetics

Identification of cosmetics has been part of forensic investigations since 1912 when Edmond Locard identified pink dust under a homicide suspect's fingernail as being chemically consistent with a face powder found in the victim's room (Gardner *et. al.*, 2013). Cosmetic smears are a type of transfer evidence that can be commonly found at a crime scene. Because of their ease of transfer and high prevalence of use, a deposit of cosmetics can be encountered on clothing or bedding in rape cases, as a smear on glasses, cups or cigarettes, tissue papers and cotton pieces while removing and applying the makeup, or even as a medium for writing threatening messages. Though conclusive identification based on a transferred cosmetic smear is impossible because of their global mass production, cosmetics may establish a link between the suspect, the victim and the crime scene, corroborate statements or assist in crime scene reconstruction. Because of vast diversity of cosmetic products

any additional information got from the cosmetic smear, such as brand or type of product, could strengthen the evidential value of cosmetic comparison, more so in case of locally manufactured cosmetics.

Trace evidence is often used to establish or refute association which can be used in crime scene reconstruction. However, their role is as good as their recovery, analysis, and interpretation. No matter how big the trace evidence role is in the criminal investigation, they may not provide all the answers. The essence of crime might be understood only using trace evidence. For all elegance and utility, trace evidence is experiencing a period of decline. Many of the techniques that were originally developed to deal with trace evidence analysis came into being in connection with the burglary and other crimes that are not currently investigated as aggressively as in the past. When blood and semen evidence exists, trace evidence is often given a subordinate role in the investigation (Sharma *et al.*, 2019; Sharma, Chophi and Singh, 2019).

Different Aspects of Cosmetic Analysis

Cosmetics as Trace Evidence

Cosmetics are valuable trace evidence showing the signs of struggle in sexual assault cases. Most commonly transferred to the crime scene as smears, stains, and chips cosmetic evidence can play an important role in linking the crime scene with criminal and victim. The quantity of samples in smears, stains, and chips is very less and more often than not contaminated with some type of contaminants such as the substrate, or some other cosmetic. It is important to note here that these contaminations pose serious challenges in the absolute identification of cosmetics and are discussed in succeeding sections. Many times cosmetics such as hair waxes, foundations, and wax-based facial creams might contain plastic fingerprints that can be developed and used for personal identifications. However, these trace evidence is often overlooked without methodical searching. With cosmetic evidence establishing the fact that two cosmetic samples are identical or not is more prioritized over the absolute identification of samples (Williams, 1958). Thus, it results in the elimination of large samples and narrowing down the pool of suspects. In forensic science, it is especially important to know whether a piece of evidence undergoes changes over time in order to be able to accurately analyze it and determine its history (Salahioglu, Went and Gibson, 2013).

Cosmetics Toxicology

Toxicity because of cosmetics might be caused because of inorganic (metallic) components such as Arsenic (As), Antimony (Sb), Cadmium (Cd), Lead (Pb), Chromium (Cr), and Mercury (Hg) and organic compounds such as parabens, nitrosamines. (Bocca *et al.*, 2014). These metals enter the production cycle of cosmetics through three major pathways. First, they are added to impart some desirable effects. Second, some metals are produced as contaminants as the by-product of the manufacturing process, residual of starting raw materials, etc. third, undesired metals might be present the several ingredients derived from plant sources such as cottonseed oil and rice derivatives. These metals, when used for a long period, might be absorbed into the body and cause toxicity, especially where the individual is allergic or more sensitive to a specific metal.

Cosmetics as Allergic Agents

Cosmetics are applied directly to the epidermis of the body (Loretz *et al.*, 2005) and therefore, are liable to cause skin allergies in regular users. Nitrosamines present in cosmetics may originate from their raw materials or can be formed through compounds in the raw materials,

such as secondary amines, tertiary amines, quaternary amines, amides, alkyl amines, and amine oxides. These nitrosamines penetrate the epidermis and result in frequent health risks (MA *et al.*, 2011). Also, the perfumes have been reported to be one of the major causes of skin dependent allergic contact dermatitis. However, there are no regulatory standards for managing the concentration of fragrances in cosmetics, which might result from the availability of over 5000 fragrances available in the market and absence of any reliable toxicological data on these fragrances (Rastogi, 1995). Another aspect of cosmetics deals with the toxicological implications of cosmetic colors. Many studies have been conducted to study the toxicological impact of cosmetic colors which has led to repeated revisions of the numbers of permitted food or cosmetic dyes (Gagliardi *et al.*, 1987). Use of 11 cosmetic dyes namely, tartrazine, amaranth, ponceau 4RC, sunset yellow, allura red AC, acid red 2G, Ponceau SX, Brilliant blue FCF, Orange I, Acid black 1, Acid orange 7 has been restricted by European union in eye shadows, lipsticks and lip gloss products (Xian *et al.*, 2013).

Lip Prints

Wrinkles and groove patterns on the lips stained with lipsticks when transferred to any surface as lip prints can be used for personal identification because lip prints are as unique as fingerprints (Maheswari, 2011). This study of lip prints is known as Cheiloscopy. They remain the same throughout life and are uninfluenced by environmental changes, diseases such as type II diabetes and trauma (Sanghar, Jaishankar and Shanmugam, 2010; Rastogi and Parida, 2012; Manjusha *et al.*, 2017). The lip prints can be visible or latent depending on the type of lipstick used. Visible lip prints are generated when conventional lipsticks are used, whereas, the latent lip prints are made when protective lip products such as lip gloss are used (Segui *et al.*, 2000). In the latter case, the development of lip prints is required which makes further analysis challenging.

Cosmetics as Writing Material

Although very rare, cosmetics can also be encountered as writing material at the crime scene. Suicide letters, threatening letters, etc. might be written most commonly by lipsticks kajal and less commonly by any cosmetic which contains pigment (Sharma *et al.*, 2019). Because of the unusual writing materials used to write on unusual surfaces in unusual circumstances, it becomes very challenging to establish authorship. In such cases, the prime focus is on the identification of the writer by matching the handwriting characteristics. However, in such cases, handwriting identification is a challenging task as the wax component smudges the handwriting characteristics which makes it difficult to match the handwriting. Identification of the brand of cosmetics can show indirect proof of contact between the victim and the writing instrument. In cases of exotic high-end cosmetics, identifying the brand of a particular brand can help in identifying the victim or perpetrator in homicidal, extortion and threat cases and helping in crime scene reconstruction.

Problems in Analyzing the Cosmetic Evidence

Cosmetic trace evidence is an important corroborative evidence, however, as the techniques for the analysis of other physical evidence develop and become more and more sensitive, the importance of trace evidence has reduced. Therefore, in the last few decades, the focus on developing analytical methods for the analysis of cosmetic traces have decreased. In this paper an attempt has been made to study the limitations encountered during the analysis of trace cosmetic evidence. Figure 2 summarize the key problems encountered during the cosmetic trace evidence.

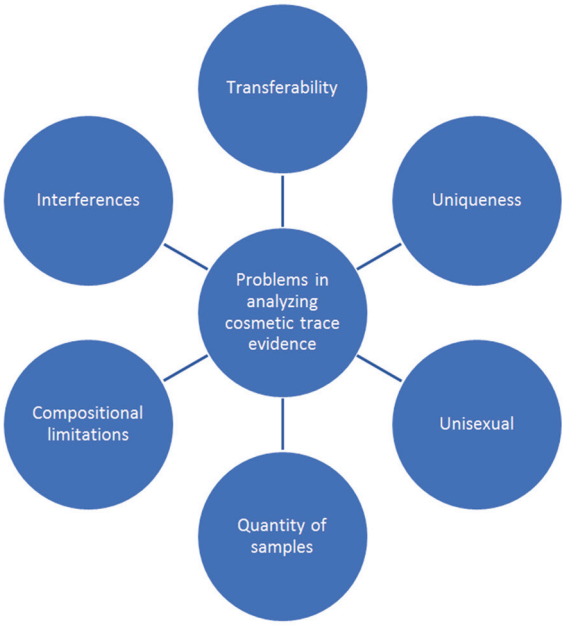

Figure 2: Summary of Problems Encountered in Analysing the Cosmetic Trace Evidence

Authors have classified these problems as those associated with transferability of cosmetic trace, their uniqueness and association with all sexes, quantity of samples, compositional limitations, and interferences. On the other hand table 1 explains these problems and the solutions to these problems. These solutions will further help in designing better research for the forensic analysis of cosmetic traces. In the following sections, the various limitations encountered during the analysis of cosmetic evidence have been discussed.

Table 1: Different Problems faced during the Analysis of Cosmetic Trace Evidence along with their Possible Solution

S.No.	Aspect of cosmetic trace analysis	Problems faced	Possible solution for further research
1.	Transferability	Permanency of cosmetics lead to reduced transferability on substrates	Research conditions must be better simulated to real cases keeping in focus the transferability of the samples used in the research
2.	Uniqueness	Globalization resulted in the availability of every brand in every corner of the world	Future research must be focussed on local cosmetics which are geo-limited
3.	Quantity of samples	Due to reduced transferability leads to only trace amounts of samples available for analysis	Research conditions must be better simulated to real cases
		Trace quantities of the sample also result in low signal to noise ratio	The amount of sample transferred during the research must be minimal

S.No.	Aspect of cosmetic trace analysis	Problems faced	Possible solution for further research
4.	Compositional limitations	Many components like dyes and pigments are very difficult to analyze	The analytical methods to be used must be component specific
5.	Interferences	Substrate interferences Sample interferences Instrumental interferences	Interferences must be taken into consideration while interpreting the results

Transferability

As with the other trace evidence, the prime limitation with cosmetic evidence lies with the difficulty in analyzing them. Obviously, the information got from cosmetic evidence depends heavily on the type of cosmetics involved (Williams, 1958). For example, nail paints, eyeliners, mascara, eye shadows, kajal, vermilion, and foundation are much more difficult to transfer as compared to lipsticks and will require considerably more force to transfer a significant amount of sample. This problem is even more aggravated by the development of modern washable and waterproof cosmetics which make it even more difficult to transfer. Also, many times the lipsticks are used along with lip primer in form of a base coat (binds lipstick on the lip surface preventing the contact between the lips and lipstick) or topcoat (protects the applied lipstick) (Hall, 2019). The transferability of cosmetic traces also depends on the state of cosmetic evidence. Liquid cosmetics such as liquid vermillion or liquid kajal solidify after application, and thus, making it difficult to transfer. Powder vermillion and semi-solid kajal easily transfer because of high transferability. To counter the problem of transferability, future research must be designed in a such manner to better render the conditions in which real case evidence are encountered (table 1). The samples in research studies must be more accurately simulated in terms in amount of cosmetic used in these studies and the conditions in which they are prepared.

Uniqueness

Globalization has led to the availability of different cosmetics of different brands in every part of the world which has resulted in loss of uniqueness of the cosmetic samples. Simply put, commonly occurring materials are more difficult to identify with a particular source than are more complex, rarely occurring materials. For example, the lipstick of a particular brand will be more useful if it is rare or available in a restricted geographic origin. Many cosmetics are region-specific and that increases their importance. For example, in a study, authors observed that in foundations were the most common cosmetics encountered as cosmetic traces in crimes in New York (Gordon and Coulson, 2004). Similarly, vermilion (especially powdered vermilion) is more common in developing countries such as India (Chandel, Bhatia and Jindal, 2013). On other hand, most of the international brands of nail paints, lipsticks, etc. are available all across the world which reduces their evidential value. Therefore, more and more studies must be focussed on the locally available cosmetics (table 1).

Unisexual

While identifying an individual, the designation of sex can eliminate a large percentage of our suspects (Williams, 1958). However, most of the cosmetics are becoming more and more unisexual that is, are being used by individuals of all sexes which results in difficulty in using cosmetics for the elimination of suspects based on sex.

Similar problems are also faced with tattoos which are frequently used by individuals of all sexes.

Quantity of Samples

Since cosmetic evidence is transferred in trace amounts, it is very difficult to analyze especially with techniques that involve extraction such as gas chromatography and liquid chromatography. Where extraction is performed not all components are extracted, which makes it difficult if not impossible to accurately identify. Infrared spectroscopy is a good alternative to this problem of extraction as no extraction procedure is required, however, with trace amounts of samples it results in noise within the spectrum. The peaks from substrates also interfere or mask the peaks of the actual sample. Raman which is another alternative can also be used, however, the peaks from dyes result in fluorescence which again results in high noise.

Compositional Limitation

Cosmetics are primarily composed of waxes, dyes, pigments, and solvents. Apart from solvents waxes, dyes, and pigments are quite stable and non-volatile in nature which makes it difficult to be analyzed by gas chromatography-mass spectrometry. The obvious solution which comes to mind is pyrolysis GC-MS, however, this instrument is very costly and ergo not available in every forensic science laboratory.

Interferences

Substrate Interferences – Cosmetic evidence is most commonly found on clothes of victim and assailant in sexual assault cases. However, the identification of cosmetics on clothes largely depends on the porosity and the absorption capacity of the substrates in question. The porous substrates such as cotton absorb and bind the cosmetic traces to inner layers, causing a large number of interferences especially in FT-IR spectra. In such cases, a low signal to noise ratio is got and it becomes very difficult to interpret the same. However, the extent of absorption depends on the type of cosmetic in question. Wax-based cosmetics are not absorbed to an extent that will cause considerable interference and hence, wax-based cosmetics can be easily analyzed compared to cream-based cosmetics. In such cases, it would be better to extract the cosmetic using a suitable solvent. Another alternative to this problem will be the use of external reflection spectroscopy, which has been successfully used for the stand-off detection of body fluids on fibers (Zapata, Fernandez de la Ossa and García-Ruiz, 2016). The thickness of the substrate also contributes to the interferences. For example, with denim (a non-porous substrate) do not yield good results because of its thickness.

Sample Interferences – Cosmetic trace evidence suffers from many limitations pertaining to the physical state, and particle size of the sample itself. Emulsions and semi-liquid cosmetics do not get absorbed on the substrate and thus, produce better results compared to liquid cosmetics which are easily absorbed on the surface of the substrate causing more substrate interference in the results. A similar pattern is shown by particle size. Larger particle-sized cosmetics do not get absorbed into the surface of the substrate and produce better results compared to the small particle-sized cosmetics. Another factor which affects the identification of cosmetic traces if the quantity of sample which has transferred and the way of acquisition used. Results can be acquisition using macro or micro techniques, Micro-techniques such as micro-spectrophotometry are better suited for the analysis of cosmetic traces as they can focus on a much smaller region. Sample heterogeneity and impurity of the traces of cosmetics are also a hindrance to the successful identification of cosmetics.

Instrumental Limitations

Different components of cosmetics can be analyzed using different analytical methods. Organic components can be analyzed using various chromatographic techniques including thin-layer chromatography (Russell and Welch, 1984; Chandel, Bhatia and Jindal, 2013), gas chromatography (EHARA *et al.*, 1997; Dewulf, Van Langenhove and Wittmann, 2002), high performance liquid chromatography (Reuland and Trinler, 1980; Gagliardi *et al.*, 1987), and its hyphenated forms and spectroscopic techniques such as Infrared (IR) spectroscopy (Pasieczna-Patkowska and Olejnik, 2013; Sharma, Bharti and Kumar, 2019) and Raman spectroscopy (Rodger and Broughton, 1998; Gardner *et al.*, 2013) poly (-lysine. Inorganic components can be analyzed using x-ray techniques such as x-ray diffraction (XRD), and spectroscopic techniques such as atomic absorption spectroscopy (AAS) and atomic emission spectroscopy (AES). To study the role of different techniques in analyzing cosmetics consult the review by Chopi *et al.* (Chophi *et al.*, 2019). However, in this section, we will discuss various limitations and problems faced by these techniques especially during the forensic analysis of cosmetic traces encountered on substrates. Most of the studies agree it is difficult to differentiate all the cosmetic samples just based on one technique (Andrasko, 1981). In forensic samples, an ideal technique must be non-destructive, and able to test trace amounts of samples. Techniques having less analysis time, and low analysis cost per sample are preferred (Willard *et al.*, 1989; Bertrand, 1998; Carlin and Dean, 2013; Stuart, 2013). Table 2 reviews different analytical methods which are commonly used for the forensic analysis of cosmetic trace analysis along with their advantages and their limitations.

Chromatographic Techniques – Major chromatographic techniques used for the analysis of cosmetics include thin-layer chromatography (TLC), High-performance liquid chromatography (HPLC), Gas chromatography (GC), and Gas chromatography-mass spectrometry (GC-MS). With gas chromatography, the analysis of high molecular weight compounds can be difficult because the high thermal stability of the stationary phase is required. Low thermal stability columns are susceptible to degradation by the high column oven temp needed for the analysis of cosmetic traces and the poisoning by trace impurities in carrier gases (Giles, 1987). The results are influenced by the age of the stain. In sunlight, many of the color additives undergo photo-degradation and hence, pose interfering peaks (Andrasko, 1981). Other factors influencing the analysis of cosmetics include the quantity of sample and solvent used for the extraction. Chromatographic techniques especially thin layer chromatography (TLC) and high-performance liquid chromatography (HPLC) require a higher amount of sample which is often not the case in forensic samples. The type of solvent used might dictate the type of components extracted and hence, resulting in partial or no results. Chromatographic techniques require longer run time, extensive sample preparation methods, and have higher analysis cost per sample. In addition, the sensitivity and accuracy depends on injection, column, detector used, and the expertise of the operator.

Spectroscopic Techniques – Major spectroscopic techniques that have been used for the analysis of cosmetic evidence include Infrared spectroscopy, Raman spectroscopy. Spectroscopic techniques are non-destructive, easy to operate, less chronophagic, with less analysis cost per sample and thus, provide an edge over chromatographic techniques. However, it also suffers from certain limitations and challenges.

Table 2: Different Techniques used for the Analysis of Cosmetic Trace Evidence, their advantages and their limitations

S.No.	Category	Technique	Component to be analyzed	Goals	Advantages	Limitations	Ref
1.	Microscopic techniques	Scanning electron microscope (SEM)	Wax structure Sweating of lipstick	Component study	High resolution with minimal sample preparation; Very sensitive; Rapid	Very expensive, large, and require an expert to be operated; Risk of radiation exposure; Analysis is limited to solid samples	[1–4]
2.	Chromatographic technique	Thin-layer chromatography	**Pigments, and dyes**	Component study	Simple and easy; Fast; Cheapest chromatographic technique	Detection limit is high; Less sensitive; Extraction is required; Destructive; Human error is common; affected by environmental conditions.	[5–9]
		Gas chromatography-mass spectrometry (GC-MS)	**Solvents** like toluene, N-methylpyrrolidone, diethylene glycol dimethacrylate, 2,4-dihydrobenzophenone; **Fragrances** like Cinnamic alcohol, cinnamic aldehyde, Eugenol, Hydroxy citrenellal, α-amylcinnamic aldehyde, Geraniol, Isoeugenol, Cournerin; **Nitrosamines**	Component study; Classification and differentiation; Effect of ageing	Very sensitive; High resolution; Absolute identification; High accuracy and precision; Small amount of sample required	Destructive in nature; Cosmetic traces requires high temperature which is not possible always; longer run time and extensive sample preparation; Requires experts for operations	[10–14]
		High-performance liquid chromatography (HPLC)	**Pigments, and dyes**	Component study	High resolution; High sensitive	Resolution is difficult to attain with complex and contaminated samples; Destructive; Long run time; Extensive sample preparation is required	[15–19]

S.No.	Category	Technique	Component to be analyzed	Goals	Advantages	Limitations	Ref
3.	Spectroscopic techniques	Ultraviolet – visible (UV-Vis) spectroscopy	**Dyes**	Component Study	Simple; Low cost; Non-destructive; Versatile; Easily available in labs	Requires extensive sample preparation methods; less sensitives; Prone to false positives	[20,21]
		Infrared (IR) spectroscopy	**Pigments and Dyes**	Classification and differentiation; Ageing studies	Easy to operate; low cost; Expert is not required for operation; Non-destructive	High substrate interference; Instrument drift; Limitations arising from data processing methods	[22–26]
		Raman spectroscopy	**Pigments and dyes**	Classification and differentiation; Ageing studies	Very sensitive; Non-destructive; No sample preparation is required; Portable instruments are required; Low substrate interference	Fluorescence due to matrix as well as the chromophores present in the pigments and the dyes; Decomposition of samples due to lasers	

Infrared Spectroscopy – With new sample preparation techniques and chemometric tools Infrared spectroscopy in recent years has emerged as an effective tool for the analysis of various trace evidence. However, it suffers from some serious issues which must be solved for better results. Apart from the interferences arising from the above factors, noise might arise because of the partial covering of ATR crystal with the ATR-FTIR spectrophotometer. Although, no studies are available to study whether covering of crystal with sample has any effect on spectra or not. However, the particle size of the sample affects the signal to noise ratio. As the particle size increases, the air molecules give rise to noise in the spectra and thus making it challenging to analyze cosmetic traces. Infrared spectrum might suffer from inconsistent baseline and noise which might result from sample and substrate interferences (discussed above) as well as chemical interferences and ways of acquisition. These variations might be aggravated because of the inherent limitations of the instrument as instrument drift. These variations might appear due to low scattering intensity or scattering (Lee, Liong and Jemain, 2017).

Raman Spectroscopy – Even though the Raman spectroscopy is a non-destructive technique, such powerful lasers focused on the samples can increase the chances of causing decomposition during the analysis (Salahioglu, Went and Gibson, 2013) cigarette butts and paper tissues were analysed. Differentiation of lipstick smears could be achieved with little or no interference from the underlying medium. Lipstick smears on glass slides, cigarette butts and tissues could also be analysed and identified in situ through evidence bags. Using a range of excitation frequencies (473, 633 and 784 nm. This might cause the degradation of some components leading to the disappearance of certain peaks from the resultant spectra or adding certain peaks to the resultant spectra. The lasers with shorter wavelengths used in Raman spectrophotometer might results in fluorescence because of the matrix as well the chromophore used in cosmetics which might mask the peaks from actual components (Rodher *et al.*, 1998).

Effect of Data Processing Methods

To minimize the variations because of interferences, various data processing methods such as background subtraction, baseline correction, normalization are used. Background subtraction is performed to remove the interference because of substrates. Theoretically, the simple subtraction of peaks arising from the substrate from the complete spectrum of the sample with the substrate should yield the spectrum of the sample. However, practically the peaks from the sample persist even after the background subtraction because of underdeveloped elimination algorithms used for the process (Lee, Liong and Jemain, 2017). The next step in data treatment relates to normalization, which is used to limit the interference caused by the varying sample size by transforming absorbance values of all values of each spectrum according to a pre-selected constant. This pre-selected constant can either be the value of the most intense band or the total sum of absorbance values. Another data processing algorithm is baseline correction which is used to correct the variations caused due to differed baseline. However, baseline correction only corrects for linear baseline shifts and does not treat global intensity variations and overlapping peaks. To resolve overlapping peaks, derivatives can be used. The first-order derivative is to remove the offset baseline and the second derivative would also resolve overlapped peaks (Gautam *et al.*, 2015; Lee, Liong and Jemain, 2017) functional groups and environment of the molecules in the sample. In combination with a microscope, these techniques can also be used to study molecular distributions in heterogeneous

samples. Over the past few decades Raman and IR microspectroscopy based techniques have been extensively used to understand fundamental biology and responses of living systems under diverse physiological and pathological conditions. The spectra from biological systems are complex and diverse, owing to their heterogeneous nature consisting of bio-molecules such as proteins, lipids, nucleic acids, carbohydrates etc. Sometimes minor differences may contain critical information. Therefore, interpretation of the results obtained from Raman and IR spectroscopy is difficult and to overcome these intricacies and for deeper insight we need to employ various data mining methods. These methods must be suitable for handling large multidimensional data sets and for exploring the complete spectral information simultaneously. The effective implementation of these multivariate data analysis methods requires the pretreatment of data. The preprocessing of raw data helps in the elimination of noise (unwanted signals).

Conclusion

Cosmetic evidence is encountered most commonly in sexual assault cases and thus provides excellent corroborative evidence helping in linking suspect, victim, and crime scene. However, while analyzing and interpreting cosmetic evidence one must be very careful. In the last few decades, the evidentiary value of cosmetic traces has decreased substantially. We have discussed the limitations and issues often encountered during the analysis of cosmetic trace evidence. The development of new and more persistent cosmetics, as well as the interferences because of substrates and the sample, result in this loss of evidentiary value. Cosmetics evidence inherently suffer from various limitations including small sample amount, contamination because of substrates and other external contaminants. Therefore, it is important to address these issues and work towards solving these in order to improve the value of cosmetic evidence.

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EXERCISE OF JURISDICTION AND REFERRAL PROCEDURES ON A SITUATION UNDER ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT – UN SIMPLE OU COMPLEXE

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ABSTRACT

The International Criminal Law is in the progressive development stage which was initiated by the Nuremberg Tribunal, Tokyo Tribunal's contributions on assessing and judging the serious violations of international human and humanitarian rights committed during World War II. These serious violations are the sources for International Crimes. The recognition of International Crimes and Procedures was adopted through the Rome Statute, 2000. The Rome Statute recognized Crime of Genocide, Crimes against Humanity, War Crimes and Crime of Aggression as international crimes under Arts. 6 to 8bis. The International Criminal Court (ICC) practicing complementary jurisdiction to over these crimes. Unlike the domestic legal system, the Rome Statute or the Rule of Procedure and Evidence has not incorporated any investigating agencies or Police System to investigate and submit the report for any violation of international human rights and humanitarian rights which resulted in the above said crimes. The Rome Statute, 2000 comes with a unique procedure for referring a situation on the commission any one or more than one prohibited acts enumerated under Arts. 6-8bis. Arts. 13 to 15ter of the Rome Statute of the ICC dealt about the referral procedures and Art. 16 speaks about the deferral procedures by the Office of the Prosecution and Arts. 17-19 dealt with admissibility and its challenges of cases. The Rome Statute of the ICC imposes the responsibility on the Office of the Prosecution (OTP) to conduct investigation on any such referral of situation made by either the State Parties, Security Council or by the OTP suo motto. In this paper, the author will discuss about the complexities in referring a situation to the OTP, investigation mechanism, accepting or deferring the situation, admissibility and challenges to the admissibility of a situations. One of the major critique faced by the ICC is the referral procedures and its complexities.

KEY WORDS

International Criminal Court, Office of the Prosecution, International Crimes, Rome Statute 2000, Reference of situation.

Introduction

The International Criminal Law is in the progressive development stage which was initiated by the Nuremberg Tribunal, Tokyo Tribunal's contributions on assessing and judging the serious violations of international human and humanitarian rights committed during World War II. These serious violations are the sources for International Crimes. The recognition of International Crimes and Procedures was adopted through the Rome Statute, 2000. The Rome Statute recognized Crime of Genocide, Crimes against Humanity, War Crimes and Crime of Aggression as international crimes under Arts. 6 to 8*bis*. The International Criminal Court (herein after referred to as the 'ICC') has universal jurisdiction to exercise the jurisdiction over these crimes. Unlike the domestic legal system, the Rome Statute or the Rule of

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Procedure and Evidence has not incorporated any investigating agencies or Police System to investigate and submit the report for any violation of international human rights and humanitarian rights which resulted in the above said crimes. The Rome Statute,2000 comes with a unique procedure for referring a situation on the commission any one or more than one prohibited acts enumerated under Arts. 6-8*bis*. Arts. 13 to 15*ter* of the Rome Statute of the ICC dealt about the referral procedures and Art. 16 speaks about the deferral procedures by the Office of the Prosecution and Arts. 17-19 dealt with admissibility and its challenges of cases. The Rome Statute of the ICC imposes the responsibility on the Office of the Prosecution (herein after referred to as the 'OTP') to conduct investigation on any such referral of situation made by either the State Parties, Security Council or by the OTP suo motto. In this paper, the author will discuss about the complexities in referring a situation to the OTP, investigation mechanism, accepting or deferring the situation, admissibility and challenges to the admissibility of a situations. One of the major critique faced by the ICC is the referral procedures and its complexities. The contemporary development of international criminal law opened the space for universal jurisdiction. Rome Statute 2000 of the ICC has jurisdiction to prosecute and punish the crimes recognized as international crimes. The question of exercise of jurisdiction, reference of cases or situation to the ICC and the grounds for challenges are still debatable internationally on the OTP's biased approach. This paper will discuss about the issues and challenges of selecting a case or situation before the Chambers of the ICC.

Jurisdiction of the International Criminal Court

The Preamble of the Rome Statute emphasized that to protect the present and future generation from the most serious crimes of international community with the powers under Universal Jurisdiction by the International Criminal Court. And at the same time, the ICC shall be the complementary to the national criminal justice system. To exercise the jurisdiction, the Rome Statute of the ICC enlisted the following crimes as international crimes; *(a) Art. 6 Crime of Genocide; (b) Art. 7 Crimes against Humanity*; *(c) Art. 8 War Crimes and (d) Art. 8bis Crime of Aggression*. The definition of Crime of Aggression has been initiated in the year 1952 before the United Nations General Assembly (herein after referred to as the 'UNGA') and in the year 1954 the UNGA constituted a Special Committee to draft the definition of Crime of Aggression. In the year 1974, the UNGA in its 2319 Plenary Meeting, approves and adopted the text of definition of Crime of Aggression. The Rome Statute inserted the Crime of Aggression in the 2010 after 10 years of its establishment. But the reservation was made in the Arts. 121 and 123 of the Rome Statute for the inclusion of the crime and also in accordance with the substances of Art. 10 of the Rome Statute which states as, "*Nothing in this Part shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute*."

The other crimes such as Crime of Genocide is the verbatim of the definition of previous statutes of regional tribunals *inter alia* International Criminal Tribunal for the Former Yugoslavia (herein after referred to as the 'ICTY') and the International Criminal Tribunal for Rwanda (herein after referred to as the 'ICTR'), Crimes against Humanity (herein after referred to as 'CAH') defined in Art. 7 which states about the prohibited acts enumerated from Art. 7(2)(a) to (k) in a systematic or widespread manner against a civilian population. The Art. 8 defines War Crimes, which is very extensive and elaborative one when compared to the ICTY and the ICTR Statutes. The serious violations of international humanitarian laws, *Four Geneva Conventions* and its

Additional Protocols, serious violations during international and non-international armed conflicts are the elementary aspects of this crime. There are more than 50 prohibited acts that covers each head of the violations. The ICC is granted with powers to exercise its jurisdiction for the above listed crimes without any immunity. The Preamble itself very clearly stated that, "*Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes; Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes…"* With the above objective, the ICC enjoys the Universal jurisdiction, The State Parties are under the obligations to cooperate with the ICC in executing the Warrant of arrest or surrender the suspect, assist the OTP in conducting investigation, protect the rights of the victims and evidences etc.

Referral of a Situation and Procedures

Part – 4 of the Rome Statute of the ICC explains about various organs of the Court such as (i) the Presidency; (ii) Appeal, Trial and Pre-Trial Chambers; (iii) Office of the Prosecutor and (iv) The Registry. Out of these organs, the OTP and the Pre-Trial Chamber are discharging the primary functions of receiving the information about the commission or allegation of commission of crime falls within the jurisdiction of the Court, conducting of investigation and analyzing the situation and approving the situation for trial. According to Art. 11 of the Statute, the principle of *Ex Post Facto Law* has been adhered very strictly by incorporating the norms that, any crimes committed after the entry into force of this Statute only eligible for trial and if any State Party ratified the Convention after its entry, the jurisdiction will be counted only after its ratification. The procedure for exercising the jurisdiction on any such commission of the crime may be referred by the (i) State Party for any one or more such have committed within their jurisdiction may refer the situation to the OTP; (ii) any situation on the commission of any one or more crimes may be referred by the United Nations Security Council (herein after referred to as the 'UNSC') acting under Chapter VII of the Charter of the United Nations and (iii) the Prosecutor itself initiate an investigation of any such crime. Further, Art. 15 dealt with the suo moto powers of the Prosecutor's Office to investigate the information on crimes: (i) analyses the situation, seriousness and gravity of the crime by seeking additional information from the States, UN Organs, NGOs, testimonies; (ii) If the Prima Facie exists in the information, the Prosecutor refer the report to the Pre-Trial Chambers by requesting for an investigation with the supportive materials; (iii) if the Pre-Trial Chamber satisfies upon the report of the Prosecutor and the documents submitted by them, they shall authorize the commencement of investigation without prejudice to the admissibility principles of the jurisdiction of the Court; (iv) If the Pre-Trail Chamber refused to accept the investigation, the Prosecutor's office is at liberty to submit another requisition on the same information with new facts and evidence; (v) The Prosecutor also concludes that the information provided doesn't consists reasonable basis for investigation and defer the information.

The limitations for the investigation of a situation or a complaint may be deferred under Art.16 as there shall not be any commencement of investigation by the Chambers for the period of 12 months, if any resolution has been adopted and requested by the UNSC as per Chapter VII of the Charter of the UN. This requisition many also renewed. Art. 17 discussed about the issues of inadmissibility of a case – (i) if the State is unwilling or unable to carry out the investigation; (ii) the person already tried; (iii) the crime is not sufficiently grave to justify Art. 5; (iv) to determine the unwillingness, the Court shall, consider the whether the due process of law which has been recognized by the International law by

checking out whether – (a) the proceedings were undertaken with an intention to shield the person from criminal liability for crimes under Art. 5 of this Statute; (b) unjustified delay; (c) the proceedings were not conducted independently or impartially and inconsistent with the circumstances. The defence is provided with liberty to challenge the admissibility of the charges under Art. 19 of the Rome Statute either before the Pre-Trial Chamber (herein after referred to as the 'PTC') or the Appeal Chambers of the ICC. The grounds for challenging the admissibility of a case are, Admissibility of a case may be challenged by - (a) An accused - against whom any warrant of arrest has been issued u/Art. 58; (b) The State on the ground that it has investigated or investigating or prosecuted or prosecuting the case; (c) A State on the basis of acceptance; (ii) The perpetrator or a State shall challenge the admissibility only once prior to the commencement of the trial. Upon SLP, there will be exception in this reservation; (iii) Any such challenges shall be made before the Pre-Trial Chamber before the confirmation of charges. if the charges are confirmed, the application for challenge shall be made before the Trial Chamber and may also be appealed before the Appeal Chambers u/Art. 82; (iv) The Prosecutor shall suspend the proceedings until the determination of issues on jurisdiction; if the Prosecutor prefers to continue the proceedings pending disposal, they may seek permission from the Court to - (a) pursue the necessary investigation; (b) record the statement or testimonies of the witnesses or complete the examination; (c) with the co-operation of the State, take appropriate steps to prevent the escape or absconding of the person against whom any warrant or arrest has been issued and pending; (v) Any challenges on the jurisdiction shall not affect the proceedings effected before the application of challenge made; (vi) if the Court decided as the case is inadmissible, the Prosecutor may review the decision with the facts to negate the inadmissibility order.

Investigation of a Case or Situation by the Office of the Prosecutor

The Prosecutor shall initiate the investigation proceedings to evaluate the credibility of the information and to determine the reasonable grounds to proceed with the case. The investigation shall be initiated after ascertaining the issues such as, (i) there exists the *prima facie* and reasonable grounds to believe that the crime has been committed within the jurisdiction of the Court; (ii) the situation or the case should be falls within Art. 17 (Admissibility) of this Statute; (iii) the gravity of the crime and interest of the victim to protect the interest of justice. If the investigation proves that the information or the complaint does not contain any substantial evidence on either legal or factual basis or if the case is inadmissible under Art. 17 or for the interest of the victims or justice, the Prosecutor shall inform the PTC and the State who made such reference or the Security Council about the determination of the case. But the decision of the OTP shall not be final. The State Party or the Security Council may approach the PTC to review its decision of the Prosecutor or the PTC, may act upon his own powers to review the decision of the Prosecutor. Either the decision to continue the case or closing the case shall be final only after the decision passed by the PTC. If any new facts evolved or under other circumstances, the Prosecutor may reconsider his/her decision.

Powers and Duties of the Pre-Trial Chambers of the ICC

The PTC, at the request of the OTP, issues any order or warrant of arrest for the purpose of investigation;. Further the Pre-Trial Chamber also permits the accused to prepare his defence; (iii) provides protection to the witnesses and the victim, preservation of the evidences and protect the accused who have surrendered or arrested and protect the privacy of the victims and the evidence of the case;

(iv) also permits and authorises the Prosecutor conduct specific investigation within the territory of the State whose cooperation has not been extended and determined that it is unable to execute the warrant of arrest due to non-cooperation and (v) seeks the assistance and coordination of the State Parties to take measures for the execution of the sanction such as forfeiture of property which has been ordered for the benefit of the victim.

The Pre-Trial Chamber upon the report and submission of the investigation report by the Prosecutor, and after the Pre-Trail Proceedings, confirm the charges against the accused. The PTC before confirming the charges has to conduct a preliminary hearing to determine the complaint for trial in the presence of the accused, Prosecutor and the Counsels. The hearing may be conducted with the presence of the accused also when the accused (i) waived his/her rights to be present; (ii) absconded or not traceable on the reasonable ground even after proper steps has been taken to inform the confirmation of the charges. The PTC shall without an inordinate delay, supply the copies of documents of charges which the OTP wishes to bring and (ii) inform about the evidence on which the prosecution is going to conduct the hearing. Before the commencement of the hearing, the OTP may either alter or withdraw any of the charges and any such amendment shall be informed to the accused. It shall be the obligation of the Prosecutor to inform the PTC with reasonable grounds for the decision of withdrawal of charges. The Prosecution shall establish all the elementary aspects of the charges individually. The admissible types of evidences are primary and documentary evidence. The defence may either object the charges or challenge the evidence produced against him and also present his own evidence. The PTC determine the charges against the accused based on the evidence which are sufficient to establish the *prima facie*. The Chamber shall (i) confirm the charges if there is sufficient evidence; (ii) refuse to confirm the charges when the evidences are insufficient; (iii) postpone the hearing at the request of the prosecutor for the purpose of adducing additional evidence or amend the charge.

The OTP is at liberty to challenge the order of refusal to confirm the charges by the PTC before the Appeal Chambers. The amendment of charges may also happen after the commencement of the hearing with the permission of the PTC. Any warrant which have been issued by the PTC against the accused based on the charges and if such charges are not confirmed, the warrant of arrest shall be ceased to have effect. If the charges are confirmed, the Presidency shall a Trial Chamber to conduct the trial proceedings. As of July 2021, the following are the status of cases under investigation before the ICC:

S. No.	Details about the Situation	Referred by whom
1.	Democratic Republic of Congo – Alleged War crimes and Crimes against Humanity committed in the context of armed conflict in the DRC since 1 July 2002	Referred by the DRC Government: April 2004. ICC investigations opened: June 2004.
2.	Uganda – Alleged War crimes and Crimes against Humanity committed in the context of a conflict between the Lord's Resistance Army (LRA) and the national authorities in Uganda since 1 July 2002	Referred by the Govt of Uganda on January, 2004 and the ICC opened the investigation on July, 2004.

S. No.	Details about the Situation	Referred by whom
3.	Darfur, Sudan – Alleged Genocide, War crimes and Crimes against Humanity committed in in Darfur, Sudan, since 1 July 2002	1st Situation referred by the United Nations Security Council by adopting the Resolution in March, 2005 and the ICC commenced the investigation on June 2005.
4.	Central African Republic (CAR) – Alleged War crimes and Crimes against Humanity committed in the context of a conflict in CAR since 1 July 2002, with the peak of violence in 2002 and 2003.	Referred by the Government of CAR in December, 2004 and the investigation commenced by the ICC on May, 2007.
5.	Kenya – Alleged Crime against Humanity in the context of post-Election violence (2007/2008) in Kenya	1st case in which the OTP opens the *proprio motu* (suo motto) investigation in March 2010
6.	Libya – War Crimes and Crimes against Humanity	Referred by the UNSC in 2011
7.	Côte d'Ivoire – crimes committed within the jurisdiction of the ICC	OTP opens the *proprio motu* (suo motto) investigation in 2013
8.	Mali – War Crimes	Referred by the Govt of Mali and the ICC opened the investigation from 2013
9.	Central African Republic – II – War Crimes and CAH	Referred by the Govt of the CAR and opened the investigation in 2013.
10.	Georgia – War Crimes and CAH committed in the context of international armed conflict	OTP opens the *proprio motu* (suo motto) investigation in 2016
11.	Burundi – CAH committed inside and outside of Burundi	OTP opens the *proprio motu* (suo motto) investigation in 2017
12.	Myanmur – CAH	The PTC authorizes the investigation in 2019
13.	Afghanistan – War Crimes and CAH	The PTC authorizes the investigation in 2019
14.	Palestine – War Crimes and CAH	Referred by the Govt of Palestine and the investigation announced in 2021

Further, as of now (July 2021) nearly 13 cases are pending under preliminary examinations condition *inter alia* (i) Colombia – Phase on admissibility for alleged War Crimes and CAH; (ii) Guinea – Admissibility issues – alleged War Crimes and CAH; (iii) Nigeria – waiting for the authorisation of the PTC to open the investigation on the alleged War crimes and CAH; (iv) Ukraine – admissibility issues; (v) Republic of Philippines – alleged crime on 'War on Drug' context; (vi) Venezuela I & II – political unrest issues and admissibility issues; (vii) Plurinational State of Bolivia – alleged CAH – admissibility issues and the examinations has been closed on the '*decision not to* proceed' for the cases in Gabon, Iraq/UK, Registered Vessels of Comoros, Greece and Cambodia, Republic of Korea and Honduras. The procedures on Referral of cases and situation at debate for various reasons such as allocation of absolute powers to the OTP to decide the case for investigation and the

acceptance of 'inability' and 'ineffectiveness' of the State Parties to take proper legal actions and conduct of legitimate prosecution against the suspect.

Jurisprudence evolved in the *Prosecutor v. Omar Hasan Ahmed Al Bashir* case on Referral Procedure and Framing of Charges

The referral and the confirmation of charges or modification of charges has brought jurisprudence over the exercise of jurisdiction of the ICC. The first case referred by the UNSC relating to the Situation in Darfur, Sudan on *The Prosecutor v. Omar Hasan Ahmed Al Bashir* (herein after referred to as the 'Al Bashir Case'), the UNSC passed a resolution in UNSC/Res/1593 (2005) decided to refer the situation in Darfur since 1 July, 2002 to the Prosecutor of the ICC. Further in the resolution the UNSC/Res/1564 also urged the UNGA Secretary General to establish an International Investigation Commission to investigate the violations of international humanitarian law and human rights within the territory of the Darfur, Sudan by all the Parties. The UNSC also requested the investigation commission to determine the commission of crime of genocide, if so identify the perpetrators of the crime and fixes the responsibility for such act. In this regard the UNSC urged all the State Parties to cooperate with the investigation commission and the Office of the High Commission of Human Rights to increase the human rights personnel to monitor the situation in Darfur, Sudan. The UNSC in its resolution considered the situation happened in Darfur, Sudan and urged the Government of Sudan and the rebel groups to facilitate the humanitarian assistance to the victims of the attacks. The Security also concerned about the lack of progress with regard to providing safety measures to the civilians, *horse de combat*, human rights leaders etc. The same stress also given to the Sudanese rebel groups to take all necessary steps to protect and provide rights guaranteed under international human rights and humanitarian laws.

Based on the resolution, the UNGA Secretary General constituted the International Investigation Commission on the Chairmanship of Mr. Antonio Cassese and its members as, Mohamed Fayek, Hina Jilani, Dumisa Ntsebeza and Therese Striggner-Scott. The Committee was requested to conduct an impartial investigation and to submit the report within three months from the date of its establishment. The Investigation Commission was periodically assisted by the Executive Director of the Secretariat, investigators, Forensic Experts, military analysts, experts on gender violence. The Investigation Commission commenced their task on October, 2004 by fixing four task agendas as; (i) investigate the international humanitarian and human rights laws violation in Darfur; (ii) determine the occurrence of crime of genocide; (iii) to identify the perpetrators of such violations; (iv) fixing the liabilities and responsibilities of the perpetrators. The occurrence happened between February 2003 and January 2005 was taken into consideration for investigation.

The Investigation Commission submitted its report on 25th January, 2005. The conclusion of the investigation commission's report consists the following findings and suggestions: (a) establishment of sufferings of Darfur for some years; (b) killing of thousands of people, rape against women, destruction of properties of villagers, forcible displacement of millions of people; (d) importance of establishment of peace keeping force to end the violence and provide justice; (e) unwillingness of Government of Sudan to conduct investigation and prosecute the perpetrators of serious violations; (g) the prosecution and punishment of the perpetrators of the crime and the providing proper justice to the victims by way of compensation shall be the ultimate aim of the investigating agency; (h) it was also established the failure of the Government of Sudan in preventing the insurgency and also

failed to protect the rights of their citizens; (i) the responsibility for the serious violations are not only on the State authorities abut also the rebel groups shall be held responsible.

Role of Security Council in Referring the Situation to the ICC

From the view of the Investigation Commission, the ICC is eligible to conduct this situation in the following merits: (i) the object of establishment of the ICC is to protect the international community from the threatening of crime and disturbance to the peace and security to mankind which was rightly observed by the UNSC according to Art. 13(b) of the ICC Statute; (ii) the involvement of the Sudanese authorities would enjoy the immunity if the investigation and prosecution would have been committed by the Government of Sudan, so the ICC is the resort to address the issue. Further the location also favours the ICC (the seat of the ICC is at The Hague) which is far away from the place of occurrence so that the perpetrators will not be shielded by any authorities; (iii) the UNSC is having all powers to direct the Sudanese Government and the Rebel groups to co-operate with the investigation; (iv) the ICC with the well-structured Rules of Procedure and Evidence and definition of crimes and composition, a best organ for the judicial mechanism; (v) the ICC can be activated immediately and finally (vi) any referral by the UNSC to the ICC will lessen the financial burden.

Further, with respect to the jurisdiction issues, Sudan has not yet ratified the Rome Statute of the ICC so it is not a State Party. According to the referral proceedings under Arts. 12 and 13 of the Statute, it has to either referred by the State itself, if the State being the contracting party to the Rome Statute or referred by the UNSC to the OTP or by the State in which the crime occurred sent a declaration to the Registrar of the ICC by accepting the jurisdiction of the ICC. The Investigation Commission after concluded the enquiry and satisfied on the crimes committed within the territory of Sudan by and against the Sudanese, recommended the UNSC to invoke its powers under Chapter VII of the Charter of the United Nations to refer the situation to the OTP by passing a resolution. The Investigation Commission opined their strong view that reference by the UNSC to the OTP will have stringent effect and further the Govt of Sudan shall not deny the jurisdiction of the ICC. The Investigation Commission also recommended the UNSC to empower the OTP in conducting the investigation from the date of the inception of ICC jurisdiction. Further the Investigation Commission also insisted the UNSC to mention its resolution about the refusal of Sudanese Government and Court to investigate, prosecute and punish the perpetrators of the crimes committed in Darfur.

Findings of the Investigation Commission

The Investigation Commission at the conclusion of the investigation and enquiry found that:

i. Government of Sudan and the Janjaweed groups are responsible for the crimes committed in the territory of Darfur, Sudan;

ii. The serious violation includes CAH, War crimes and also crime of Genocide

iii. The rebel groups are also equally responsible for such violations;

iv. The Sudanese government encouraged the government militia and other agencies to indulge in attacks against civilians, destroying the properties of the villagers;

v, From the various alleged crimes committed by the Sudanese Government militia and the rebel groups established the wide spread and systematic violations of international human rights and humanitarian rights which also satisfied the elements of war crimes, CAH and genocide;

vi. The Investigation Commission also suggested the suspects or the perpetrators of the above said crimes such as Officials of the Government of the Sudan, members of the armed forces and the rebel groups, army personnel of the foreign countries. This includes the responsibility for joint commission such as conspiracy, abetment, assistance, harbouring etc., Some senior officials were also named for Superior Command Responsibility.

Measures should be taken by the Sudan Government

The Investigation Commission recommended the Sudan Government the following measures:

a. to put an end to the impunity for the serious violations in the nature of War Crimes and Crimes against Humanity;

b. the Sudanese laws should be modified in such a nature to remove the flaws of detaining person without proper legal enquiry, granting of immunity from prosecution to the officials;

c. to protect the rights and dignity of the internally displaced person and implement the principles to facilitate the voluntary return of the internally displaced person;

d. to empower the courts with absolute freedom and independency to address the human rights violations;

e. to permit the access to visit and communicate with the person detained by the ICRC, UNOHCHR and other monitoring committees;

f. to protect the victims and witnesses interest and human rights, enhance the judicial capacity of the Sudanese Judges, Prosecutors, advocates by providing proper training in human rights, humanitarian rights and international criminal law;

g. to extend full cooperation to the UN, African Union, UNSC and establishment of consultative process and truth reconciliation commission which includes the members from civil societies, victim groups etc.

With the above observations, the International Commission of Inquiry on Darfur, Sudan submitted its report in pursuant to the UNSC Resolution 1564/2004. Based on the Report of the UNSC referred the situation to the Office of the Prosecutor and the case is now listed and pending before the Pre-Trial Chamber of the ICC.

Issues and Challenges of the Referral Proceedings

The nature of the International Criminal Court is complementary one to the National Legal System. According to the Preamble of the Rome Statute of the ICC, it is stated that, "…Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions...", the referral should be in consonance with the national legal system. The Office of the Prosecutor may initiate the proceedings or investigation on the basis of information received from the State. The Prosecutor has to ascertain the gravity of the crime by getting additional information from various organisations such as UN, NGOs, written and oral statements of the victims and witnesses. According to the initiating proceedings of the investigation, the prosecutor and the OTP is an absolute authority in determining the acceptance and refusal of any situation or complaint. Art. 53 of the Rome Statute speaks about the initiating proceedings before the ICC. The Prosecutor is empowered to decide the acceptance of the information or refuse the same for the absence of reasonable doubt or source to proceed with the complaint or information. Further, the provision also enlisted the circumstances to be taken into considerations for deciding the acceptance

inter alia reasonable belief in the information; crimes falls within the jurisdiction of the ICC and satisfies the admissibility test under Art. 17 of the Statute; gravity of the crime and the interest of the victim. If there is no substantial belief, the Prosecutor shall inform the Pre-Trial Chamber. The next stage of determination is based on the investigation report. If the investigation report doesn't show any substantial evidence for the alleged crime based on legal findings, inadmissibility under Art. 17, against the interest of justice and the gravity of the offence is less. The rejection or the acceptance of the complaint or situation shall be intimated to the referred State or the UNSC. If the referral was made by the State or by the UNSC, the decision of rejection shall be reviewed by the PTC on suo motto basis and instruct the OTP to reconsider the decision. Further the PTC also initiate the review proceedings on its own decision. The decision of the Prosecutor shall be final only upon the confirmation of the PTC. Art. 16 of the Rome Statute dealt with the Deferral Proceedings on investigation and prosecution. If the UNSC passed a resolution and requested the PTC or the OTP not to proceed with the information for a period of 12 months and this request may be extended by renewal process.

Critics on the Referral Proceedings

According to the earlier discussion, it is evident that unlike the international ad hoc criminal tribunal, the ICC is adopting a unique procedure for selecting of cases and situations. The OTP has been given absolute power in deciding the selection of cases (Schabas, 2015 pp. 366 & 370). But the Draft Statutes of the ILC on the establishment of the ICC haven't given such wider power to the OTP in selecting the cases or situation and it was only with the UNSC ((Schabas, 2015. But the final version of the Statute reciprocated the procedure. Now the procedure permitting the OTP to accept the case without the presence of the UNSC under the powers vested proprio motu. However, the decision of the OTP is subject to the review by the PTC judicially. The criticism on the Prosecutor are about the political based movement. The criteria to justify the acceptance of the situation is on objective criteria. In the Palestinian situation, there was criticism on the Prosecutor that he was not keen in observing the situation and proceed further (Schabas 2015, p. 374) Further, the OTP has been criticised that, the conducting of investigation by the Prosecuting agency on the information referred by either the State Parties or the UNSC shall not be effective. Unlike the other international investigating agencies or the Interpol, the OTP is not having such an effective mechanism to conduct the investigation. Either the OTP has to refer the investigation by constituting a Commission or refer the matter to the UNSC. The another criticism is on the selection of cases and the situation only based on the African Countries and other States are not been either investigated or brought before the ICC.

Conclusion

The jurisprudential development of the International Criminal Law is a remarkable one in the discipline of public international law. The Rome Statute of the ICC has enhanced the faith on UNSC and the other human rights apparatuses. But the critics on the working mechanism of the Chambers of the ICC and the powers vested on the OTP diminishing such faith. The referral by the Non-State Party is still a complicated one. To maintain the cooperation of the State Parties, the OTP and the Registry of the ICC compromising the essence and objective of the individual criminal responsibility and the Universal Jurisdiction. The Statute and the Rules of Procedure and Evidence has to be amended in such a way to improve the investigation process and modify the selection of cases and situation pattern.

The decision of acceptance or the rejection of information need to be monitored and assessed by the UNSC before the judicial review by the Pre-Trial Chamber. The jurisdiction and the declaration of acceptance by the Non-State Parties to the Statute need to be monitored and the UNGA should take proper measures to avoid the direct influences of Veto Power nations *inter alia* USA, UK, France etc in the policy decision of the ICC. It is the obligation of the ICC and its organs to create faith in judicial proceedings before its chamber by crossing the limitations and invoke its jurisdiction even in the American and other countries. Situation in Syria, Palestine, Afghanistan – Taliban issues, Burma-Rohingya issues, Sri Lanka – Srilankan Tamil issue etc. are to be properly addressed by the International Criminal Court. The referral of situation should be amending as much as easily approachable one. Removal of the complexities under Arts. 12, 13 and 17 shall be the need of the hour.

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REVISITING THE RIGHT TO FAIR TRIAL OF VICTIM: BEYOND COMPENSATORY JUSTICE

Momina Zahan* and Manju Singh**

ABSTRACT

Right to fair trial is the basic human right and is the bedrock of any criminal justice system for upholding the rule of law. This basic human right is mostly misunderstood to be only meant for suspect or defendant only. The victims whose rights have been violated by the offender, stand helpless and neglected by the criminal justice system. Understanding the need of victims, various legal instruments are being drafted to protect their right to fair trial. Despite all attempts, the victim's right to fair trial is not being protected completely and it is still violated across the globe. Where the victim's right is acknowledged, the right to fair trial of the victim is only understood in terms of the restorative justice or compensatory justice. But the victim's right to fair trial is much more than that, it includes the right to access to justice, participation, and redressal from the criminal justice system.

KEY WORDS

Access to Justice, Compensatory Justice, Fair Trial, Human Rights, Right to Participation, Victim, etc.

Introduction

Right to fair trial is the basic human right and is the bedrock of any criminal justice system for upholding the rule of law. The United Nations has described the 'right to fair trial' as an 'indisputable right of every human being', and a 'basic guarantee of human right'. But this basic human right, which is indisputable for every human being, is not being granted to everyone in the criminal justice system and mostly misunderstood to be only meant for suspect or defendant. The Black's Law Dictionary has defined the concept of 'fair trial' as "a trial by an impartial and disinterested tribunal in accordance with regular procedures". Even after various developments in the international sphere recognising the rights of the victim's fair trial, the Indian Judiciary has held in *Zahira Habibullah Sheikh* (2004) that the concept of fair trial "obviously would mean a trial before an impartial Judge, a fair prosecutor and judicial calm". Thus, this right is generally understood to be indistinguishably associated with the defendant's right to a trial in open court, examine witnesses in criminal matters in presence of an unbiased judge, etc. To meet the demand of justice, the concept of fair trial needs a shift of approach making it available to all players in the criminal justice system including the accused. The victims, too, have an equal interest in the just and fair outcome of the criminal trial like that of the accused as they are the ones whose rights have been violated by the accused. The term 'victim' means 'the person(s) who have suffered injury or loss physically, psychologically, socially or economically due to the actions of the offender'. As per the *Declaration on Justice for Victim* (1985), a 'victim' would include not only 'the person who suffered directly in the hands of the defendant' but also those people who are

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connected immediately to the victims'. It is regretful that the victim whose rights are assaulted by the offender is not bestowed with any right to participate except as a witness and this was acknowledged way back in 2003 by the *Malimath Committee Report* that the criminal justice system is heavily dependent upon the victims, yet it has disregarded the interests of the victims due to their heavy concerns with the rights of the offender. Most adversarial criminal justice system does not afford the victims with any rights/opportunity to assist the Court in adducing evidence or putting questions to the witnesses, thereby acting insensitive towards the rights of the victims (*Malimath Committee Report*, 2003 and *Madhav Menon Committee on Victim Orientation to Criminal Justice*, 2007).

Thus, concern for the victims has been the 'missing link' across the globe as extraordinarily little attention has been rendered to their role and rights in the justice system. Understanding the need of victims and gap present in the criminal justice system, United Nations have drafted various principles for the protection of their right to fair trial of the victim in 1985 and necessitated that the member nations give due recognition to the victim's right to fair trial. The *Declaration on Basic Principles of Justice for Victims of Crime and Abuse of Power* (1985) dealt with the rights of the victim to access to justice and fair treatment, Restitution, Compensation, and Assistance. Inspite of all the attempts, the victim's right to fair trial is most of the time neglected across the globe while trying to protect the rights of the accused and India is no different. Also it is observed that where their rights are acknowledged, it is merely understood in terms of the restorative or compensatory justice. But as per the Declaration (1985), the victim's right to fair trial is more than that - it includes the right to access to justice, right to be treated fairly, right to participation, and right to get redressal for the injury, *etc*. In this milieu, the researcher plans to investigate victim's right to fair trial which stands beyond restorative or compensatory justice. The paper will be a doctrinal one, studying various international instruments and domestic legislation to understand whether the victim has the right to access justice and participate in the prosecution process, while investigating the issues related to the failure of implementation. The paper will attempt to see how the international human rights instruments (soft laws) have treated the victims and whether such soft laws have been able to mould the domestic regime to appreciate the victims' right to fair trial in equal footing as that of the defendant.

International Regime on Victim's Right to Fair Trial

The right of fair trial, as a basic guarantee, is upheld by almost all human rights instruments including the *European Convention on Human Rights (ECHR)* (Article 6), *International Covenant on Civil & Political Rights (ICCPR)* (Article 14), *Universal Declaration of Human Rights (UDHR)* (Article 10 & 11), *etc*. in the form that is expected as a norm in any legal system. The basic rights of fair trial as provided in the *ICCPR* includes the right to a public hearing, right to be informed, right to legal counsel and right to examine and have examined witnesses against him along with the right not to be compelled to testify against himself. Article 10 of *UDHR* provides that every accused is entitled to fair and public trial in full equality by an independent and impartial tribunal in the determination of his rights and obligations. Almost all human rights instruments echo the same philosophy of accused's right to fair trial when they mention about public trial, impartial judge/jury, right to confront, right to legal aid, *etc*., and it is worth wondering why the victims' right to fair trial have been neglected, shifting the duty to grant justice by the State. The sole logic behind

guaranteeing more rights to the accused has been that he/she is standing against the powerful State prosecution mechanism, and it is the freedom of the accused which have been curtailed; and victims, on the other hand, do not need any such protection as their freedoms are not at stake. However, the advocates of accused's rights to fair trial tend to forget that the victims are the ones against whom crimes have been committed or rights have been violated, and who deserve to seek recognition in the criminal justice system. Of course, this does not mean that the right to fair trial of the accused is to be denied at all, rather it is expected that their rights are not to be considered as an absolute one and that they should be moulded to balance other's rights depending upon the circumstances of the case.

Recognising the importance of the protection of the victim's human rights and to fill this breach present in the criminal justice system due to neglect or non-recognition of victim's right to fair trial, the United Nations came up with the *Declaration of Basic Principles of Justice for Victims of Crime* (1985) which attempted to give due recognition to the rights of the victims as basic human right promise. Failure to fulfil the guarantee stated in this Declaration, in relation to the access to justice and fair treatment to the victims of crimes, will constitute human rights violations. Keeping in line with this thought, the justice delivery system has been violating this human right by not granting their due respect or allowing them to participate in the prosecution process as provided in the Declaration (1985). The Declaration provides for treating them with compassion and respect for their dignity (Art. 4), informing the victims of their rights in accessing the redressal mechanism (Art. 5) and providing assistance throughout the legal process (Art. 6c). It further mandates that unnecessary delays in disposition of the case must be avoided, which leads to harassment of the victims justice should be rendered within reasonable time (Art. 6e). Unless cases are disposed off within reasonable time, justice for the victims is not left with any value as the saying goes "justice delayed is justice denied". Thus it seems that this piece of soft law has tried to uplift the position of the victim like that of the accused, when it states that proper assistance throughout the prosecution process and making them aware of their rights for accessing the justice. Considering the guarantee of the Declaration for the assistance with the legal process, one may comprehend that a victim is eligible to obtain legal assistance or special prosecutor, who in turn will assist the public prosecutor, so that the victim may be informed about the prosecution process and its progress from time to time. This Declaration further acknowledges the right to protection of their physical safety and their privacy. It guarantees the victims right to reparation from the defendant and damages from the State and mandates that where compensation cannot be made available from the accused or other sources, State should endeavour to provide monetary compensation, thereby making compensatory justice compulsory for victims.

Besides, there is *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims* (2005) adopted by the UN for the victims of gross violations of international human rights law and serious violations of international humanitarian law, stressing the importance of safeguarding of victim's right. But the Declaration, being a soft law, is not binding upon the States, leaving the victims at the mercy of the State government to uphold their dignity and integrity by granting them their due rights. It just acts as a guiding document to the State governments and there is neither any force upon the government to include the principles within their domestic laws, nor any sanction for those who opt not to follow

them. Thus, this non mandatory attribute of the Declaration has not been able to change the status of the victim much across the globe. However, there are certain provisions which have been included in the *Criminal Procedure Code*, but their implementation is still questionable (like informing the victims of their rights, taking informed consent during medical examination, providing special prosecutor for the victim, right to restitution, *etc*.). Although the victim's right to fair trial is always considered in terms of restorative or compensatory justice, yet this regime is also not completely developed in India. Only violations by the State may be compensated and private violations are not covered within this regime to render restorative justice.

Victim's Right to Fair Trial – Right of Participation

Victim's right in a criminal trial is always considered in terms of receiving compensation or restitution for losses and never in terms of retribution. But a trial cannot be considered fair unless it entails triangulation of interests of the accused, the victim, and the society. Thus, Hoopes (2009) has rightly said that victims have every right to effective prosecution of crimes. In relation to the concept of retributive justice, in Erez and Tontodonato (1992), it was found that the satisfaction of victims with the criminal justice system is influenced primarily by their satisfaction with the penalty granted to the offenders and their feeling that the trial was fair. Wemmers (2008) has stated that seeing the offender getting punished acts more therapeutically in healing the pain caused by the offender than the compensation granted to the victim. It is noteworthy that victims suffer loss, injury, and trauma at the hands of the defendant, and they tend to suffer additional hardships, and trauma again if they manage to approach the criminal justice system seeking effective prosecution of the offender (Waller, 2003). At times, accused may want retributive justice as well *i.e.,* they may want to see the accused incarcerated or penalised for committing the crime against the person. Thus, to meet the ends of justice, the victim of crime must be provided with the right to participate in the prosecution process as an active party.

The concept of fair trial includes fair pre-trial procedures, fairness in investigation process etc. as the pre-requisite of a fair trial. In consonance with this, the primary expectation of the victim of crime is fair treatment and participation in the investigation process, where possible. The Apex Court has judicially acknowledged that fair trial includes fair investigation as envisaged by Article 20 and 21 of the *Constitution of India* in the case of V*inubhai Haribhai Malaviya* (2017). In general, a victim is not allowed to participate in the investigation process besides being a complainant on oath and called to identify the accused. This at times, may raise the level of frustration in a victim, who can do nothing after reporting besides being a bystander. Although there is no scope of participating actively in the investigation process, yet the victim can approach the concerned Magistrate for relief whenever he/she feels that investigation is not being done properly or fairly under Sec. 156(3) (*Ajay Kumar & Ors. v. State of U.P. & Ors*, 2020). For facilitating the access to justice and fair treatment, the *Declaration on Victims* and the procedural code has provided certain provision through the *Criminal Law Amendment Act*, 2009 for appointing special prosecutor for the victim by the government on request, so that the victim may participate in the prosecution process; but this provision is there only in certain specific cases (Muralidhan, 2004). As per new provision (*i.e.,* Clause 8 of Sec. 24, *Cr. P. C.*), a victim may move to the government to appoint a special prosecutor who may assist the public prosecutor (PP) but such

prosecutor is not permitted to participate in the trial unswervingly (Sec. 301(2), *Cr. P. C.*). In *Rekha Murarka v. The State of West Bengal & Anr.* (2019), the SC confirmed that the special prosecutor appointed for the victim under Sec. 24(8) of the procedural code cannot make oral arguments, but he can point out if any vital evidence or argument is left out in the form of written statement. No doubt such provision safeguards the victim's right to participation in the prosecution process to some extent. Till date, the victim's private prosecutor is not guaranteed as a right, rather it is at the discretion of the government, who may either grant or reject the application. Also such special prosecutor has an extremely limited role to play, as they work as an assistant to the PP rather than representing the interests of the victim. In *Victim (Party in Person) v. State of Kerala* (2020), the Kerala High Court granted the petitioner's (victim) application (quashing the government order) for appointment of Special Prosecutor under Sec. 24(8), claiming that she was not satisfied with the performance of the PP. The case was filed in 2016 and till the date of filing of the writ petition in 2020, the case was pending in the Session Court and the PP did not bring to the notice of the Court the grievances of the petitioner and that, accused were granted bail without affording an opportunity to the prosecution to raise objections. Aggrieved with such attitude, the victim applied for the appointment of the special prosecutor to the State Government, but it denied the application on the ground that it did not satisfy the clause of public interest. This case somewhere indicates that such provision is not uniformly executed by the justice system like that of the accused as the victim has to apply to the government for the same (*Victim v. State of Kerala,* 2020) and in most cases, even the victims are ignorant of their available rights.

Implementing the Declaration of 1985, American justice system have designed the concept of 'victim advocate', who is trained to support victims of crime by offering emotional support, providing information on victims' rights, help in finding needed resources and assistance in filling out crime victim related forms. They even accompany the victim and his/her family throughout the criminal proceedings. In France, the victim's lawyer can act as '*party civile*' and claim for the damages for the injury meted upon the victim by the offender resulting in the restitution of the aggrieved party. In Sweden, there is mandatory provision for counsel for the injured party which put the victim in a position more equal to that of the offender in the procedure (Wergens, 2002). Also many countries use the concept like 'victim impact statement' before passing the final judgment to decide the term and nature of penalty to be imposed upon the convict. Such practice makes the victim feel inclusive and satisfied for becoming involved in the justice delivery mechanism. But in India, the jurisprudence of victims' right to fair trial is still in the rudimentary stage and leaving a gap for future research and development. Considering the victims of sexual violence as a special class, they are being guaranteed with certain special rights (like Sec. 161(3), 164A, *etc.* of *Cr. P. C.*) in our justice system and that too, the rights are less exercised due to lack of awareness. With regard to the provision of legal assistance to victims of sexual violence, the *Delhi Domestic Working Women's Forum's* case (1995) held that such assistance to the victim of sexual violence must be provided from the initial stage itself, *i.e.,* at the police station after lodging the first information report, so that the victim may be guided and supported during recording of her statements. Although the female victims of sexual violence are provided with certain special rights by the 2013 Criminal Law Amendment, but similar rights have not been provided for the victims of other class of crimes. The indifferent attitude of the Criminal Justice System towards the victims

of other class somehow violates the human right of those victims to access justice and fair treatment requirement of 1985 *Declaration on Victims*. Also it is noteworthy that even where the rights are granted to the victims (female victims of sexual violence), they are not implemented well (*The Indian Express,* 2022).

Although victim's right in Indian criminal justice system has been more bent toward the compensatory justice, but this right of the victim towards compensating the injury has not yet been implemented. There is Sec. 357 of *Cr. P. C.* which enables the judiciary to pass order of compensation out of the fine imposed on the convict or from the fund created for the purpose.

Conclusion

Victims, being the key stakeholder of the justice delivery system, all the machinery of the criminal justice system, *viz.* the police, the advocates and the judges must act as healer of the pain meted upon the victims by the offenders while harmonising the rights of the offenders as well (Halder, 2012). There has been variety of reform strategies initiated in the domestic jurisdiction in the last decade trying to improve the status of the victims, yet for the majority interaction with the justice delivery machinery remains an unsavoury and unsatisfactory experience (Archilles and Zehr, 2001). Due to the non-recognition of the rights of victims in a criminal justice system, they develop a sense of disinterest in the proceedings or in bringing offence to justice, resulting in non-reporting of crimes and attrition of the same (especially the cases of sexual violence against women). According to an e-paper *mint* (2018), almost 99% of the rape crimes go unreported and as per the *UN Women Report* (2013), wherein the organisation surveyed 57 countries and found that almost 89% of the cases of sexual violence go unreported. This may be due to the attitude of the prosecution machinery, which at times, discouraged the victims of crimes especially that of the sexual offences from registering the complaint due to biased mindset doubting the veracity of the complaint or by invoking family values (PLD Report, 2015). Even *Justice Verma Committee* (2013) has acknowledged the presence of the institutional biasness against women in India has led to failure of the State and its organ in providing appropriate non-discriminatory treatment to the victims of crime (especially to female victims of violence). Although Justice Verma Committee talked mostly about the female victims of sexual violence, the researcher believes that the sympathetic condition of the victims may be extended to the other victims from vulnerable class. The legal frameworks relating to the rights of the victims of crimes showcase that there is scope for much more work to be done through legislative step, besides compensatory justice. After all, as provided in the *UN Declaration* and other such soft laws (like *Istanbul Convention* 2011), a victim deserves much more than the right to compensation. They have the right to participate and see that offender meets the end of justice by getting penalised for their actions. Inspite of appreciating the fact that a victim has certain rights in a criminal trial, yet the legal provisions legislated in the State fail to address the needs of victims to be treated with dignity, to render access to the justice mechanisms, and to rehabilitation (Muralidhan, 2004). Consequently, a victim prefers to remain silent and avoid reporting a crime due to the failure of criminal justice system. The prosecution machinery, including police, advocate and judges must be trained to change their attitude so that they can be good listeners and render a healing approach to the victims, irrespective of the nature of crime and background of the victim. There are provisions legislated for the assistance of the victims, but in their effective implementation raises certain concerns like that of appointment of special prosecutor who cannot participate in the

trial on behalf of the victim, except assisting the PP. In such situation the victim's interest remain at the mercy of the PP to uphold the justice. Although it is believed that the State can prosecute the offender without the participation of the victim, yet in reality the prosecution is rarely successful without the support and participation of the victims. Also it must be kept in mind that a victim not only seeks economic justice to be done against the injuries caused but also expects that real justice is done and for this the concept of 'victim impact statement' (implemented in countries like USA, Canada, *etc*.) may serve the purpose. Thus, the criminal justice system needs a reorientation to understand and address the needs of victim beyond compensation, without excluding the right to fair trial of the defendant. Unless the prosecution grants a fair trial to the victims of crime along with the accused, the criminal justice system will not be entrusted with faith by the common people. However, this right to fair trial should not be treated as an absolute right of any party, rather it is the justice delivery system which must weigh, and balance relevant factors balancing test and balancing processes and then determine in each case whether right to fair trial must be determined on the basis of shifted paradigm in present scenario. To stress upon the importance of the victims in the justice system, the researcher quotes the statement made in the *Malimath Committee Report* (2003) that 'unless justice to the victims of crime is treated like a focal point of a criminal proceedings, the system will not be able to restore the balance as fair procedures in the search for truth'. The researcher feels that granting the victims with the right of legal representation in the court of justice will somehow empower the victims to voice their needs in an effective way.

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ADOLESCENTS SELF-COMPASSION AND EMOTIONAL WELL-BEING ON CYBERBULLYING

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ABSTRACT

Cyberbullying is a serious social problem across the world. The fast and widespread use of information and communication technology had led an increase of cyberbullying in adolescent's population. Self-compassion refers to accepting and caring towards oneself. Self-compassion contributes to improving mental health and emotional well-being by helping the individuals to have positive emotions and feelings. Adolescents are currently dealing with stress and depression from daily life as they go through bullying. Emotional wellness involves understanding themselves and the capability to face the challenging situation in life. The present study is to analyze the effect of self-compassion and emotional well-being on cyberbullying. This study adopted the survey research design and purposive sampling technique. Sample of 124 adolescents who affected previously on cyberbullying (male n=62 and female n=62) were participated. The following standardized tools were used to collect the data. The Olweus Bully Victim Questionnaire (1996). Self-compassion scale developed by Neff, KD (2003). Positive and Negative affect Scale (PANAS) developed by Watson et al. (1988). Statistical analysis of Pearson's correlation co-efficient, 't' test and regression analysis were obtained using SPSS 22.0. Results revealed that no significant association, and difference of self-compassion and emotional well-being on cyberbullying. Based on research findings adolescents should follow ground rules and supervised to ensure the appropriate engage and usage of internet to protect their lives from cyberbullying.

KEY WORDS

Adolescent, Cyberbullying, Self-compassion, Emotional well-being and Mental health

Introduction

The use of internet is growing rapidly among children's and teens. Cyberbullying is defined as "any behavior performed through electronic media by individuals or groups that repeatedly communicates hostile messages intended to inflict harm or discomfort others" (Tokunaga 2010). Cyberbullying is a public health problem with consequences on adolescent's health and well-being. At present cyberbullying has gained attention from researchers, educators, parents, and general population due to its serious impact on victims, depression, loneliness, lacking self-confidence, and suicidal ideation (Kowalski *et al.* 2014). Children and Adolescent population have internalized negative affect towards cyberbullying (Patchin & Hinduja 2006). Research studies on Stephen and Smith (1989) reveals that bullying is the inclusion of an aggressive behavior that causes distress to the individuals. Cyberbullying differs from traditional bullying in offenders. Cyberbullying is a term that constructs online bullying, electronic bullying, and internet harassment. Many cross-sectional and longitudinal research study revealed that cyberbullying victimization was associated with anxiety and depression (Cole *et al.* 2016 & Fredstrom *et al.* 2011). Cyberbullying victims' experiences life challenges have lower

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self-esteem and higher depression (Ybarra *et al.* 2006). Self-compassion a protective factor of mental health (Neff 2003a & 2003b). There is a paucity of research on self-compassion and emotional well-being on cyberbullying. Cyberbullying research available to date which related to the prevalence, culture, gender, negative outcomes, and its impact in previous stage of research.

Consequences of Cyberbullying

The long-term effect of cyberbullying questions remains unanswered. Researchers stated the consequences of cyberbullying tend to parallel to those of traditional bullying (Kowalski *et al.* 2008). Majority of pupils was unaffected by the harassment, especially preadolescent and victimized pupils reported that these preadolescents were emotionally distressed by cyberbullying Ybarra *et al.* (2006) and found that online victimization had shown increase in anxiety. Victims of online bullying found to be lonely, insecure, and humiliated (Breguet 2007). Cyber victims also suffer from low self-esteem, hopelessness, and withdrawal, Patchin and Hinduja (2006). In the year 2005, adolescent of 13-year-old boy committed suicide after being continuously teased, (Breguet 2007).

Self-Compassion

Self-compassion was rooted in eastern traditional Buddhist philosophy for over 2500 years. According to Neff (2012), self-compassion is essential to be mindful of one's pain to extend compassion towards oneself. It is crucial to pay attention to self-suffering to avoid over-identification. Self-compassion entails three major components: self-kindness, common humanity, and mindfulness. Self-compassion is positively related to well-being and negatively related to depression and anxiety, self-criticism, rumination, and suppression in thought (McBeth & Gambley 2012). Self-compassion considered to be an important construct that facilitates the coping strategy towards oneself. Individuals with high level of self-compassion tend to use the adaptive strategies to cope up effectively during adverse events. Self-compassionate individuals rely heavily on positive cognitive restructuring and less rely on avoidance and escape from the stressful situation (Allen & Leary 2010). Research study of Jiang *et al.* (2016) revealed that association between peer victimization and adolescent's non-suicidal self-injury was lessen under the condition that states high level of self-compassion.

Self-compassion is the strategy of emotional regulations on which the individual's pain, distressing feelings and failure resulting to more positive feeling state. In this viewpoint self-compassion may attenuate individuals' negative reactions to stressful situations and enhances emotional well-being of an individual's life.

Emotional Health and Well-Being

Research studies consistently revealed that the consequences of bullying for emotional health of children and adolescents shows that victims of cyberbullying often lack acceptance with their peers which results in loneliness and social isolation. This leads to low self-esteem, depression, and suicidal isolation. Cyberbullying always extends an individual's targets life and evidence of the research studies also shows additional risks to the targets of cyberbullying, including damage to self-esteem, academic performance, and emotional well-being. Research study of Schnenk & Fremouw (2012) revealed that cyberbullying victims of college students scored more than control groups on depression, anxiety, poor mental health, and paranoia. Juvonen *et al.* (2008) and Mitchell *et al.* (2007) studies found that cyber victims of school students had psychosomatic symptoms, depression, behavioral problems, unsafe, isolated, social, and emotional difficulties. According to Mayer *et al.* (2016), the emotional ability is to identify individuals' emotions and feelings which increases individuals emotional understanding and regulate the negative

emotions. Adolescents with high positive emotions regulation skills resolve emotional conflicts and efficiently challenge the negative consequences more successfully. Employing coping strategies, persisting resilience skills, cope with stressors of life, and work productively are vital factors in achieving overall mental health and well-being.

Potential Positive and Protective Role of Social Support

Research studies indicates that social support could potentially buffer against the negative consequences of bullying on long-term effects Davidson, *et al.* (2007). Social support refers to supportive social relations that increase individual's well-being by acting a buffer against negative consequences Cohen *et al.* (2010). Social support includes both emotional and instrumental dimension that is individual's perception to access practical help with obstacles in life. Social support works as a buffer in stressful situations as a coping mechanism on which adolescents can draw long term effects on cyberbullying, Newman *et al.* (2005). Involvement of ongoing cyberbullying can see as a chronic stressor. Therefore, emotional, and social support could act as an important resource when the adolescence experience bullying, also helps them to stop bullying at an early stage. Greater family and peer support have been shown to prevent and protect from cyberbullying, Fanti *et al.* (2012). Social and emotional competencies influence the development of bullying behavior but effect on cyberbullying is not clear (Beltran-Catalan *et al.* 2018). Cyber bullying has become an unfortunate consequence of increased online interactions. Literature review uses Robert Agnew's General Strain theory and the General Aggression Model to explain the motivation towards perpetrators on cyberbullying. Research studies revealed that adolescents who exposed to cyberbullying behavior exhibit long term effects on social and emotional repercussions.

There exists research gap in analyzing the level of adolescent's self-compassion and emotional well-being on long-term effect on cyberbullying. The main aim of the present investigation is to examine the quantitative research on finding the relationship, differences and long-term effect of self-compassion and emotional well-being on cyberbullying Hence the present study aims to fill this research study.

Literature Review

Chu *et al.* (2018) conducted cyberbullying victimization and symptoms of depression, anxiety, and self-compassion as moderator among 489 early Chinese adolescents. Results revealed that gender, age, and hopelessness were partially mediated the relationship between cyberbullying victimization, depression and anxiety. Findings suggests that the direct effect of cyberbullying victimization on depression, hopelessness were moderated by self-compassion.

Cowie (2013) investigated the study on cyberbullying and its impact on young's people's emotional health and well-being. Study revealed that cyberbullying was an interpersonal problem grounded in social context.

Hellfeldt *et al.* (2019) examined cross-sectional study on cyberbullying and psychological well-being in adolescence. Sample of 1707 young adolescents of age 10-13 years were participated. Results concluded that cyberbullying victim shows highest levels of depressive symptoms and subjective well-being was found low.

Michael (2015) examined the study on emotional and social effects on cyberbullying among secondary school students to raise awareness and support of digital citizenship to youth. Research findings revealed that adolescents must actively supervised to an appropriate usage of internet. Findings suggests that appropriate behavior reinforcement should inculcate in schools, home and in society.

Methodology

Research Questions

The specific research questions are:

- Does previous experience on cyberbullying exists association between self-compassion and emotional well-being?
- Do gender differences exist across self-compassion and emotional well-being?

Hypotheses

- No significant association exists between self-compassion and emotional well-being on previous experience cyberbullying (H1).
- No significant difference exists between male and female across self-compassion and emotional well-being (H2).

Research Design and Sampling Technique

The study was conducted using survey research design and purposive sampling method.

Sample Description

The sample consisted of 450 adolescents which represent the total sample size. On that 124 adolescents were previously affected by cyberbullying, which includes male (n=62) and female (n=62) age ranged between 17 to 19 years.

Psychometric Measures

Cyberbullying

To find the cyberbullied participants two items from the Revised Olweus' Bully/ Victim Questionnaire (OBVQ, were used to assess cyberbullying. A detailed definition of bullying was introduced to the participants. The cyberbullying included three common criteria of bullying, *i.e.*, intentionality, repetitiveness, and power imbalance between perpetrator(s) and victim. Questions like "How often have you been cyber-victimized during the past six to ten months?", and one on cyberbullying, "How often have you cyberbullied other students during the past six months?". Items were rated on five-point Likert scale 1 (Never), 2 (1 or 2 times), 3 (2 or 3 times a month), 4 (Once a week), and 5 (Several times a week). Questions about cyberbullying states 'cyberbullying', through e-mail, instant messaging, in a chat room, on a website, or through a text message sent to a cell phone".

Self-Compassion Scale (SCS)

To assess self-compassion, self-compassion scale developed by Neff, KD (2003) 26 items were used. This questionnaire typically measures how individual act towards themselves during difficult times. Self-compassion questionnaire consists self-report 26-item SCS explicitly represents the thoughts, emotions, and behaviors associated with the three components of self-compassion and includes items that measure how often people respond to feelings of inadequacy or suffering with each of six components.

Coding Key – statements for each sub-scale within the SCS are numbered as follows.

Self-Kindness Items: 5, 12, 19, 23, 26

Self-Judgment Items: 1, 8, 11, 16, 21 (reverse score when calculating overall self-compassion)

Common Humanity Items: 3, 7, 10, 15

Isolation Items: 4, 13, 18, 25 (reverse score when calculating overall self-compassion)

Mindfulness Items: 9, 14, 17, 22

Over-Identified Items: 2, 6, 20, 24 (reverse score when calculating overall self-compassion)

Scoring

5-point Likert-type scale, ranging from 1 (Almost never) to 5 (Almost always), and scoring for some items is reversed. The subscale scores are calculated from the mean of the subscale items' responses. To calculate the total self-compassion

score, *we must* reverse score *the* negative subscale items - isolation, over-identification, and self-judgment, (*i.e.*, 1=5, 2=4, 3=3, 4=2, 5=1). Then add up all the six subscale means to get the total mean. The higher the score, the higher the self-compassion

Positive Affect and Negative Affect (PANAS)

To assess emotional well-being the PANAS scale developed by Watson *et al.* (1988), this scale consists of 20 items – 10 items of positive affect and 10 items of negative affect. It consists of several words that describe different feelings and emotions.

Scoring

A five-point scale of "very slightly or not at all" to "extremely" and scoring for some items are reversed. This scale consists of a positive affect score and a negative affect score.

Positive Affect Scores: Add the scores of items 1, 3, 5, 9, 10, 12, 14, 16, 17, and 19. Scores can range from 10-50. The higher the scores, the higher the levels of positive affect.

Negative Affect Scores: Add the scores of items 2, 4, 6, 7, 8, 11, 13, 15, 18, and 20. Scores can range from 10-50 with a lower score representing a lower level of negative affect.

Procedure

The data collection was carried using google form along with the consent form. The participants answered a web-based questionnaire. The web-questionnaire took approximately 45 minutes to complete. The participants received the information about the purpose of the study. Total 450 participants had participated in this research study, on that 126 participants were affected previously by cyberbullying. These 126 participants were included to check the formulated hypotheses.

Data Analysis

The following statistics was used to analyze the hypotheses stated for the research with the help of the software SPSS 22.0. Analysis was carried out based on the requirements of the research study.

To examine the association between self-compassion and emotional well-being on cyberbullying Pearson's correlational analysis was conducted. 't'-test method was conducted to find the gender differences between self-compassion and emotional well-being on cyberbullying. The impact of self-compassion components on positive and negative affect on emotional well-being was analyzed using regression.

Results and Discussion

Table 1: Descriptive Statistics of Variables of the Study (N=124)

	Mean	Std. Deviation	Skewness	Kurtosis	Minimum	Maximum
Self-Kindness	5.73	1.121	1.932	4.630	5	11
Self-Judgment	5.93	1.184	1.398	2.182	5	11
Common humanity	4.68	0.950	1.152	0.355	4	8
Isolation	4.69	0.887	0.807	-0.865	4	7
Mindfulness	4.55	0.830	1.188	0.051	4	7
Over-identification	4.43	0.818	1.866	2.469	4	7
Self-Compassion	55.56	4.936	0.766	1.098	48	74
Positive emotional affect	15.19	3.169	0.974	1.082	10	26
Negative emotional affect	46.72	2.304	-0.532	-0.280	41	50

Descriptive statistics of variables self-compassion, emotional well-being and its dimensions are showed in Table 1. No significant association exist between self-compassion and emotional well-being. In the dimension of self-compassion, the mean and standard deviation values of self-kindness are 5.73 (1.12) which indicates that both the values of self-kindness show low to these adolescents because they fail to love, care and to be kind towards themselves when they feel emotionally pain and experiences hard time on cyberbullying. The mean and standard deviation values of self-judgement are 5.93 (1.18) indicates that these individuals miss to disapprove and judge themselves when commit mistakes previously. The mean and standard deviation values of common humanity are 4.68 (0.95) found to be very low due to inadequate feeling to remain themselves and these individuals missed to experience that failings are part in human condition. In the dimensions of mindfulness and over-identification, the mean and standard deviation values are 4.55 (0.83) and 4.43 (0.81) shows that cyberbullied adolescents keep their emotions in an imbalance during painful situation and miss to blow the incident out of proportion during adverse situation. In the dimension of positive and negative affect of emotional well-being, the mean and standard deviation values are 15.19 (3.16) and 46.72 (2.30) which indicates that these individuals' positive affect decreases due to the consequences of cyberbullying and experiences increased the state of negative affect such as stress, anxiety, feelings of isolation, fear and poor concentration. Hence, the stated hypothesis H1 is accepted.

Research studies also reiterates cyberbullying also has affective components of both positive and negative affects (Diener *et al.* 2003). Emotional competencies influence the development of bullying behavior. Role of emotional competence acts as a buffer against the negative impact of cyberbullying in adolescents' life that seems to be an emotional wellness.

Table 2: Gender Differences across Self-Compassion and Emotional Well-Being Dimensions

	Male (N=62)			Female (N=62)			Mean differences		
	Mean	Std. Deviation	Std. Error Mean	Mean	Std. Deviation	Std. Error Mean	Mean Diff	t(df=122)	p
Self-Kindness	5.53	0.824	0.105	5.92	1.334	0.169	-0.387	-1.944	0.054
Self-Judgment	5.89	1.229	0.156	5.97	1.145	0.145	-0.081	-0.378	0.706
Common humanity	4.55	0.823	0.105	4.81	1.053	0.134	-0.258	-1.520	0.131
Isolation	4.77	0.876	0.111	4.60	0.896	0.114	0.177	1.115	0.267
Mindfulness	4.68	0.805	0.102	4.42	0.841	0.107	0.258	1.746	0.083
Over-identification	4.60	0.799	0.101	4.26	0.808	0.103	0.339	2.347	0.021
Self-Compassion (Total)	55.44	4.233	0.538	55.68	5.583	0.709	-0.242	-0.272	0.786
Positive emotional affect	15.16	3.026	0.384	15.23	3.331	0.423	-0.065	-0.113	0.910
Negative emotional affect	46.27	2.306	0.293	47.16	2.234	0.284	-0.887	-2.176	0.032

Table 2 results shows the mean difference between male and female were observed and found that no significant difference exists. Both genders had equally experienced cyberbullying. Cyberbullies, the results of the past empirical research study (Campbell *et al.* 2012) corroborate, it seems reasonable that these adolescents affected in cyberbullying, creates fear and poor self-esteem tend to show less social interactions and facing difficulty in interpersonal relationship. Adolescents who previously experiences cyberbullying may provoke to intrude negative thoughts and has lower level of emotional clarity that eventually affects well-being. Hence, the stated hypothesis H2 is accepted.

Table 3: Influence of Self-Compassion (Dimensions) on Positive Affect

Predictors	Unstandardized		Standardized			
	Beta	SE (Beta)	B	SE (B)	t(117)	p-level
Intercept			11.041	3.595	3.071	0.003
Self-Kindness	0.013	0.092	0.037	0.260	0.142	0.887
Self-Judgment	-0.039	0.094	-0.105	0.252	-0.416	0.678
Common humanity	0.062	0.094	0.206	0.313	0.657	0.513
Isolation	0.103	0.094	0.367	0.337	1.089	0.278
Mindfulness	-0.073	0.097	-0.277	0.371	-0.748	0.456
Over-identification	0.183	0.092	0.710	0.355	2.000	0.048
Dependent variable: Positive affect						
R=0.226; R2=0.051; F(6,117)=1.046; p=0.339; SE of estimation=3.166						

Table 3 shows the influence of self-compassion on positive affect of emotional well-being. The impact of self-compassion dimensions on positive affect in adolescents who experienced cyberbullying is estimated by regression analysis. The RSquare value denotes 0.051 on which all the six dimensions of self-compassion *i.e.*, self-kindness, self-judgement, common humanity, isolation, mindfulness, and over identification have shown only 5% of variance in positive affect of emotional well-being. Therefore, it is not statistically significant as shown by $F(6,117) = 1.043$; $p = 0.339$. The effect of each self-compassion dimension on positive affect shows that over identification has statistically significant effect on positive affect of emotional well-being ($B = 0.710$; $t(177) = 2.000$; $p = 0.048$. Hence, it is interpreted as higher the over identification higher the positive affect among adolescents who have experienced cyberbullying.

Table 4: Influence of Self-Compassion (Dimensions) on Negative Affect

Predictors	Unstandardized		Standardized			
	Beta	SE (Beta)	B	SE (B)	t(117)	p-level
Intercept			42.937	2.609	16.459	0.000
Self-Kindness	-0.006	0.092	-0.012	0.189	-0.061	0.951
Self-Judgment	0.115	0.094	0.224	0.183	1.224	0.223
Common humanity	0.044	0.094	0.107	0.227	0.472	0.638
Isolation	0.051	0.094	0.132	0.244	0.538	0.591

Predictors	Unstandardized		Standardized		t(117)	p-level
	Beta	SE (Beta)	B	SE (B)		
Mindfulness	0.138	0.097	0.384	0.269	1.428	0.156
Over-identification	-0.028	0.091	-0.078	0.257	-0.302	0.763
Dependent variable: Negative affect						
R=0.234; R2=0.055; F(6,117)=1.130; p=0.349; SE of estimation=2.300						

Table 4 shows the influence of self-compassion on negative affect of emotional well-being. The impact of self-compassion dimensions on negative affect of emotional well-being in adolescents who experienced cyberbullying is estimated by regression analysis. The RSquare value shows 0.055. All the six dimensions of self-compassion (self-kindness, self-judgement, common humanity, isolation, mindfulness, and over identification) together have shown only 5.5% variance on negative affect of emotional well-being. Therefore, it is not significant as shown by $F(6,117) = 1.130$; $p = 0.349$.

Conclusion

The goal of the study was to analyse the self-compassion and emotional well-being on cyberbullying in adolescent populations. The results of the study reveal no significant association and difference exist. Cyberbullying is identified as significant vulnerable factor in adolescent population. Self-compassion acts as a coping strategy that buffer the dreadful effects of cyberbullying. As self-compassion entails self-kindness, common humanity and mindfulness. These dimensions support the individual to understand during confronting pain and failure; also perceive them their suffering as part of large human condition; holding their painful thoughts and feelings in well balanced. On the whole, self-compassion react as a protective factor of mental health and well-being to alleviate the cyberbullying consequences.

Limitations

This study is based on the limited variables and sample of adolescents. Generalization of the findings of other population of school children and adults and variables are restricted. The data were obtained through online mode, this may lead to bias. Findings of the study is inappropriately generalized. Hence, the qualitative research and longitudinal study could be used for productive generalization.

Suggestions

Future research study could verify whether the relationship between these variables (self-compassion and emotional well-being) was analysed independently, to check the prediction of these variables (self-compassion and emotional well-being) on different cyberbullying roles. Implementing coping strategy and effective preventive measures should be embedded as part of curriculum in schools and colleges to prevent and protect students from cyberbullying.

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INDIAN LEGAL REGIME FOR INTELLECTUAL PROPERTY RIGHTS PROTECTION: NEED FOR CRIMINAL LEGISLATION

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ABSTRACT

Rapid globalization and liberalization helped the world economy and due to them "Intellectual Capital" emerged as a crucial capital driving force of international trade amongst the countries. With the time Intellectual Property Rights have become imminent component of India's commercial fraternity in all of the aspects that may be any emerging statute or any judicial pronouncement. When India's consent to World Trade Organization agreement was given then eventually it gave a way for India's obedience to Trade Related Aspects of Intellectual Property Rights as well. The present article emphasizes on the intellectual property laws in India and also if there is any necessity for criminal legislations, with exact emphasis on the changes brought by amendments brought forth by TRIPS.

KEY WORDS

Crime in India, Semi-logic Growth Model, Crime data, Female children.

Intellectual Property Rights in India

There was a rise in "Intellectual Capital" in 21st century and it was considered as one of the major wealth drivers of international trade amongst various countries and it was a result of rapid globalization and liberalization of economies the world over. Intellectual Property Rights gained importance and then they eventually became an irreplaceable element of its business industry. India's consent to the World Trade Organization treaty has surfaced the way for its obedience with TRIPS.[1] The discussion in this article enunciates on the intellectual property laws, with some light thrown on the amendments which were brought forth by TRIPS and also the prevalent legislations with respect to Intellectual Property Rights in India and if there is any need to incorporate criminal remedies for the same.

International Considerations

In 1995 India joined World Trade Organisation as the IPR regime was expanding in the country.[2] Consequently, after becoming a signatory to World Trade Organization if anyone is into business with India, then they will come across some resemblance between local Intellectual Property law and the procedures for enforcement and also those that are prevalent in the UK.

Treaties and Reciprocal Agreements

India is been signatory to various international agreement which protect and enunciate on IPRs.[3] The *Paris Convention*,[4] *Berne*

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[1] Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, signed in Marrakesh, Morocco.
[2] WTO Agreement mandated the adoption of IP Protection norms in national laws of member nations.
[3] India is not a part of Hague Agreement.
[4] Any individual of signatory state can also apply for a patent or trade mark in any other signatory state, and thus that particular individual will be given the equal implementation rights and also the status as a national of that particular country would be given.

Convention,[5] *Madrid Protocol* and *The Patent Corporation Treaty*[6] are the key agreements.

National Criminal Statutes and the Necessity for Multilateral Criminal Remedies: A Historical Review

This section emphasises on national developments with respect to criminal IPR enforcement and the initial efforts to include the idea of enforcing criminal sanctions for IPR protection in multilateral forums.

Some Initial National Legislation

It can be noticed that for the first-time use of criminal measures was done in ancient China for the protection of Intellectual property rights specially in relation with copyright protection.[7] Copyright[8] been in ancient China hundred years after the development of printing by Bi Sheng of Song Dynasty[9]. Violators[10] had been penalized and their printing apparatus had been demolished.[11]

Later on, there were numerous amendments and eradications of IPR legislation in the Chinese history with the modification of political power from one dynasty to another and eventually to the Communist Party in 1949. Though, the recurrence of criminal sanctions against IPR violations can be seen in the 1979 *Chinese Criminal Code*.[12]

In United Kingdom (UK), the use of criminal sanctions for IPR can be first evidently recognized against copyright abuses by the Star Chamber.[13] Participation of the Star Chamber for deciding IPR started in 1586, incorporating criminal sanctions, including both fines and imprisonment, and was finally encapsulated by decree in 1637. Subsequently, the *Copyright Act* of 1710 fundamentally implemented the combination of civil and criminal remedies which had established over times, characterised in a vital provision for the annihilation of infringing works and the forfeiture of a fine, premeditated by the number of infringing copies, alienated equally amongst the claimant and the state.[14] Criminal legislation for copyright was finally merged in the UK by Section 11 of the *Copyright Act* of 1911. This Act extended criminal procedures to protect all forms

[5] The Berne Convention is an international agreement dealing with Copyright, which provides the same value to the copyright of authors. There are a total of 179 Contracting Parties in the Convention.

[6] It can be considered as a major system for gaining a heap of national patent applications multiple jurisdictions through a sole application.

[7] Christopher May & Susan Sell, Forgetting History is Not an Option! Intellectual Property, Public Policy and Economic Development in (Oct. 25, 2021, 10:04 AM), http://www.dime-eu.org/files/active/0/MaySell.pdf

[8] During the period of the Song Dynasty then there was a Imperial Court and this court was there in order to protect the Imperial College edition of the Nine Chinese Classics and it has issued orders prohibiting their engraving and printing by any person who is not authorised.

[9] T. Guanhong, "A Comparative Study of Copyright and the public interest in the United Kingdom and China" (2004) 1:2 SCRIPTed 272, (Dec. 2, 2021) http://www.law.ed.ac.uk/ahrc/scripted/issue2/china.asp

[10] Ibid.

[11] Guiguo Wang, Protecting Ideas and Ideals: Copyright Law in the People's Republic of China, 27 Georget. J. Int. Law 1185 (1996).

[12] In this regard, Article 127 of this Code sanctions imprisonment and fine for trade mark counterfeiting.5 Subsequently, the Chinese Criminal Law has been amended in 1997 to include criminal sanctions under the heading "Crimes of Infringing on Intellectual Property Rights" in Section 7, Chapter III of Part two of the Code.6 In this Section Articles 213 to Article 220 has criminalised certain acts of trade mark counterfeiting, copyright piracy, patent violations and disputes relating to trade secrets.

[13] There was a court known as Star Chamber and this court sat at the Royal Palace of Westminster till 1641. The members of this court were Privy Counsellors and also common-law judges this court supplemented the activities of the common-law and equity courts in both civil and criminal matters. The constitution of this court was done to ensure the fair enforcement of laws against some known people of the society, like those people who are immensely powerful so that ordinary courts could never convict them of their crimes.

[14] C. Tapper, Criminality and Copyright in IP IN THE NEW MILLENNIUM, ESSAYS IN HONOUR OF WILLIAM R. CORNISH (CAMBRIDGE UNIVERSITY PRESS (1999).

of protected work. However, additional to numerous succeeding amendments, criminal procedures for copyright violations in the UK at present are provided under Section 107 of the *Copyright, Designs and Patents Act* of 1988, with *Copyright and Related Rights Regulations* of 2003,[15] which executed the European Parliament and Council Directive.

Trademarks violations did not have criminal sanctions against them in the early beginnings in UK. The history of UK suggests that with a couple of minor exceptions, trademarks were basically part of private sectors and hence they attracted legal protection by use as compared to formal grant by the state.[16] Though, pressure continued to accumulate in favour of a legal system of trademarks and that call was ultimately satisfied by the *Trade Marks Act* of 1875.[17] From 1875, subject to extensions in the law by Acts in 1883, 1905 and 1919, the essence of the modern system of law and practice was in place. The subsequent Acts did not change the criminal enforcement legislation noticeably. At present, *Trade Mark Act* (as amended) 16 of 1994 is the major statute for trademarks in UK, Criminal offences are stipulated in Section 92 of the Act.

In Continental Europe, the use of criminal sanctions to penalize counterfeiting can be first seen against misuse of marks in those medieval city-states and principalities where modern commerce first developed.[18] Also, in the early of 13th century, the copying of valuable marks became so frequent and so harmful in France and then those violations had been made a misdemeanour and, even in some cases they were declared as a felony and were punished in the brutal manner.[19]

Nineteenth century marks the ending of these somewhat draconian provisions and they were replaced by modern system of fine and imprisonment[20] in all the European countries.[21] However, the implementation of these types of statutes has not been even in Europe. Laws have been severely imposed in countries like Holland and Belgium, but strikingly less in other countries, like Italy.[22]

In latter quarter of nineteenth century first attempts were made to criminalize IPR violation in United State, this was done because of the extraordinary increase in monetary and other types of fraud, succeeding the fiery growth of the US economy after the Civil War. With this regard, in 1876, 400 chief merchants and producers of New York, Boston and Philadelphia appealed the United States Congress to ratify criminal sanctions against commercial counterfeiters, stating:

> The nefarious but lucrative business of counterfeiting genuine trade mark goods has too long succeeded unchecked to the innumerable injury of every consumer, of every truthful merchant, manufacturer, and trade, and has extensively multiplied costly[23] and tedious litigation.[23]

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[15] *Statutory Instrument of 2003 No. 2498.*

[16] *JON HOLYOAK & PAUL TORREMANS, INTELLECTUAL PROPERTY LAW 293 (Butterworths (1995).*

[17] *From 1875, subject to extensions in the law by Acts in 1883, 1905 and 1919, the essence of the modern system of law and practice was in place. The subsequent Acts did not change the criminal enforcement legislation noticeably. At present, Trade Mark Act (as amended) 16 of* 1994 *is the major statute for trademarks in UK, Criminal offences are stipulated in Section 92 of the Act.*

[18] *Jed Rakoff and Ira Wolff, Commercial Counterfeiting: The Inadequacy of Existing Remedies, The Trademark Reporter, 1983 at 504.*

[19] *The Elector Palatine in the 14th century issued an order as per which if anyone sold spurious wine was the most outrageous form of deceit, punished by hanging the innkeeper whosoever sold ordinary wine as Redesheimer.*

[20] *By the 19th century, however, these somewhat draconian penalties had been replaced in virtually all European countries with a modern system of fines and imprisonments for those found guilty of commercial counterfeiting.*

[21] *Jed Rakoff and Ira Wolff, 'Commercial Counterfeiting: The Inadequacy of Existing Remedies' (1983) 73.*

[22] *Ibid.*

[23] *4 Congressional Record 4775 (*1876*), quoted in Jed Rakoff and Ira Wolff, "Commercial Counterfeiting: The Inadequacy of Existing Remedies" (1983) 73 The Trademark Reporter 493.*

In the same year US congress revised the existing federal *Trade Mark Act* of 1870 to criminalise the knowing use of counterfeit trademarks.[24] Thereby, the United States Congress endeavoured to recognise the complaints of the trade mark industry and to take the first progressive steps towards tougher intellectual property rights protection regime. Undesirably, these kinds of regulations and laws were only temporary in US.[25]

The annulment of the *Trade Mark Act* of 1870 brushed away the 1876 criminal amendment as well.[26] It look as if that though numerous attempts were made by stake-holders to implement criminal sanctions against counterfeiting in the United States, they have been futile due to hostility and strong politicization from consumer groups.[27] Eventually, criminal sanctions against counterfeiting in the US lastly saw the light of day in the *Trade Mark Counterfeiting Act* of 1982.[28]

In the US, copyright protection can be regarded as a concept resolutely rooted in the legal system, originating its authority from the US Constitution itself.[29] Criminal remedies against copyright violations were firstly established by the *Copyright Act* of 6th January 1897.[30] Nonetheless, this *Copyright Act* of 1897 has the provision which constrained criminal remedies only for the acts which are like illegitimate performances and depictions of copyrighted dramatic and also musical compositions.[31] Further, this Act entailed a *mens rea* requirement, that implies the institution of both the "wilfulness" and the "profit motive" of the defendant's conduct.[32] Ensuing to this initial step, there had been quite a few amendments to the criminal copyright legislation[33] in the US, especially due to unceasing lobbying by stakeholder groups.[34]

With these developments there are a lot of countries who have also acknowledged necessity for tougher punishments against counterfeiting and piracy and they have also taken steps for the same. Nevertheless, despite of domestic legislations ratified mostly during the latter part of the 20th century, the problem of enlarged trade in counterfeit and pirated goods has sustained to grow.[35] The need to implement criminal remedies to protect IPR has solitary been felt by countries with substantial intellectual property rigorous industries, nonetheless not by countries with fewer intellectual property rights reliant on

[24] *Act of August 14, 1876, ch 274, 19 Stat 141 (1876), quoted in Jed Rakoff and Ira Wolff, 'Commercial Counterfeiting: The Inadequacy of Existing Remedies' (1983) 73, The Trademark Reporter 493.*

[25] *Protection which was provided in the Trade Mark Act only remained for three years; in 1879 the US Supreme Court invalidated the entire federal Trade Mark Act of* 1870 *on the ground that it was improperly based on Congress' power over copyrights and patents, rather than as would have been proper and constitutional on Congress' power over interstate commerce.*

[26] *Jed Rakoff and Ira Wolff, 'Commercial Counterfeiting: The Inadequacy of Existing Remedies' (1983) 73.*

[27] *The most noticeable is the attempt to include criminal sanctions in the Lanham Act of* 1946. *This had failed due to the objections raised by the National Retail Dry Goods Association of the US.*

[28] *When Senator Charles Mc C. Mathias of Maryland introduced Section 2428 in the Second Session of the 97th Congress. As a result of this development, criminal sanctions against counterfeiting in the USA are now provided by 18 U.S.C. 2320, read with the amendments introduced to this section by the Stop Counterfeiting in Manufactured Goods Act (SCIMGA) of* 2006.

[29] *U.S. CONST. art I, § 8, cl.8.*

[30] *PRIMARY SOURCES ON COPYRIGHT 1450-1900 (L. Bently & M. Kretschmer eds.) (Nov. 10, 2020, 2:30 PM) www.copyrighthistory.org*

[31] *Ibid.*

[32] *Ibid.*

[33] *At present criminal procedures and punishments against copyright infringements in the US are stipulated in 17 U.S.C. Section 506 and also in 18 U.S.C. Section 2319.*

[34] *Mary Saunders, 'Criminal Copyright Infringement and the Copyright Felony Act' 71 DENV.U.L.REV. 671.*

[35] *The local nature of laws enacted and the absence of international mechanisms to compel individual states, which do not impose criminal sanctions to adhere to generally recognised standards of protection, can be seen as contributory factors to this growth.*

industries. With this respect, even among the few countries which had initially applied criminal remedies, noteworthy differences could be noticed in the scope and the severity of remedies. The modification in the importance attached by countries to IPR protection can be seen as the foremost cause for this disparity. This matter can be sufficiently established by considering the possibility and the level of penalty imposed for counterfeiting by China and the US, where one country ascribes a strikingly different level of implication to IPR protection than the other. In the US, breach of trademarks and service marks are criminalised at present by the *Trade Mark Counterfeiting Act*, 18 U.S.C. Section. 2320, amended by SCIMGA.[36] In this respect, 18 U.S.C. Section 2320 (a), states:

> Whosoever intentionally traffics or if attempts to traffic goods or services and also knowingly uses a counterfeit mark on or in relation with such goods or services, or intentionally traffics or attempts to traffic in labels, patches, stickers, wrappers, badges, emblems, medallions, charms, boxes, containers, cans, cases, hangtags, documentation, or packaging of any type or nature, knowing that a counterfeit mark has been applied thereto, the use of which is likely to cause any delusion, or to deceive shall, if an individual, be fined not greater than US$ 2,000,000 or imprisoned not greater than 10 years, or both, and, if a person other than an individual, be fined not greater than US$ 5,000,000.

Even the auction of one counterfeit item is criminalised by this philological of the offence-creating statute in the US. The fundamentals of the offence that are prerequisite to be established under this provision are: 1) the intention of the defendant to traffic or attempt to traffic, 2) the defendant actually made use of a counterfeit mark on those goods or any services and 3) the defendant expressively used that mark and also knew that the mark he was using was counterfeit.

On the opposite side, under Chinese legislation, Articles 213-215 of the Criminal Law involves the specific acts of trade mark counterfeiting that may be question to any criminal penalties.[37] Still, these Articles have defined specific dawns for an act of counterfeiting to qualify for criminal sanctions. For example, Article 213 recites:

> If anyone uses a trademark without the authorization of its owner and the trademark which is used is identical with the registered trademark in respect of the same goods shall, if the conditions in which it is being used are serious, be sentenced to fixed-term imprisonment of not greater than three years or criminal detention and shall also, or shall only, be fined; but when the circumstances are specifically serious, he or she shall be punished for a fixed term of imprisonment of not less than three years but not greater than seven years and shall also be fined.[38]

It is obvious that, in order to convict a defendant by this legislation, option has been left to court to regulate the scope of the words such as "used", "serious" and "especially serious". As an over-all practice,[39] Chinese courts have been compassionate towards local defendants when interpreting these words and imposing sentences. For example, in circumstances when the sentence granted is less than three years, the courts have instead applied a probation period.

Consequently if the case be suitable, by certified criteria, as tremendously serious and

[36] Pub. L. No. 109-181, § 1, 120 Stat. 285, 285-88 (2006) (Nov. 1, 2021, 3:35 PM) https://www.govinfo.gov/content/pkg/PLAW-109publ456/html/PLAW-109publ456.htm

[37] The language of these Articles have been subsequently interpreted by the Supreme People's Court in 2004 and 2007.

[38] Criminal Law of the People's Republic of China (1997) Part II, Chapter III, Section 1.

[39] B. Gang & P. Ranjard, Actions speak louder than words, Managing Intellectual Property: China IP Focus (2007), (Jan. 12, 2021, 11:35 PM) http://www.managingip.com/Article.aspx?ArticleID=1329564

deserving a sentence from three years to seven years, several cases have been reported where the court has methodically applied the lowest term and further also probation period.[40] Because of substantial lobbying made by further countries that trade with China, the Supreme People's Court of China attempted to define these words in 2004. Nevertheless, the disparity has continued to loom large. As a result, the Supreme People's Court has defined "use" as acts that include applying for registered trademarks or counterfeit trademarks to commodities, packaging, or user guides and transaction documents.

The expression "serious circumstances" has been well-defined to need more than US$ 6,925 in banned business volume or US$ 4,155 in illegal advantages if any one or two registered trademarks are tangled.[41] If more than two registered trademarks are involved, the threshold has changed under this definition to RMB 30,000 in illegal business volume or RMB 20,000 in illegal gains.[42] Further, "especially serious circumstances" has been defined to require at least RMB 250,000 in illegal business volume or RMB 150,000 in illegal gains when one or two registered marks are involved. When more than two marks are involved, this threshold has been lowered to RMB 150,000 in illegal business volume or RMB 100,000 in illegal gains.[43]

The aforementioned legislative provisions evidently prove the inequality of the standards used by the two countries in enforcing criminal remedies against counterfeiting. In the US, the trade of a single counterfeit item, irrespective of the value, involves a criminal prosecution, whereas in China, numerical thresholds have been used to regulate the criminality of a violating act, which are extraordinarily higher than the standard used under the US law.[44]

Lack of Multilateral Legislation

It is significant to note that, though trade in counterfeit and pirated goods are unusually international in nature as well as in result, up until the last two decades of the 20th century few measures had been started to limit commercial counterfeiting and piracy at the international level.[45] The *Paris Convention* was the only significant international agreement that was in reality till the late 20th century, which confined some provisions suitable to counter piracy[46] and counterfeiting.

The *Paris Convention*[47] which protects Industrial Property came into force on 1884. However, the convention did not call for the application of criminal remedies against intellectual property embezzlement. Though, it is worthy to perceive that the *Paris Convention* does comprise three articles relating to the enforcement of non-criminal remedies against commercial counterfeiting.[48]

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[40] *Ibid.*

[41] *Supreme People's Court Interpretation, Article 1 of the 2004.*

[42] *Ibid.*

[43] *Ibid.*

[44] *It is interesting to note that these numerical interpretations had been made only after China acceded to WTO in 2001. But before that the matter had been left to the discretion of local judges without any previous IPR enforcement experience. United States and China had been at loggerheads due to this enforcement disparity since 2001. Though in 2007 the Supreme People's Court attempted to low down the criminal prosecution threshold in copyright infringement cases and also increase the level of penalties that judges can impose United States filed formal proceedings in the WTO against China in April 2007.*

[45] *To make matters worse, even these few measures have proved ineffective and inadequate to restrict the increase in the illicit trade of fake goods.*

[46] *In answer to the expressed requirement for international protection for original inventions, which was raised during the International Exposition held in Vienna in 1883.*

[47] *Protection of Industrial Property of 20th March 1883 which was revised at; Brussels on 14/12/1900, Washington on 02/06/1911, The Hague on 06/11/1925, London on 02/06/1934, Lisbon on 31/10/1958, Stockholm on 14/071967, and as amended on 28th September 1979.*

[48] *Although it is an important international document, the Convention has been greatly criticised for its ineffectiveness in curbing the production and the flow of counterfeit goods.*

The Convention does not require signatory nations to apply precise standards, but needs only that they grant the undistinguishable trade mark safeguards to the citizens of other signatory regimes as they provide to their own nationals.[49] Consequently,[50] the protection shall be same as the latter, and the legal remedy shall also be same against any infringements of their rights, except only to the situations and formalities which are levied upon citizens are complied with thoroughly.[51]

Consequently, in addition to the absence of any criminal remedies against counterfeiting, the protection provided by the *Paris Convention* against counterfeiting by other procedures was only as operative as individual national legislations and lacked the outlook of a multilateral agreement imposing universal standards for the protection of intellectual property rights. In this background of intellectual property rights protection measures, economic globalisation, that is the addition of general economies into the international economy through trade, capital flows, migration and the spread of technology[52] (all of which started in the late nineteenth century), expanded rapid pace in the fourth quarter of the 20th century. By this process, trade in counterfeit and pirated goods, which was before a cottage industry, also became an international industry with multifaceted corporate structures and global distribution systems. As a consequence, local legislation against counterfeiting and piracy proved incompetent in the face of the global scale of infringing activities. As Clark Lackert observed:

> Problems of national sovereignty and differences between counterfeiters and their methods of distribution make prosecution of transnational claims more difficult than domestic trademark infringement cases. Moreover, local laws are often poorly enforced because of lack of resources or neglect by local authorities, and the current success of counterfeiting is attributable at least in part to confusion among legal professionals, law enforcement agencies and local government officials.[53]

Accordingly, the absence of multilateral efforts to fight counterfeiting and piracy together with the lack of stricter remedies at the local level to discourage infringements continued to aggravate stakeholders of intellectual property rights during the last quarter of the 20th century. When this time arrived then there was plenty of evidences that proved that the market had huge amount of pirated items and those items were in flow in world markets and in such markets where minimal intellectual property rights protection was available.[54] The unavoidable frustration due to the uselessness of local laws only led to a new interest in international cooperation.[55]At this point, of time stakeholders were beginning to feel that counterfeiting and piracy should be addressed at the international level, in order to stem the tide at the source of its origin rather than at the final point of sale.[56]

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[49] WILLIAM WALKER, 'A PROGRAM TO COMBAT INTERNATIONAL COMMERCIAL COUNTERFEITING' Trademark Reporter 117 (1980).

[50] Paris Convention for the Protection of Industrial Property, art. 2.

[51] Paris Convention.

[52] Jagdish Bhagwati, In Defence of Globalization (Oxford University Press, 2004).

[53] Clark Lackert, 'International Efforts Against Trademark Counterfeiting' (1988) Columbia Business Law Review 162.

[54] WILLIAM WALKER, 'A PROGRAM TO COMBAT INTERNATIONAL COMMERCIAL COUNTERFEITING' Trademark Reporter 117 (1980).

[55] Ibid

[56] Counterfeiting is not confined to territorial boundaries of the nations. By stealing intellectual property, technologies, and trade secrets, counterfeiters reduce the need for significant research and development investments. Therefore, international corporation and multilateral actions brought about this change and it was quite not possible without international cooperation and multilateral action.

Multilateral Actions and Private Initiatives: Prevention of Trade in Counterfeit Goods

Though there was heightened concern in the intellectual property concentrated industries regarding the danger posed by counterfeiting, there was little or no public awareness.[57] This practice of trade in counterfeit products first caught attention because of the decision which was given by the company Levi Strauss when its blue jeans was counterfeited on the large scale in late 1970s.[58]

Throughout this period, Levis Strauss discovered several unlawful schemes in operation in South-East Asia, which produced hundreds of thousands of blue jeans bearing the Levis trade mark for distribution and sale throughout Europe.[59] These movements by Levi Strauss lead to numerous important changes in US customs regulations relating to counterfeit merchandise. The ratifying of the *Customs Procedural Reform and Simplification Act* of 1978, which added a new sub-section to Section 526 of the *US Tariff Act* of 1930, providing for the appropriation of merchandise imported to the US without the consensus of the trade mark owner could be stated as one such change.[60]

Though, the most important impact of these campaigns was the attention they drew to the desirability of implementing any form of international mechanism to battle counterfeiting. At the beginning of Levi Strauss discussions a choice was made as to adhere to tougher remedies against foreign trade in counterfeit merchandise through official international agreement amongst the political system, and it was acknowledged that a multilateral negotiation was the need of the hour.[61] Encouraged by the espousal of "codes of agreement"[62] throughout the Tokyo Round of GATT[63] negotiations, the company hooped together with a group[64] of firms which are trade mark-sensitive pressed for an anti-counterfeiting code.[65] Primarily, the determination for sturdier protection of IPR in foreign markets was only determined by industries sensitive to trade marks. By the early 1980s, some of the key manufacturers of industrial and front-line high technology products merged[66] the trade mark industries which demand for better-quality of foreign IPR protection.[67]

The subsequent step of this initiative was to classify an suitable international forum to crusade for stronger protection of intellectual property rights. In this regard, as William

[57] The moment counterfeit goods entered the consumer chains they reached the consumers with minimal risk of detection by the retailers or the end users.

[58] Supra note 54.

[59] As an auxiliary of disregarding the problem Levi Strauss mounted a prestigious public relations operation to doom the counterfeiters.

[60] The detailed discussion on the issue can be seen in customs regulation instigated by Levis campaign.

[61] Ibid.

[62] This was the name used for optional GATT-related agreements, which were open to the members of GATT to join, or not, as they wanted.

[63] General Agreement on Tariffs and Trade 1994*, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994).*

[64] This organisation, which comprised European and American companies, was known as the International Anti-Counterfeiting Coalition (IACC).

[65] Paul Doremus, 'The Externalization of Domestic Regulations: Intellectual Property rights reform in a Global Era' (1995-1996) 3 Indiana Journal of Global Legal Studies 341 at 358.

[66] Although stronger multilateral IPR protection was the call of the hour at this stage of developments, it is interesting to note that there was no specific demand for international scale criminal sanctions. The call was for any form of stronger protection, that is civil, administrative, which could secure the interests of rights' holders involved in international trade. However, it needs to be mentioned that the initiative taken at this stage to seek for an international forum for stronger protection subsequently facilitated the enactment of criminal sanctions at multilateral level.

[67] Paul Doremus, The Externalization of Domestic Regulations: Intellectual Property rights reform in a Global Era (1995-1996) 3 Indiana J. Glob. Leg. Stud., 341-362, at 358.

Walker, who was the attorney to the IACC from its inception, explains:

> In seeking suitable multilateral fora within which to chase this initiative due consideration was basically given to four possibilities that are the Organisation for Economic Cooperation and Development (OECD), the Customs Cooperation Council (CCC), the World Intellectual Property Organisation (WIPO) and the GATT.[68]

Of these, the OECD was effortlessly rejected.[69] Its position as "developed countries' club" was on poise a adverse factor, since though pact might be easier to get in such an atmosphere, the scale of the counterfeiting problem in many developing countries predestined that it would have been counterproductive to eliminate them.[70] The main struggle was that by convention or tradition the OECD was not any kind of negotiating forum.[71] Then the Customs Cooperation Council (CCC) was also not in any list.[72] This choice had clear magnetisms, but the CCC had no preceding knowledge of intellectual property, and also was not interested to obtain new tasks.[73] It was incompetent to promise to put anti-counterfeiting proposals on any pertinent schedule until January 1979, which was inadmissibly detached for Levi's.[74]

The Beginnings of Anti-Counterfeiting in GATT and Laying Down the Foundations for Urugway Round

The Tokyo round[75] was the seventh major multilateral negotiation since the end of the Second World War intended at liberalising world trade through lessening of tariffs and lowering of nontariff barriers.[76] Thus, the Tokyo round of negotiations at this point of time provided an perfect opportunity for the IACC to comprise intellectual property protection into the outline of GATT trade negotiations. Hence, in the beginning of May 1978, a political effort was started on behalf of IACC to present the subject of counterfeiting into the MTN.[77]

As the level of differences together with developed-developing partition that prevailed among constricting parties prior to the ministerial meeting, the presence of this paragraph in the ministerial

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[68] *Supra note 38.*

[69] *Christopher Wadlow, 'Including trade in counterfeit goods: the origins of TRIPS as a GATT anticounterfeiting code' (2007) Intellectual Property Quarterly 350.*

[70] *Ibid.*

[71] *Supra note 38.*

[72] *It was founded in the interests of international trade to enhance government cooperation while taking into account the economic and technological aspects of customs systems. The CCC was considered as a multilateral organisation specialising in customs regulations, which administered several international customs conventions at that time.*

[73] *Ibid.*

[74] *Ibid.*

[75] *By the end of 1978 the Tokyo round of Multilateral Trade Negotiations (MTN) was also under way under the patronages of the GATT, which was considered as the main organisation under which countries ruled international trade at that time.*

[76] *Supra at 38.*

[77] *Keeping in line with the order of the day, anti-counterfeiting measures were also promoted by way of a code of conduct, to be adopted by the signatory states. During these discussions, much agreement was reached by the United States and the European Community with respect to the content of the code and further agreement was sought from countries like Japan and Canada to finalise the anti-counterfeiting code. Nonetheless, despite a text which was bilaterally agreed and the support of the European Community, the code was not incorporated among the text open for signature as part of the Tokyo Round, and the latter concluded in 1979 without adoption of any of these measures. Nevertheless, it is interesting to note that the draft Anti-counterfeiting code, which was circulated among other governments by the United States and the European Community in 1979, did not contain any provisions requiring signatory states to implement criminal sanctions against counterfeiting. However, in stipulating the purpose of the code the preamble declared, "Recognising that deterring trade in counterfeit merchandise will foster reduction and elimination of the trade restricting or distorting effects of commercial counterfeiting."*

declaration seems to be one of the first ladders towards multilateral protection of intellectual property rights. Though, in this section the only words that positively mandate the growth of further events for IPR protection looks to be the phrase "and elaborate as appropriate novel guidelines and disciplines". In this backdrop, when comparing this paragraph with the concluding text of the TRIPS Agreement, which covers a wide area of substantive provisions in addition to other aspects such as enforcement, it becomes apparent that much had been achieved during the new round of talks from this initial mandate. This initial mandate paved the way for the introduction of criminal remedies against intellectual property rights infringements, among other developments.

Intellectual Property Rights in India: The Enforcement and Legislations

Intellectual Property rights could be affected by taking actions by the civil courts or by criminal action. India's Intellectual Property law regime sets out for both kind of actions such as civil and criminal proceedings same as the *Competition Act*.[78]

An insufficiency of civil hearing is that when one is dubious to recuperate enormous damages, and disciplinary damages against an infringer are infrequent. Nevertheless, if you have a documented infringer, it might be judicious to launch civil litigation, subsequently if a temporary injunction is decided. Compensations are frequently given in cases of copyright piracy and trade mark violation[79]; less as in patent cases.[80] There are various methods of dispute resolution and mediation or negotiations with any infringer can also be considered as an alternative form of dispute resolution.[81]

Existing Legal Provisions for IP Protection in India

India's legal framework caters to the following areas of intellectual property such as Trade Marks, Patents, Copyrights, Industrial designs, Geographical indications, Layout designs of integrated circuit, Varieties of plant, Information Technology and Cybercrimes and Data protection.

Intellectual properties rights in India are governed under the following Acts *Trade Marks Act*, 1999, *The Patents Act*, 1970 (amended in 2005), *The Copyright Act*, 1957, *The Designs Act*, 2000, *The Geographical Indication of Goods (Registration and Protection) Act*, 1999, *The Protection of Plant Varieties and Farmers Rights Act*, 2000 and *The Information Technology Act*, 2000.

Self-Help Considerations

Number of things can be considered so that it becomes harder for the infringer to violate copyright. For example:

1. The design of the product shall be kept in mind and then how easy or difficult it would be to copy that design and reproduce it.
2. While hiring staff the company should have effective intellectual property related clauses in the contracts of their employment. Also, it should be made sure that the employees are educated on IP rights and their protection
3. One shall have strong protection for papers, sketches, samples, machinery and all.
4. Production over runs shall be checked so that it may be made sure that authentic products are not being sold under any different name.

[78] If there is any design or patent infringements then criminal proceedings might not apply.
[79] which come under criminal litigation.
[80] With the passage of time the decision of judiciary has however shown that judiciary has impartial approach. As most of the decisions have been seen to be given in favour of foreign companies against the local infringers.
[81] Mediation Process is also Part F Indian legal system as under the Civil Procedure Code.

Registering and Enforcing Intellectual Property Rights in India

Registration of IPRs is very much important when it comes for their protection and effective enforcement.[82] 'Priority rights'[83] which is a part of the *Paris Convention* can assist in the local registration of trade marks, patents and designs by sanctioning rights which were earlier registered somewhere else to become effective in India, if they are filed within a stipulated time limit.

Conclusions & Suggestions

India's intellectual property regime protects every aspect of intellectual property rights. The strategies of protection related to various kind is intellectual property rights have been amended in recent years.[84] In country like India there are enormous numbers of small players that infringe IP rights at small level that goes un noticed, this can be considered as a remarkable element of IP environment in India.[85]

Avoiding Problems

If anyone can be organized then that person can avoid the problems and also avoid the infringement of their Intellectual Property Rights. The following points can be taken into considerations.

1. As prevention is better than cure that implies that one should take advice from Indian Intellectual Property Right Experts on how one should protect his intellectual property rights.
2. Carry out risk valuation and also due diligence checks on any organizations or individuals with whom one has to deal with;
3. Take professional advice from other experts;[86]
4. Business which have certain same characteristics shall discussion amongst themselves.
5. Consultations with agents, distributors and suppliers on how to defense ones rights in best manner can be done;

The Onus of Protection of One's IP

One shall make indubitable that everyone in one's business owns some responsibility for Intellectual Property protection.[87] It might be real to propose a manager[88] to have specific accountability for understanding and guarding one's Intellectual Property rights.

Policy makers have utilized intellectual property strategy as an instrument for fiscal development, from the early stages in fifteenth century Venice,[89] by its initial

[82] The registration for patents shall be made in India only while one is going for patent application in the country but if there are some rights which are other than industrial rights then in such circumstances one can also go under the terms of the Patent Cooperation Treaty, which is generally easier and also quicker. There is no need for registration the case oof copyrights but registering copyrights is always advisable.

[83] In case of patent industrial design and trademark rights are time barred rights, also they are triggered by the first filing of an application for a patent. The right of priority belongs to the applicant or his successor in title.

[84] In India though IP laws are thorough and generally comparable with European IP laws, there is still major issues over IP enforcement. There are a lot of factors which needs to be looked after so that proper enforcement of IP can be done in India. Such as administrative with a lot of backlogs of cases at both the civil as well as criminal courts. This means that the case can run for years with no specific time limits and also there is no transparency t the local level.

[85] Understanding that seizures which tend to be small that need to be sustained. An economic draining effect shall be looked into and avoided.

[86] Like lawyers or local diplomatic posts or Chambers of Commerce and the UK India Business Council.

[87] There are a lot of businesses which actually depend on their IP and thereby the IP can be considered their most valuable asset.

[88] If one is going to enter into businesses with legal departments, a legally-trained manager would be suitable.

[89] Where privileges were generally used to maintain technological advantage.

development when the British bestowed monopoly privileges to those who presented new methods in to the kingdom.[90]

National legislations which support the criminal remedies can be seen in some countries even before the start of the industrial revolution in the latter part of the 18th century. With globalisation and disappearance of national boundaries and barriers for trade in goods and services has also challenged national laws for IPR protection with novel challenges. In this regard, the necessity of actual criminal remedies for IPR protection, which persisted and continued at national level since the late 19th century in some countries, has been shifted to the international level during the past few decades. As a result, several multilateral efforts for the protection of IPR have taken place to implement criminal sanctions globally.

Thereby there are legislations which protect Intellectual Property Rights at various levels and give sufficient remedies to it but there shall be some debate as to if that much of remedy which is provided in that manner is sufficient or not. If there is any need for multilateral legislation that applies to various countries at the same time and also, they provide for criminal remedies. Criminal remedies for the Protection of IP are important as it deters the infringer and thereby gives a chance to the owner of IP to have a safe environment for their rights.

The overall discussion on TRIPS agreement and the road course through which the international agreement was achieved shows that the IP rights have gained their importance eventually. As the IP rights became an important factor in global economy their protection became a major challenge. Thus, it is important to take into consideration the ways which could be adopted to make sure that the IP rights of the individuals are protected and there are no major financial harms caused to the individual right holder. India as a growing economy should keep in mind the above factors which are discussed in the article and shall also make ways for having stronger regime for IP protection and introducing stringent punishments such as criminal remedies for its violation.

The study undertaken by this paper contributes to the existing literature on criminal IPR enforcement in several aspects. It demonstrates the progression of the use of criminal sanction for IPR protection and extensively scrutinise the negotiations during the Uruguay Round in the GATT to introduce criminal sanctions at the multilateral level. The findings in this study favour the utilisation of criminal procedures for the protection of IPR. It contends that criminal remedies would strengthen and widen the capacity of remedies used for IPR protection. In this regard, it demonstrates that certain inherent characteristics of criminal remedies, such as the criminal conviction and sentence, addresses certain aspects of IPR enforcement, which cannot be reached by other remedies. This is especially highlighted in relation to counterfeiting and piracy. However, it questions the desirability of expecting the enforcement of criminal IPR regimes that are catered and suited for industrialised countries universally. It identifies the importance of evaluating and critically analysing the adequacy of a criminal IPR enforcement regime in any jurisdiction with caution, having given due consideration to other economic development related interests and priorities of that country.

[90] *For this end, the various strategies used by countries for the enforcement of intellectual property rights (IPR) have played a very vital role. Although the use of criminal sanctions in national and multilateral legislation for the enforcement of IPR has not been prevalent in the past, the utilization of criminal law in this field is not a new phenomenon.*

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NECROPHILIA AS A CRIME IN INDIA: THE NEXT PITSTOP IN THE QUEST FOR JUSTICE

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ABSTRACT

Necrophilia is a term which is used to describe the mental condition of a person having a pathological sexual attraction to engage in sexual activities with dead bodies. The desire to have intercourse with a dead body is so extreme that people suffering from it often do not hesitate to cross all societal boundaries or commit a crime to obtain a dead human body. There have been numerous instances where people have killed people, dug out graves, have trespassed into morgues to have sex with a corpse, all of which is not only detrimental to the dignity of the dead and their right to decent final rites, but also to the society and individuals. In fact, both the World Health Organization and the American Psychiatric Association have observed Necrophilia as a mental ailment, and have thus placed it under the categorisation of Paraphilia, due to its sexual attraction to inanimate objects. However, it is apposite to note that despite the fact that Diagnostic and Statistical Manual of Mental Disorders, 5th edition, categorises necrophilia as an uncommon and a rare sexual disorder, it is practiced much more frequently in our societies and what is further worrisome is the fact that there does not exist well-structured laws in most countries, including India, to either tackle the crime or to treat the perpetrator. Indian laws are pretty much silent about Necrophilia, and the crime committed by a person. The accused is generally prosecuted for charges of murder, rape or bestiality and not for an offence committed against the dead. The author, therefore via this paper, attempts to analyse the laws related to Necrophilia in other Countries in comparison to framework in India, highlighting the need to have better laws, to provide efficient justice to the victims of the crime, and to determine the criminality of the mentally ill perpetrators. In the first part, endeavour has been made to provide comprehensive introduction about the concept of Necrophilia and its psychological analysis while discussing its evolution. The second part, deals with divide over criminalisation of Necrophilia from the perspective of moral or ethical rightness or otherwise of necrophilia and discuss the laws in existence in various countries to deal with Necrophilia. The third part discusses the recognition of Necrophilia in India viz a viz the dignity of the dead persons and their right to decent final rites while looking into invocation of various provisions of the Indian Penal code,1860 (IPC) for prosecuting Necrophilia cases which are increasing at an alarming rate. The fourth part is the conclusion and suggestions wherein the conclusion places a fair reminder upon the importance of privacy and need to adopt modified penal law in India to provide efficient justice to the victims of such crime

KEY WORDS

Necrophilia, sexual intercourse, dead persons, Justice, India, Dignity

Introduction

Meaning and Concept

Necrophilia, one of the oddest abnormalities in human history, is an erotic obsession or sexual contact with corpses. The term 'necrophile' is customarily used to denote a sexual perversion, namely the desire to possess aad body, generally of a woman, for purposes of sexual intercourse, or a morbid

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desire to be in the presence of a dead body. In the characterological sense, it can be described as a passionate attraction to all that is dead, decayed *and putrid. In fact, both the World Health Organization and the American Psychiatric Association have observed Necrophilia as a mental ailment, and have thus placed it under the categorisation of Paraphilia, in the International Classification of Diseases and the Diagnostic and Statistical Manual respectively* [Diagnostic and Statistical Manual of Mental Disorders, 2013]. *Paraphilia can be understood as an umbrella term, often used to refer to uncommon sexual mental condition/ orientations prevalent in the society. It encompasses habitual behaviours of intensely fantasising of, or urge to commit, or actually commit, sexual acts with inanimate objects.* Thus, Necrophilia is characterised under the genus 'paraphilia', due to its sexual attraction to inanimate objects, which are corpses. The term Necrophilia is derived from two Greek terms, *'nekros'* meaning 'corpse' or 'dead', and *'filia'* meaning 'love' or 'attraction'. The etymology of the term(s) was first written in 1886 by a German psychiatrist Richard von Krafft-Ebing in *'Psychopathia Sexualis'* (psychopathy of sex). Necrophilia is further categorised under two forms, which are sexual and non-sexual. A person falling under the former category merely likes to stay in the presence of a corpse and is referred to as a 'necrophile'(s), while, a person falling under the latter category, actually engages in sexual intercourse or fondling with the corpse, and are called 'necrophiliac'(s). The likeliness of a Necrophile committing a crime to satisfy his urge of being in the presence of dead bodies, is contingent on the facts of each case and is pretty much less, as compared to a 'necrophiliac'. A '*necrophiliac*' even if it is assumed did not kill a person to obtain a body, will definitely be said to have committed a crime if is found in engaging only in sexual intercourse with the dead body which will otherwise also be there if he kills a person to obtain his body.

In fact, Necrophilia is a practice, which does not have a standard pattern of behaviour that can be identified in all necrophile(s). It is practiced differently by different people based on their sexual desires. It has thus been classified into several categories by researchers based on their different types of associations and the nature of intimacy with corpses. For instance, Jonathan Rosman and Philip Resnick classify Necrophilia into three categories namely *'Homicidal Necrophilia', 'Regular Necrophilia', and 'Necrophilic Fantasy'*. A necrophile is known to be of homicidal necrophilia category when he murders the person and makes sure that it has died before engaging into sexual intercourse or any other kind of sexual gratification. On the other hand, a necrophile of regular necrophilia category does not commit homicide but uses an already dead body to obtain sexual pleasures and in Necrophilia Fantasy, the person of such category does not actuality commit necrophilia but only fantasizes of a sexual activity with corpses and thus it poses least harm as compared to the other two [Rosman & Resnick, 1989]. However, it becomes pertinent to note that there has been a further bifurcation of the abovementioned categories into ten more categories, since the abovementioned classifications were made in the year 1989 when the human society was not as complex as it is now.

Dr. Aggarwal, a professor of forensic medicines at Maulana Azad Medical College, based on the intentions and motivations of a necrophile has, while committing a necrophiliac act, has categorised necrophilia into ten categories namely:—

- Role Players – it includes people who does not desire to have sexual intercourse with a corpse but enjoys having sex with a person pretending to be dead.
- Romantic Necrophiles – which includes people who due to their inability to bear the loses of their loved ones, or sexual partners, mummify them to continue to be sexually associated to them.

- Fantasizer Necrophiles – which includes people who does not in actuality commits necrophilia but only fantasizes of sexual activity with corpses.
- Tactile Necrophiles – also includes people who in actuality commits necrophilia but only fantasizes of sexual activity with corpses, which though is pretty much similar but not identical to being fantasizers necrophiles, as such necrophiles in order to get an orgasm must need to have touched the corpse.
- Fetishtic Necrophiles – includes necrophiles who also do not regularly engage in actual sexual intercourse but whenever they get the chance, they chop off some bodily part of the corpses for satisfy their sexual fetishes.
- Necromutilomaniacs – includes necrophiles similar to Fetishtic necrophiles, but of severe kind, as they also do not engage in sexual intercourse with the corpses but derives sexual pleasure either by mutilating them or in some cases by eating their certain body parts.
- Opportunistic Necrophiles – includes necrophiles which though maintain normal sexual relations with living persons, but however does not let go of chances of having sexual intercourse with a corpse if gets an opportunity.
- Regular Necrophiles – includes those necrophiles who despite of being able to have sex or maintain normal sexual relations with living people, prefers and seeks to have sex with dead bodies as finds them to be more pleasurable.
- Homicidal Necrophiles – includes necrophiles who though are capable of having sex with living people, but has such an extreme urge to have sex with a corpse that they kill people in order to satisfy it.
- Exclusive Necrophiles – includes necrophiles that cannot have sex with alive people at all and finds pleasure by having sex with dead bodies only [Aggarwal, 2009; Pettigrew, Mark 2019].

It becomes pertinent to note that though it is a gender-neutral practice and there have been instances of females having sexual intercourse with male dead bodies and vice versa, it is more prevalent in males as compared to females, and the necrophile can simultaneously maintain normal sexual relations with living beings. Thus, an activity of having sexual intercourse with the dead is a reflection of the most unusual and perverse sensuality. It not only violates the dignity of the dead but also norms prevalent in more than one culture and society and thus poses great threat to the society while capable of leading to chaos and anarchy in the society.

Necrophilia: Psychological Analysis

Over the past century, various studies have been undertaken using a great variety of methodology ranging from case histories to aggregation of various data, to determine the etiology, essence, and evolution of necrophilia. `However, it has been exceedingly difficult to arrive at any concrete theory on the evolution and practice of Necrophilia except the consensual agreement by the investigators on two assumptions one, that necrophilia is a rarest of known paraphilias and the second, the literature on this subject is severely limited. The most comprehensive study in this field was published in the year 1989, by Dr Jonathan Rosman and Dr Phillip Resnickin, wherein they examined 122 cases (comprising 88 from the world literature and 34 unpublished cases of their own) to examine the reasons for indulging in necrophilic behaviour and revealed that it is the desire to possess an unresisting and unrejecting partner, which is one the most major reason, in addition to other lesser motivations such as to overcome the feeling of isolation, wanting to be reunited with their dead romantic partner;

being sexually attracted to corpses and seeking self-esteem by expressing power over a homicide victim. Alternatively, they also suggested that necrophiliacs may be fearful of dead people, and that they transform their fear into a sexual desire. Further, Rosman and Resnick theorized about the situational antecedents leading to necrophilic behaviour into three types: (i) necrophilic homicide (ii) "regular" necrophilia, and (iii) necrophilic fantasy as already been discussed supra. In fact, in addition to the study conducted by Roseman and Resnik some other researches also suggested consistent failure to create normal romantic attachments with people that are alive as one of the reasons to opt for a non-living mate by the necrophiles. The sadistic side of necrophilia has certainly been reported in some of the more extreme case studies. For instance, Edwin Ehrlich and colleagues put forth the case of a young man, convicted twice on charges of defiling female corpses and who underwent a long course of psychiatric treatment. All his necrophilic acts were committed over a 15-year period. In three cases, the necrophiliac skinned the trunk of the dead victims, placed the skin on his naked body and then stimulated himself sexually. In several cases, he kept mementos from the victims at his home (for *e.g.*, used burial clothes that were removed by him from coffins) [Ehrlich, E., Rothschild, M.A., Pluisch, F. & Schneider, V., 2000]. Professor Anil Aggrawal also, in his research based on case studies in the literature, indicated the existence of necrophilia in many variations and put forward a new classification exhibiting ten different types of necrophiliacs [Aggarwal, 2009].

Evolution of Necrophilia

Necrophilia is not a novel concept and people have been practicing it since ancient times and it is believed that this practice first surfaced in Ancient Egypt. Herodotus the famous Greek author stated in his writings that in Ancient Egypt, beautiful women were not embalmed immediately upon their death, because several cases of embalmers and husbands, having sex with such dead bodies of women were witnessed and reported. To prevent such disturbing acts, Ancient Egyptians developed the practice of letting the body rot for 3-4 days before they were embalmed. Necrophilia then was practiced due to the prevalence of the belief that it was a means of communication with the dead. This practice was also prevalent in South America as various paintings of people having sex with the dead also been found in the pyramids of the Moche Civilization [Weismantel, 2004]. Surprisingly, even some historical characters have been known to practice necrophilia for instance, the tyrant of Corinth Periander (627 BC), who lived for years with the corpse of his wife Melissa after her demise [Dámaris Romero-González, Israel Muñoz-Gallarte, Gabriel Laguna-Mariscal, 2019]. Juana la Loca also retained the corpses of his dear Felipe I beautiful for a period of three years, after his death in 1506. In the majority of reported incidents of necrophilia, the act is committed mostly by a person who has a professional dealing with dead bodies daily such as an Embalmer, Coroner, Cemetery worker, Funeral director, and assistant.

Several grim and peculiar incidents of necrophilia have also been reported in the modern period. In 1827, a Frenchman named Leger not only killed a young girl, but also mutilated her genitals and drank her blood after having sexual intercourse with her. Another infamous incident of necrophilia witnessed between 1847–1849, was of Sergeant François Bertrand of the French Army, who used to exhume graves and thereafter mutilate corpses, to have sexual intercourse and other bodily pleasures such as of masturbating etc. similarly in 1886, French necrophile, Henri Blot aged 26 was arrested after he exhumed and fornicated with the dead body of ballet dancer. Apparently his necrophilic act was linked with sort of epilepsy which dropped him into a trance

state after the act was accomplished. At his trial, he showed no remorse for his actions and commented *"Every man to own taste. Mine is for corpses"*. Blot was sentenced to 2 years behind bars, but he escaped from prison and nothing further is known about him [Aggarwal,2011].

Criminalisation of Necrophilia: Debate from Moral or Ethical Legality to Social Legality

With respect to necrophilia, one can witness a divide as to the moral rightness or otherwise of necrophilia. Pro-necrophilians have put forward the argument that a corpse is neither a person nor does it have a moral status. A corpse also lacks the ability to consent or otherwise for which reason a corpse is nothing more than a thing Thus, sexual acts with a thing is not morally wrong, may be morally indifferent [McKearn S, 2008]. McKearn in her study has put forth her reasoning on ethical grounds where she does not find it ethically and morally wrong but she finds it legally, socially, or hygienically not correct and thus does not encourage it. She maintains that once a man dies, his remains lose individual identity. Necrophilia is wrong for people who think the 'body' to be a person [McKearn S, Supra]. To the contrary, people who are anti-necrophilia, rely upon society's respect for the dead and how they bodies deserve respect and therefore, condemn it [Tyler T. Ochoa & Christine Jones, 1997]. Of course, the dead body cannot express its displeasure which is why the laws on necrophilia do not primarily seek to protect the objective honour of a corpse, but rather the dignity and respect of the living for the ex-human life, and the respect that all lives deserve generally.

Over the years this question is no more limited to moral or ethical legality. The focus has shifted to the effects of necrophilia on society in order to check social legality. The perception is that the practice of necrophilia not only violates the ethical conduct of a society but also lead to an increase in criminal offences such as trespassing on burial grounds for stealing the body from burial grounds thereby disturbing their peace in addition to kidnapping, murder for lust and sexual fantasies by the necrophiles in addition to causing disrespect to society and the dead - who are incapacitated to give any consent and thus can be seen as disrespect to the body or human and even to the family of the dead. In fact, recent rise in instances of necrophiliac acts and its complex categories have exposed the challenges which are being faced by various global legal systems. To curtail necrophiliac acts, only a few countries, which believe in the privacy of the dead, have enhanced their laws to protect their dignity, and in other remaining countries, such acts are still being charged either for disturbing the peace of the dead or for defiling them or for hurting the sentiments of the relatives of the dead or for disturbing law and order of the society and the repercussions of which are that necrophiliacs do not get punished effectively due to the narrower legal juncture of the existing laws, and even if they are somehow punished, the punishment provided is inadequate whereas such practice is legal in countries like North Carolina, Kansas, Louisiana, Oklahoma. The legal position of necrophila in some of the countries has been discussed as under:

International Perspective

Since Necrophilia has become a global challenge, there arises a need to revamp both the outdated laws as well as the legal status of corpses, as both these issues are faced in prosecuting necrophilia in a majority of jurisdictions. While some countries have been able to overcome these challenges and have also enacted special laws or have made amendments to their existent laws to protect the dignity of the dead, some countries still however, remain completely silent about the concept of necrophilia in their laws and have been relying on old age outdated laws and therefore, face major challenges. At the same

time, there also exist countries which have legitimised having sexual intercourse with recently died persons, such as Louisiana, North Carolina, Oklahoma, and Kansas, henceforth making necrophilia a legally sanctioned act.

The United Kingdom and the South Africa remain the only two countries which have made specific laws to curtail the menace of necrophilia. In South Africa, Necrophilia is penalised under section 14 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act of 2007[1], and in United Kingdom it is punishable under section 70 of the Sexual Offences Act, of 2003.[2] The former country prohibits the commission of a sexual act with a corpse, while the latter, punishes any person who intentionally sexually penetrates, knowingly or recklessly, any part of his body into any part of dead person with an imprisonment of two years. In the United Kingdom, prior to 2003, having sexual intercourse with a corpse was although not penalised, but exposing a naked corpse in public was and which was also classified as a public nuisance.

As far as laws of New Zealand, Brazil, Canada and Sweden are concerned, they may not said to have explicitly prohibiting sexual intercourse with a corpse, but the same can be inferred from the statutory language of the provisions of their respective criminal codes. For instance, New Zealand Crimes Act of 1961 in its section 150 prescribes a punishment of up to two years, on any person who "*improperly or indecently interferes with or offers any indignity to any dead human body or human remains, whether buried or not*." This provision can be argued to be inclusive of necrophilia, as it also amounts to offering indignity. A much similar argument can be inferred from section 10 of chapter 16 of the Swedish Penal Code which although does not explicitly forbid sexual intercourse with a corpse but still can be invoked for necrophilia under the vast and inclusive ambit of the expression, '*abuse of a corpse or grave'*. The section prescribes a punishment of up to two years or fine on, *"A person who, without authorisation, moves, damages or treats with disrespect the corpse or ashes of a deceased person, opens a grave, or otherwise inflicts damage on or abuses a coffin, urn, grave or other resting place of the dead or a gravestone."* In Canada, Section 182 of chapter V of the Criminal Code of Canada[3] though does not having any sex-oriented word such as penetration but can nevertheless still be invoked against an act of necrophilia. It becomes pertinent to note that section 182 of the Criminal Code of Canada is very much similar to section 297 of the Indian Penal Code, which also uses expressions such as *'offer indignity to corpses*.' However, the only difference that exists between the two is that the former will be able to punish necrophilia irrespective of the fact that whether the

[1] *Criminal Law (Sexual Offences and Related Matters) Amendment Act,* 2007 *(Act No. 32 of 2007), s. 14. Sexual act with corpse. "A person who unlawfully and intentionally commits a sexual act with a human corpse, is guilty of the offence of committing a sexual act with a corpse".*

[2] *The Sexual Offenses Act,* 2003*, s. 70. Sexual penetration of a corpse*

"(1) A person commits an offence if—

(a) he intentionally performs an act of penetration with a part of his body or anything else,

(b) what is penetrated is a part of the body of a dead person,

(c) he knows that, or is reckless as to whether, that is what is penetrated, and

(d) the penetration is sexual.

(2) A person guilty of an offence under this section is liable—

(a) on summary conviction, to imprisonment for a term not exceeding 6 months or a fine not exceeding the statutory maximum or both;

(b) on conviction on indictment, to imprisonment for a term not exceeding 2 years."

[3] *The Criminal Code of Canada (R.S.C.,* 1985*, c. C-46) s. 182 provides that, "whoever …. behaves indecently or improperly or offers any indignity to the dead body or its remains is guilty of the offence and is liable to the punishment of imprisonment for a term not exceeding five years."*

person trespassed into a burial ground or not, while on the other hand the latter will be able to punish necrophilia only in cases where the person had trespassed into a burial ground. Also, the former prescribes a graver punishment of imprisonment which is 5 years, while the latter only provides for an imprisonment of only up to one year.

A protection for the dead can also be found in the French Laws, wherein Article 225-17 of the French Penal Code, which though does not explicitly punish sexual intercourse with a corpse, but still provides a punishment of imprisonment of two years and a fine of up to €30,000, for any '*violation of the physical integrity of a corpse by any means.*,

Further, in the United States of America, though necrophilia is not a crime under the Federal Laws, but around 40 out of 50 of its States have laws which define illegal actions perpetuated against corpses and punishes necrophilia in some or other form. Around 36 of these states do not make an explicit reference to necrophilia in their laws, but still these laws can be invoked against necrophilia, while the other remaining 4, which are Arizona, Georgia, Hawaii and Rhode Island makes a specific reference to necrophilia in their respective statutes. Out of the 36 states of the USA which does not make explicit reference to necrophilia, 14 states have made specific laws to tackle abuse committed against the corpse, while the other 22 have made laws prohibiting '*crime against nature*', all of which can definitely be invoked against cases of necrophilia. It becomes pertinent to note that these State laws not only differ in respect to their legal conjecture, but in their categorisation of crime as well which is often based on seriousness or graveness. For instance, both in Washington and in Nevada, necrophilia is penalized as a felony, while in Texas it is only considered a misdemeanour. In Minnesota it is equated to bestiality, and in New Mexico, Nebraska, Vermont, Kansas, Kentucky, Louisiana as well as North Carolina it is not even considered as a crime. Further, since Nevada considers it as a felony, it has prescribed the harshest of punishments for it.

Necrophilia: Indian Perspective

Rights of Dead Persons viz a viz Necrophilia

The question which arises in every jurisdiction while prosecuting the offence of Necrophilia is, that is it really immoral and wrong? Since, corpse is neither able to grant consent nor withhold it or deny it so therefore, can it be really said to be similar to having sexual intercourse with an inanimate object? In necrophilia, since the other person is always dead, so one can strongly assert that consent for the sexual intercourse was not granted or obtained, since the consent can be construed as agreement or permission or meeting of minds that something should happen or be done. Another primary question which arises with the prosecution of necrophiliac acts is that whether the ambit of right to dignity can be extended to dead persons? Do they have a right to dignity after death or is it only available to a living being? The fact that majority of laws which exist or which are framed, are made with living beings as their subjects cannot be overlooked, however, upon a closer look, we would find that there are some laws which have been made for the dead as well and which generally provide for a decent burial of dead bodies and in some cases, crime against corpses. The *Geneva Convention*, 1949 also facilitates the right to a decent burial and it states that, "*As far as the military consideration allow, such party to the conflict shall facilitate the steps taken to protect the killed".* Talking about India, the right to Right to a decent burial is recognized as a facet of the right to life guaranteed by Article 21 of the Indian Constitution and also stands sheltered under article 25 of the constitution wherein traditions and cultural aspects are inherent to the last rites of a person's dead body. Further, under Schedule VII of the constitution powers relating to 'Public Health

Care' and 'Burial and Cremation Grounds' falls under the State List. In fact, in addition to the constitutional provisions, the position of the dead can also be analysed in context of various judicial interpretations of Article 21 of the Constitution of India wherein apart from a living person, the right to life, which includes within its ambit, the right to dignity and fair treatment, has been extended to a dead body as well [*Paramanand Kataria, Advocate v. Union of India & Another*, (1995) 3 SCC 248; *S. Sethu Raja v. The Chief Secretary Government of Tamil Nadu* [(2007) (5) MLJ 404]. In fact, in the case of *Ashray Adhikar Abhiyan v. Union of India* [(2002) 2 SCC 27], while acknowledging the rights of homeless deceased/unclaimed dead persons to a decent burial/cremation, the Supreme Court examined the various steps taken by the Police and the local bodies for providing a decent burial to such persons in accordance with their religious beliefs. The Supreme Court held the State to be under an obligation of ensuring a decent burial to such dead persons. The Madras High Court also, in the case of *Amrutha v. The Commissioner* [W.P. No. 33762 of 2017] held that a dead person also has a right to privacy. The Law does not favour any form of disinterment and hence protects the sanctity of the buried dead bodies, in the spirit of public property. After a body is buried, it is not to be disturbed, unless the court orders to do so under exceptional circumstances. In *Vikash Chandra Guddu Baba v. The Union of India & Ors*, [(2008) SCC On Line Pat 905], there was an unceremonious dumping of dead bodies in Ganges River without even sewing and stitching the bodies after post-mortem conducted by the Patna Medical College. Observing that it was the State Government and the hospitals which shoulders the responsibility to ensure disposal of cadaver of the unknown, the Patna High Court held that disposal of the cadaver should be done in accordance with the religious belief of the deceased's faith, if known, and with fully human dignity.

Recently, a Division Bench of the Bombay High Court in the case of *Pradeep Gandhy v. State of Maharashtra*, [(2020) SCC on Line Bom] reiterated that the right to a decent burial goes hand in hand with the dignity of the individual which is an important facet of the right to life guaranteed under Article 21 of the Indian Constitution. In this matter, which pertained to the treatment of bodies of persons who were suspected/confirmed cases of COVID-19, the Court held that there was no reason to disentitle such persons from the facilities they would have otherwise had but for the COVID crisis. In the absence of any scientific evidence at this stage as to spread of COVID-19 infection from the cadaver of any suspected/confirmed COVID-19 infected individual to any living human beings, the court disposed off the writ petition and did not grant any relief to the Petioner against the permission given by the Bombay Municipal Corporation for burying the bodies of COVID-19 victims at Bandra West cemeteries.

Offence of Necrophilia and The Indian Penal Code, 1860 (IPC)

To strengthen the abovementioned rights extended to a dead person, there are several provisions in the Indian Penal Code (IPC) dealing with offences relating to corpses and their burial. For instance, Section 404 of the IPC provides for 'misappropriation of a dead person's property'; Section 499 which provides for the offence of defamation also punishes libel or slander against a dead person; similarly, Section 503 of the IPC that deals with criminal intimidation, also includes criminal intimidation of a person by threatening to injure the reputation of a dead person dear to them. It is pertinent to note here, both Sections, 499 and Section 503, by dealing with the cases of wrongs against the dead, are clear depiction of the fact that the right to dignity is not being limited to living beings but also being available to people after death. Further, Section 297 of the Indian Penal Code is the only law in India concerning

trespass of burial grounds. However, in prosecuting necrophiliac acts under the IPC, there are certain complexities which can be seen while attracting the liability under the existing provisions dealing with dead persons or their burial. In this context, it becomes relevant to carefully analyse Sections 297 and 377 of the IPC as under:

Necrophile Liability under Section 297 of the IPC.

As mentioned supra, Section 297 of the Indian Penal Code is the only law in India concerning trespass of burial grounds. It states that, *"whoever enters a religious place of sepulchre with the intention and knowledge of hurting religious feelings and sacraments of any person, commits the offense of 'trespass to burial grounds' and is liable to be punished with imprisonment for a term which may extend to one year, or with fine, or with both." Therefore,* for a person to be punished under the Section, he must have firstly trespassed into a burial ground, and secondly, he must have intended to offer indignity to the corpses, which may include having sexual intercourse with it by digging it out of the grave, or otherwise.

It becomes relevant to note here, an act will be punished under Section 297 of the Indian Penal Code, only for, "*Trespassing on Burial Places*" and thus all necrophilic acts will most likely be unable to be prosecuted under this provision because the primary requirement for attracting section 297 of the Indian Penal Code is that there must be trespassing into a burial ground by the accused which may not be possible in every case of necrophilia as there have been incidents where the accused was one who was employed in the vicinity of the corpses such as a guard of the graveyard, or morgue keepers who are more likely to be found practicing necrophilia, perhaps because of their loneliness, coupled with easy access to corpses and can never be said to have trespassed into burial grounds. The impracticality of the Section also becomes apparent as a corpse can be found in numerous other places apart from burial grounds such as morgues, crime scenes etc., thereby raising further questions on the applicability of Section 297 to necrophilic acts committed outside a burial ground. Further, even if it is somehow proved by the prosecution that a person had sexual intercourse with a corpse by trespassing into a burial ground, a meagre punishment of only one-year imprisonment or fine or both, can be imposed, which cannot be considered as a deterrent at all. Also, in cases where the accused first lures its victim and then kills it before committing the act, Section 297 may not be applicable at all.

Necrophile Liability under Section 377 of the IPC.

The failure of application of section 297 of the code to necrophilic acts opens up the room for a debate for application of section 377of the IPC to such acts. The primary issue which requires to be analysed while applying section 377 to the act, is whether necrophilia, which is a psychological disorder, qualifies to be prosecuted under Section 377 since the phraseology of Section 377 states that, *"Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine."*

The difficulty which arises in applying section 377 to cases of necrophilia is due to its language which mandates punishment only to "voluntary" engagement in carnal intercourse against the order of nature with any man, woman or animal. It becomes pertinent to note that though the condition of sexual intercourse being against the order of nature is prima facie satisfied in necrophilia cases, the voluntary aspect of the provision remains unsatisfied as a dead body can neither grant consent nor withhold it. Furthermore, the section requires the intercourse to have been committed with a man, woman or

animal, and a corpse cannot be considered as such as it is only a dead 'body'. The concept of necrophilia is further complicated by the complex status of corpses under law. A corpse though may not hold a legal or a real value despite being considered as a property of the living, but they are certainly believed to hold a high intrinsic emotional value for their relatives, which thus makes such acts as acts of vandalism rather than sexual attacks perpetuated against real persons. The application of section 297 or Section 377 or any law which has only living persons as it subjects may thus seem redundant in such cases and does not seem to be in consonance with the changing concept of crime in the society as well as the Judicial recognition of the rights of the dead persons.

Alarming Rise in Necrophilia Incidents in India

The rise in the cases of necrophilia in India has really indicated the need to have a separate stringent law for Necrophilia. In an effort to trace the incidents of necrophilia in India, one comes across an infamous incident which shook the entire country, commonly known as the *Nithari* village incident of 2006, wherein 19 girls went missing and investigations brought one Sh. Surendra Koli and Mohinder Singh Pandher under Police radar. The police on searching the duo's residence found several pornographic CDs and pictures of naked women and children from their premises, which was followed by conduction of further rigorous investigation and submission of a report to Court. However, due to lack of sufficient evidence available against Pandher, the Court had to acquit him and only his cook Koli, who confessed for kidnapping, raping, murdering and defiling bodies of his victims after their death, was prosecuted. It is pertinent to note that the Court though was able to prosecute Koli for murder under section 302, for rape under section 376, for hiding evidence and giving false information to protect the accused under section 201 and several other provisions of the Code, was not able to prosecute him for having sex with dead persons, as necrophilia was not a crime then in India. Further prosecution under section 297 of the Code could only have been attracted on fulfilment of the precondition of a person trespassing into a graveyard and then having sex by digging out graves, which clearly was not the case with Koli. As a consequence, thereof, both Mohinder Singh and his cook Surendar Kohli could not be prosecuted or punished for necrophilia in this case [*Surendra Koli v. State of UP*, (2011) 4 SCC 80]. Another incident of necrophilia was reported in Uttar Pradesh in the year 2015, wherein three men after raping a corpse of a woman who had recently succumbed during child delivery, left it twenty feet apart from the grave which they had dug out for obtaining the corpse.

In another incident of necrophilia which too surfaced in Uttar Pradesh, a deaf and mute man's failure to rape a woman due to her resistance, resulted him strangling her to death and then rape her corpse [TNN, UP, 2019]. On August 29, 2020, India again witnessed a necrophiliac instance wherein a homeless woman from Karnataka was murdered after hitting her with a cement block while she was sleeping on the pavement. In this case, the offender did not rape the victim prior to murdering but raped her after murdering her and also did not dispose of the victim's body [Singh, 2020].

Recently in the year 2020, a 30-year-old shopkeeper of Palghar, after killing a 32-year-old woman, had sex with her corpse [Singh Subhangi, 2020], and in Assam a 51-year-old man, who was released on parole in March end following a Supreme Court order to decongest jails due to the coronavirus disease (Covid-19) outbreak had sex with the dead body of 14-year-old minor girl who died in suspicious circumstances and was buried by her family members [Utpal Parashar, 2020]. All these incidents posed one substantial challenge for their prosecution, that is under

which provision these incidents should be tried *i.e.*, whether under section 297 of the code, which will most likely be defeated by the nonfulfillment of the presupposed condition as was in the *Nithari* case, or under Section 377 for unnatural sexual intercourse, all of which needs to be determined was dug out from her grave.

Despite several grim incidents which surfaced during the past decades as well as in recent times, India remains one such country that still does not have any specific law to tackle Necrophilia which remains excluded from the ambit of the criminal justice system of India. No doubt, in recent times, sexual ethics have undergone a paradigm shift. Homosexual behaviour, which was once viewed as obstinate, is now widely accepted across the globe including same sex marriages. In India also, the Supreme Court has pronounced various judgments with respect to Right to Life and Privacy of Trans-genders [*National legal Services Authority v. Union of India* (2014) 5 SCC 438] and homosexuals [*Navtej Singh Johar v. Union of India* (2018) SC 4321] and the Right to privacy as part of Right to Life and Personal liberty [*K.S. Puttaswamy v. Union of India (*2017) 10 SCC 1]. However, *Indian laws are pretty much silent about Necrophilia, and the crime committed by a person*. Despite of its being practiced much more frequently in our society, India *lacks well-structured law to either tackle the crime or to treat the perpetrator.*

Conclusion and Suggestions

From the ongoing discussion, it is quite manifest that in India, despite there being a sharp rise in necrophilia incidents, the term 'Necrophilia' neither find any express mention in the existing criminal statute nor does it constitute an independent criminal act inviting any statutory liability. Though, with a paradigm shift in sexual ethics in recent times, discourses on pornography, sadism, masochism, anal and oral sex, which were once considered as a taboo and were never discussed, are now being openly deliberated upon. Unfortunately, meaningful discourses on the rights of dead persons especially in context of sexual abuse of dead bodies and recognition of the offence of Necrophilia as next pitstop in the quest for justice are still missing**.** Therefore, the following suggestions are being offered for consideration in order to invoke the liability for the committing acts of Necrophilia and in order to fulfil the quest for justice:

(i) In order criminalize necrophilia in general, the amendments are required to be introduced in Section 297 and Section 377 of the Indian penal code or in the alternate, a separate provision dealing with the cases of necrophilia with a clear perspective of law along with stringent punishment be introduced;

(ii) With respect to the amendment to be proposed under section 297 the word *'trespass'* needs to be excluded from the purview of Section 297and an explanation to the effect of introducing criminal liability on the part of any person who under his/her duty in the morgue or the burial ground, engages in a such act is required to be introduced. This would ensure that no person, not even the guards of a burial ground, escape the due process of law. Further, enhancing the term of imprisonment stipulated in Section 297 in respect of such a crime would also serve as a deterrent;

(iii) There is an urgent need to amend the language of the section 377 by including the word *'corpse'* expressly in the section while making other amendments in the section in tune to the judgements pronounced by the apex court of India with respect to section 377 of the IPC.

(iv) In order to put in place a stringent and effective law to deal with necrophilia inspiration can be drawn from the international communities which have somewhat paved the path for the same.

Therefore, similar to the laws contained in other countries like New Zealand or South Africa, wherein improper or indecent interference with a corpse, whether buried or not, as well sexual act with a corpse, has been made punishable, similar provisions need to be introduced in India as well;

(v) Since Necrophilia is an ailment of sexual attraction to corpses, therefore, the persons who are found to be practising this activity need to be treated with utmost care which in turn calls for dedicated and separate sections in hospitals, rehabilitation centres and mental hospitals for dealing with such patients;

(vi) Seminars, conferences and awareness programs can be organised for initiating a discourse on this topic and for the purposes of imparting knowledge amongst people. This would even help identifying persons developing such symptoms; and,

(vii) Sensitisation and training programmes for Police personnel is the need of the hour. Such programmes will facilitate effective communication with people suffering from such disorders and appropriate action by the police personnel.

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CHILD WELFARE COMMITTEE: UNDER THREAT OF LAWYERS' INGRESS

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ABSTRACT

Child Welfare Committee (CWC) in India is the competent authority under the Juvenile Justice (Care and Protection of Children) Act 2015 (JJA) conferred with powers to make decisions regarding protection and rehabilitation of Children in Need of Care and Protection (CNCP) produced before them. This article looks at CNCP vis a vis their right to participation, speak, be heard and be represented before CWC while they seek protection and justice. It looks at understanding of the term 'representation' being limited to legal representation, resulting in the ingress of lawyers in a space that always relied on 'other professionals' from the social, psychological and other community-based spheres. The article critically examines the national level schemes and guidelines framed to provide legal aid for CNCPs, and argues how this attempt to legitimizes the role of lawyers to represent children before CWC is against the ideology and principles of JJA. The article emphasises on the need to strengthen the role of support persons, Guardian Ad Litem (GAL) and Probation Officer's not just in 'letter' but also in 'spirit'. Given that there are no written literature on this topic, this article has relied on court orders, government schemes and working experiences in the field for making various dissension.

KEY WORDS

Juvenile Justice, Access to Justice, Role of lawyers, Child Welfare Committee (CWC), Legal Aid, Child in Need of Care and Protection (CNCP), Guardian *Ad Litem* (GAL)

Introduction

In India, the *Juvenile Justice (Care and Protection of Children) Act* 2015 (herein referred to as *JJA*) was meant to safeguard and protect the interest of 'Children in Need of Care and Protection (CNCP) and 'Children in Conflict with the law' (CCL). *JJA* in its preamble, reiterated its commitment to the Indian Constitution, standards prescribed in the *United Nations Convention on the Rights of the Child* (UNCRC), *UN Standard Minimum Rules for the Administration of Juvenile Justice*, (1985) (better known as the Beijing Rules), UN Rules for the Protection of Juveniles Deprived of their Liberty (1990), *Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption* (1993), and other related international instruments.

This article, specifically looked at the category of CNCP (also referred to as a child in the article) within the *JJA*, and their right to participation and be represented as mentioned under various UN conventions. Under participation, it tried to understand the child's right to be heard and speak. Under 'representation', it discussed how increasingly, the term 'representation' was limited to being misconstrued as legal representation. This in a way, resulted in the ingress of lawyers in a space that always relied on social, psychological and community-based professionals for the rehabilitation of CNCP. The role of lawyers vis a vis CNCP was further endorsed by the National Legal Services Authority (NALSA) through a National level Scheme which the researcher discusses, is in contravention to the spirit of the *JJA*. Prescribing legal professionals to

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fulfill social obligations that require a specific skill set and knowledge is not a healthy practice and this is elaborated further in the article.

Who is CNCP? Section 2(12) of *JJA* defined a child as a person who has not completed eighteen years of age. Section 2(14) elaborated on the various categories which would deem a child to qualify as a CNCP. This included children who were victims or at high risk of being victims, abandoned, neglected, exploited, abused (physically, financially, mentally/emotionally). At a very young age, these children carry with them a burden that should not have been theirs in the first place. It included infants to teens to young adults with varying personalities from different social-cultural-religious and economic backgrounds living in challenging social situations.

What is participation and representation as per UN Conventions? Article 12 of UNCRC provided for minimum standards for child's right to express views and do so in judicial proceedings through a representative. It emphasised on due weightage to be accorded to views of the child, given the age and maturity; and for this purpose, to provide the child the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

The UN Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime (Guidelines 19, 21, 22, 24), UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (Article 6) and UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems (Principles 4, 11; Guideline 7) laid down guidelines on how child victims should receive access to appropriate support and assistance, including legal assistance, from their first moment of contact with the criminal justice process. In line with these instruments, the child victims of crime, who are asked to participate or give information in a criminal case are required to receive some form of legal advice or representation to ensure that they are able to participate in a meaningful way.

With respect to family court proceedings, courts often appoint lawyers or advocates to represent child's best interests, child's wishes, or both[1].

Attention is drawn here to how these guidelines and declarations stressed on 'legal assistance' for 'judicial proceedings' (like depositions, hearings, pre and post-trial proceedings) in 'criminal matters'. This point has been used across the article to debate on the role of lawyers in the context of representation of CNCP before the Child Welfare Committee (CWC).[2]

Further, to facilitate the right to be heard and represented, UN Model Law on Justice in Matters involving Child Victims and Witnesses of Crime published by UN Office on Drugs and Crime, Vienna, UN, New York 2009[3] (herein referred as UNML for child victims) provided for assistance to be given to a child victim or witness through an array of professionals, support person, guardian and guardian *ad litem* whose definitions are given below. (These guidelines have also found mention in some of the judgements passed in India)[4]

– "Professionals" means persons who, in the context of their work, are in contact with child victims and witnesses of crime or are responsible for addressing the needs of children in the justice system

[1] *https://archive.crin.org/en/guides/legal/legal-assistance-toolkit/legal-assistance-children.html*
[2] *ibid.*
[3] *https://www.unodc.org/documents/justice-and-prison-reform/Justice_in_matters...pdf*
[4] *ibid.*

and to whom the [Law] [Act] is applicable. This includes, but is not limited to, the following: child and victim advocates and support persons; child protection service practitioners; child welfare agency staff; prosecutors and defense lawyers; diplomatic and consular staff; domestic violence programme staff; magistrates and judges; court staff; law enforcement officials; probation officers; medical and mental health professionals; and social workers;

– 'Support person' means a specially trained person designated to assist a child throughout the justice process in order to prevent the risk of duress, revictimization or secondary victimization;

– 'Child's guardian' means a person who has been formally recognized under national law as responsible for looking after a child's interests when the parents of the child do not have parental responsibility over him or her or have died;

– 'Guardian *ad Litem* means a person appointed by the court to protect a child's interests in proceedings affecting his or her interests;

'*Ad litem*' in Latin meant 'for the suit,' and used to refer to guardians who play a specific role in various types of legal proceedings and is case specific.

While the practice of appointing Guardian *Ad Litem* (GAL) for children was well established and documented in America, different US States adopted different practises of appointing an attorney, GAL, a court-appointed special advocate (CASA) or a combination of the three, depending on the nature/context of case. The attorney was seen as client directed and supposed to represent a party in the case, a parent or the child and act as a legal advocate on behalf of the person he or she represented. GAL was seen as a person who worked in the 'best interest of the ward.' When the court heard a matter that involved cases related to child abuse or neglect, a divorce in which child custody was an issue, paternity cases, visitation and even contested inheritances, they would prefer appointing a GAL. CASA was appointed to assist the court by investigating a child's circumstances and providing recommendations on meeting the child's needs. In some cases, a CASA could serve as the child's GAL. Those appointed as GALs and CASA were not necessarily an attorney or someone having a law background. Education and training requirements to qualify to become GALs were different in the different states in US.

It may be noted, how the definitions stated in UNML acknowledged different professionals and their training of different skill sets in the field of psychology, counselling, social work, law, education etc. and emphasised on their role *vis a vis* a child. Professionals like support person, guardian, guardian *ad litem*, CASA were person/individual who may or may not have a law degree. It was just the 'attorney' who came with an educational background of law.

In the Context of India

India too recognised support persons, guardians and GAL. Given the lack of documentation, the researcher relied on judicial orders and experiences of working in the field to write on the same.

Pre-independence, the practice of appointment of GAL in India was quoted in several judgments as old as 1923[5] and 1926[6] which was based on Order 32, Rule 4 of the *Civil Procedure Code*, 1908 stated below.

***Order 32, Rule 4 of Civil Procedure Code*, 1908** provided for a guardian to be appointed for a minor by the competent authority, and

[5] *Jinnat Ali and Others v. Kailas Chandra Chowdhury and Another, Calcutta High Court,* 1923.
[6] *Rasik Moral v. Kumar Jyotish Kantha Roy, Calcutta High Court,* 1926.

that no person other than such guardian shall act as the next friend of the minor or be appointed his guardian for the suit unless the court considers otherwise.

Rule 4, Sub-rule (1) stated 'Any person who is of sound mind and has attained majority may act as next friend of a minor or as guardian for the suit.'

Rule 4, Sub-rule (2) stated 'No person other than such guardian shall act as the next friend of the minor or be appointed his guardian for the suit unless the court considers, for reasons to be recorded, that it is for the minor's welfare that another person be permitted to act or be appointed, as the case may be.'

Post-independence, the High Court of Delhi, formulated 'Guidelines[7] for recording of evidence of vulnerable witnesses in criminal matters' based on UNML for Child Victims. These guidelines found mention in orders of *Arsheeran Bahmeech v. State Government of NCT of Delhi* 2015 and *Smt. Lavanya Anirudh Verma v. State of NCT of Delhi*, 2017. It defined a support person and provided clarity on the process of appointment of GAL, duties of GAL and legal assistance *vis a vis* 'vulnerable witness in criminal matters'. It defined—

- Support Person – means and includes guardian *ad litem*, legal aid lawyer, facilitators, interpreters, translators and any other person appointed by court or any other person appointed by the court to provide support, accompany and assist the vulnerable witness to testify or attend judicial proceedings.
- Appointment of Guardian *ad litem* (GAL) – The Court may appoint any person as guardian *ad litem* as per law to a witness who is a victim of, or a witness to a crime having regard to his best interests after considering the background of the guardian *ad litem* and his familiarity with the judicial process, social service programs, and child development, giving preference to the parents of the child, if qualified. The guardian *ad litem* may be a member of bar/practicing advocate, except a person who is a witness in any proceeding involving the child.
- Duties of guardian *ad litem* appointed by court were to:
  - (i) attend all depositions, hearings, and trial proceedings in which a vulnerable witness participated.
  - (ii) make recommendations to court concerning welfare of the vulnerable witness keeping in view the needs of the child and observing the impact of proceedings on the child.
  - (iii) explain in a language understandable to the vulnerable witness, all legal proceedings, including police investigations, in which the child is involved;
  - (iv) assist the vulnerable witness and his family in coping with emotional effects of crime and subsequent criminal or non-criminal proceedings in which the child is involved;
  - (v) remain with the vulnerable witness while the vulnerable witness waits to testify;
- Legal Assistance – A vulnerable witness may be provided with legal assistance by the court, if the court considers the assignment of a lawyer to be in the best interests of the child, throughout the justice process in the following instances:
  - (a) at the request of the support person, if one has been designated;
  - (b) pursuant to an order of the court on its own motion."

[7] *https://delhicourts.nic.in/ejournals/Vulnerable_Witness_Guidelines.pdf*

The definitions/provisions for appointment of support persons and guardian have also been stated in *JJA*, *JJ Rules*[8] and *Protection of Children from Sexual Offences (POCSO) Act and Rules*:

– Section 2(31) *JJA* 2015 defined "guardian" in relation to a child, as his natural guardian or any other person having, in the opinion of the Committee or, as the case may be, the Board, the actual charge of the child, and recognised by the Committee or, as the case may be, the Board as a guardian in the course of proceedings;

– Rule 54(14) *JJ Rules*, 2016 provided for appointment of support persons. It stated that Legal Services Authority (LSA) was assigned (may) to provide a support person or para legal volunteer for pre-trial counselling and to accompany the child for recording of the statement who shall also familiarize the child with the Court and Court environment in advance, and where the child is found to have been disturbed by the experience of coming to the Court, orders for video-conferencing may be passed by the Court, on an application moved by the support person or para-legal volunteer or by LSA, on behalf of the child.

– Section 39 *POCSO Act* provided for the State government to (shall) prepare guidelines for use of non-governmental organizations, professionals and experts or other persons having special knowledge to be associated at the pre-trial and trial stage to assist the child.

– Rule 2(1)(f) *POCSO*, 2020 defined a "support person" as a person assigned by CWC, in accordance with sub-rule (7) of rule 4, to render assistance to the child through the process of investigation and trial, or any other person assisting the child in the pre-trial or trial process in respect of an offence under the Act;

POCSO Rules nominated CWC[9] to appoint support persons in the year 2012, while *JJ Rules* nominated Legal Services Authority[10] (LSA) to do so in the year 2016. Working experience suggests that appointment of support persons by CWC and LSA were rare and practically non-existent in majority of the districts across the country. Same seem to be the status regarding appointment of GAL. Reason for not appointing support person or GAL could have various reasons which needs further study.

In India, the role of GAL and CASA can be identified with the role of Probation Officer (PO) as envisaged across various sections in the *JJA* and *JJ Rules*. The *JJA* expands the role of PO to not just work with Children in Conflict with the law, but also with CNCP. The PO is supposed to prepare the Social Investigation Report and inform, orient and mentor the Child.

In other words, support persons, PO, GAL have been entrusted the role of 'representing' CNCP as per the letter of the law.

CWC, the Competent Authority for CNCP

Where are CNCP's processed? *JJA* provided for the constitution of a competent authority called Child Welfare Committee (CWC) at every district in every State, exclusively to address the issues and problems of CNCP. Any parents, guardians, public spirited individual, organization could seek protection and justice on behalf of their child (CNCP) or the child himself or herself could approach CWC.[10]

CWC comprised of a Chairperson, and four members of whom at least one was to be a woman and another, an expert on matters

[8] *Juvenile Justice (Care and Protection of Children) Model Rules,* 2016 *(referred to as JJ Rules in the article).*
[9] *ibid.*
[10] *ibid.*

concerning children. *JJA*, further specified educational qualification and work experience required to be eligible for appointment on CWC.[11] A degree in law was not stated as an essential requirement to qualify as a member of CWC. *JJA* acknowledged working with CNCPs towards their care, protection, rehabilitation and reintegration required knowledge (social and legal), skill and years of experience of working with children. These experience generally evolve from working in the social sector. Besides this, many more[12] safeguards were put in place to ensure that individuals with repute, distinction and no criminal record were appointed as members on CWC as the post called for credibility, commitment and accountability. This criteria of qualification of members was evolved keeping in mind the non-adversarial role it played.

Orders passed by CWC were within the ambit of providing care, protection and rehabilitation of the child, including directions relating to immediate shelter and services such as medical attention, psychiatric and psychological support including need-based counselling, occupational therapy or behaviour modification therapy, skill training, legal aid, educational services, and other developmental activities, as required, as well as follow-up and coordination with the District Child Protection Unit or State Government and other agencies with the ultimate aim of social reintegration.[13]

When the child was bought or came before the CWC, the CWC was supposed to interact with the child and direct the Probation Officer (PO)/Social worker/Case worker to prepare a Social Investigation Report (SIR) based on which the CWC could decide in consultation with the child on what could be the best possible rehabilitation/reintegration plan to be adopted. SIR involved activities like speaking to the child, their significant others, home visits to understand their living conditions and background, and if the case required, to also visit institutions like school, college, or work space. CWC was expected to coordinate and network with social workers, POs, civil society organizations, health professionals, police and many other agencies/systems and individuals in order to achieve the aim of rehabilitation and re-integration of a child back into society. As the saying goes, 'it takes a village to raise a child'.

Several provisions in *JJA* and *JJ Rules* made mention of the kind of infrastructure, sitting arrangement for CWC and children, to ensure that the privacy of children was respected; surroundings were "Child friendly" and made the child feel safe to speak.

These provisions mentioned in the *JJA* and *JJ Rules* was to facilitate the spirit of the 'child's right to participate' and ensure that the child was at the centre of focus and there were spaces for the child to interact with different personnel at every step of the process directly. The thought behind this was to facilitate direct interaction which would help build trust. As trust is the only emotion which could make the child feel safe, wanted and protected.

The Ingress of Lawyers in the JJ System

The above mentioned roles and functions of CWC, make it amply clear that CWC in no way deals with criminal matters. They are not a 'court' or an 'adversarial' body. They can be called a quasi-judicial body whose orders have legal recognition. This is why *JJA*, in its wisdom, made no mention of legal representation of children before the CWC.

However, this silence on the role of lawyers, was misconstrued to develop spaces for lawyers to function within CWC. Working experience has shown that children rescued

[11] *Section 27(4) of the JJA.*
[12] *Section 27(7) of the JJA.*
[13] *Section 37 of JJA and Rule 17 of the JJ Model Rules.*

by NGOs, civil society organizations or police from exploitative situations like child labor, trafficking, abuse, would get represented by lawyers. Many of them hired by pimps, employers, or the very same exploiters. This was done under the camouflage of 'protecting' children from the system, while in reality it was done to protect the interest of the adults who would get implicated into a criminal case if proven that the child was exploited by CWC.

Lawyers were often seen to soliciting parents/ guardians to seek their assistance 'to protect' children when 'produced' before the CWC by misleading them to believe that CWC was a court/adversarial system and not a 'protector.' They use legal jargons within CWC hearings, which intimidate children, parents and at times the CWC also.

The mental frame of any child/parent/ guardian sitting at the CWC premises is that of anxiety and fear as the system has no mechanism like a 'Help Desk' or 'May I help you' desk to educate, counsel or inform them of the *JJA* procedures as they await their turn. To add to their anxiety, they often hear terms like children being 'caught' (rather than 'rescued') by police; 'produced' before the 'court' (rather than 'bought' before CWC), 'Sir/Madam/Magistrate' will pass an 'order'. The presence of police and lawyers in the premises further add on to their stress.

In this context, given the frame of mind, parents/guardians would jump at any offer made by any individual to free their children, who they feel have been trapped/caught by police or authorities. In many of the cases, it is the institution staff or lawyers who 'offer' to help at a 'cost'.[14] This leads to further exploitation of the family and children, not only at an emotional level, but also at a financial level. It is not uncommon to hear stories of how parents had to sell their land, or take a loan, or mortgage property/assets which could have been their only source of livelihood income, to pay the lawyers or institution staff. Here it must be understood that majority of CNCP hail from low socio-economic backgrounds and getting caught in the system can be an expensive affair for them.

In several informal spaces of interaction with Probation officers/Social workers, it was shared on how they were approached by lawyers with the 'request' to make 'positive' SIR which could help lawyers build a strong case before the CWC to 'release' their child back to the parent. Similarly we have heard several parents complain of how they were asked for money to prepare 'positive' SIR's by staff.

Practices of lawyers misleading parents seeking divorce to approach CWC for custodial and visiting rights of their child/ children are also on the rise. Civil society organizations/NGO's would vouch for how the ingress of lawyers has led to secondary victimization of the children.

Legal Aid Clinics for CWC: Conflicting Schemes Overwriting Provisions in the Law

Section 12(c) of Legal Services Authorities Act, 1987 stated that 'A child who has to file or defend a case is entitled to legal services. It further defined a 'Case' to be a suit or any proceedings before a Court.

This definition does not apply for a child produced before a CWC because CWC does not have suits or conducts proceedings against a child. It hears cases 'on behalf of CNCP'. So the question of defending the child against CWC who is working in the child's best interest does not arise.

This is also evident from the orders of Supreme Court (SC) of India in *Sampurna Behrua v. Union of India (UoI) & Ors.* W.P. (C) No. 473/2005 where National Legal Services Authority (NALSA) was asked to put in place Legal Aid Centers attached to Juvenile Justice

[14] *https://zeenews.india.com/news/videos/dna/dna-analysis-of-mumbais-juvenile-home-sting-operation_1880315.html*

Board(s) (JJB) only in the State capitals where there was high pendency. The case of *Sampurna Behrua v. UoI*, looked at the effective implementation of *JJA* in totality, and was not limited to CCL's/JJB alone. So, when SC ordered for legal aid centers to be attached to JJB's only, it indirectly stated that CNCP's did not require to be represented by lawyers in CWC. The SC order, termed it as Legal Aid Center keeping in mind the 'child' context, However NALSA continued to call it Legal Aid Clinics as is used in the adult system.

On the lines of SC order, NALSA issued a 19-point guidelines[15] stating specific roles, procedures and decorum to be followed by legal aid lawyers while engaging with CCLs within JJB in the year 2011.

However, in 2015, NALSA framed the 'Child Friendly Legal Services to Children and their Protection) Scheme[16]'. This scheme indirectly nominated State Legal Services Authorities (SLSA) as the official body to monitor, evaluate and supervise working of the Women and Child Development Department (WCD Dept); and in many places, took over the roles which ideally had to be done by the WCD Dept.

The objectives of the scheme were stated as—

- to ensure legal representation to the CNCP and CCL at all levels.
- to strengthen legal services, institutional care, counselling and support services at the National, State, District and Taluka levels
- to ensure that mandatory authorities and institutions, like JJB, CWCs, other welfare committees, observation and shelter homes, psychiatric hospital or psychiatric nursing home, commissions, boards, office of POs etc. under various child friendly legislations have been set up.
- To undertake research and documentation to study the various schemes, laws etc. to find out the gaps and then to make suggestions to the appropriate authorities

Roles of SLSA were mentioned as 'Shall'—

- ensure that JJB and CWC is established in each district separate from the regular court and where no such board/ committee has been set up, SLSA will take up the matter on urgent basis with State Government so that JJB is established in every district.
- ensure Special Juvenile Police Unit has been established and contact details of Juvenile Welfare Officers are prominently displayed in every police station.
- ensure child protection Unit has been established.
- ensure constitution of State child rights Commission under the Commission for Protection of child rights Act.
- take up matters with State for appointment of Child marriage prohibition officer where they have not been appointed.
- keep an updated record of how many institutions *i.e.* children's home, shelter homes and observation homes for CNCP or CCL are there in the State.
- take the matter regarding unregistered institutions with the state government.
- draw an action plan so for elimination of Child Labour from the society.
- constitute a committee namely Observation and Children's Home Committee for every district in the State comprising of District Secretary as chairperson, one panel lawyer and probation officer as members and also see to it that these homes should not look like

[15] *NALSA guidelines of reference No F.No.L/13/2011/NALSA, dated: 12th September, 2011.*

[16] *https://nalsa.gov.in/actsrules/preventive-strategic-legal-services-schemes/nalsa-child-friendly-legal-services-to-children-and-their-protection-scheme-2015*

a jail or lock up and have a good quality of care, facilities, sanitation, hygiene, clothing, bedding, meals, diet, medical and mental health care.

The scheme, seemed oblivious to the limitations of the administrative structure of SLSA and DLSA across the country. SLSA was dependent on DLSA to assist them for all district level activities. DLSA generally comprised of one or two judicial officers and three to four clerical staff. They in turn rely on networking with various organizations, legal aid lawyers or para legal volunteers for organizing their activities. Working experience suggests that SLSA does not have mechanisms to monitor the working of they own empaneled legal aid lawyers at JJB's which is considered to be their core activity. Excluding Delhi, all empaneled legal aid lawyers in JJB across the country have thriving private practice in the very same JJB that have been empaneled. As a result of which the quality of legal aid provided to the miniscule children that get this service is poor. So, when a system that has not been able to monitor the core role assigned to it, develops a scheme to monitor the implementation of a larger Act, there is an irony to it.

Besides, monitoring of the implementation of an Act cannot be stated under a Scheme. The *JJA* provides for the State Commission for Protection of Child Rights, District Child Protection Units, District Women and Child Development Department, civil society organization, inspections committee in States to monitor the working and implementation of the *JJA* and *POCSO*. If these systems do not exist or their effectiveness is questionable, the solution may not be in reassigning their roles to DLSA of SLSA.

The justification for expansion of the role of SLSA was cited as orders/directions given in certain cases by HC of respective states in the scheme. For example, SLSA was assigned the role to monitor whether Commission for Protection of Child Rights was set up in each State, based on directions given in 'Exploitation of children in orphanages in the *State of Tamil Nadu v. Union of India*.

However, it failed to understand that, certain judicial orders get passed under extra ordinary conditions where a quick fix may be required and so many systems (who may not be directly associated with the said cause), get activated for interim relief. These are exceptions and cannot be made norms. For example, in a PIL[17] *Bombay HC on its own Motion v. the State of Maharashtra and others* (2017), appointed the Secretary of Maharashtra State Legal Services Authority as the Nodal Officer for the city of Mumbai and the Member Secretaries of the District legal Services Committees as Nodal Officers for the districts to receive complaints regarding poor conditions of the road as an interim measure. In the final order, HC in its wisdom stated that "Considering the multifarious duties assigned to the Secretaries under the said Act of 1987, we are of the view that Secretaries cannot be burdened with any other responsibilities". Thus withdrew the interim order. One can well image, what would happen if this would have to become a norm.

The scheme seemed oblivious to the working reality of traffickers and employers, who hire lawyers to save their own skin in CWC and in its objectives states "…. *In Mumbai, 12-year-old 'y' is the victim of sexual abuse…. In Chennai, 13-year-old 'S' was rescued from a factory who found to be trafficked. Everyday children such as these come in contact with the justice system, where formal and informal justice providers make decisions that have the potential to influence the future course of their lives. What rights do these children have when they come in contact with the law? are they entitled to any type of legal assistance? ... The*

[17] *Public Interest Litigation No. 71 of* 2013 *https://www.roadsafetynetwork.in/wp-content/uploads/2019/01/Bombay-high-court-suo-moto-PIL-71-of-2013-potholed-roads-final-judgment.pdf*

purpose of this scheme is to suggest a conceptual and practical framework for addressing these question, with the ultimate goal to provide children with meaningful, effective, affordable and age-appropriate legal assistance 'on the ground'." The manner in which the objective has been written, leaves scope to mislead people to believe that child gets 'caught' rather than are 'rescued' by the law.

Also, as stated earlier in the article, working reality showed how lawyers try their best to prove that rescued children are not child laborer's or trafficked or/and some go to the extent to prove that the individual rescued, were not children at all. Lawyers get hired by employers and pimps to get children released in the custody of their parents/guardians to safeguard their own interest. If proven at CWC, that the children were misused and exploited, the exploiters would have to face a criminal case which would get registered against them.

Besides, it was not clear if CWC was referred to as the 'informal justice provider' in the objectives of the scheme mentioned above. If yes, then this contradicts *JJA* which positioned CWC as a 'formal', 'legitimate' system for children. Justice need not always mean legal, it could also refer to social justice. This scheme found no mention of DLSA to appoint 'support persons' or GAL for victims as mandated in *POCSO*.

Instead, the schemed focused on expanding the role of lawyers through Legal Aid Clinics (LAC)[18] to CNCP's which the researcher argues is about overstepping provisions stated in *JJA* and SC order of Sampurna Behrua. The scheme further stated, '*the aim of LAC's was to provide inexpensive local machinery for rendering legal services of basic nature like legal advice, drafting of petitions, notices, replies, applications and other documents of legal importance and also for resolving the disputes of the local people by making the parties to see reason and thereby preventing the disputes reaching courts.*'

In the *JJA*, within the CWC, there are no 'petitions' filed. However, the CWC, in certain cases, does have to issue notices, replies, applications and other documents of legal importance to various stakeholders or individuals. At times like this, it is the CWC (and not children) who require lawyers to help them with drafting of these documents. Understanding this reality, the judgement of *Sampurna Behrua v. Union of India* on the 9th February 2018 by Hon'ble Justice Madan B. Lokur, read *"However, it might be noted that it is not always necessary for the State Legal Services Authority to appoint legal aid lawyers to assist the CWC – this would depend on a case-to-case basis and only as an Amicus Curiae for the purpose of advising the CWC on a question of law, should the need arise."*

This judgement clearly spells out that LSA can appoint lawyers whose role would be limited to "assisting" CWC on a question of law.

The role of '*for resolving the disputes of the local people by making the parties to see reason and thereby preventing the disputes reaching courts*', cannot be applicable to the JJS as that would question the very existence of JJB and CWC.

Other roles of LAC were—

- *Preparing applications for job card under the MGNREGA Scheme.* This clearly is not applicable to CWC
- *Liaison with the government offices and public authorities, helping the common people who come to the clinic for solving their problems with the officials, authorities and other institutions also shall form part of the legal services in the legal aid clinic.* Liaoning with various government offices and public authorities can be done by PO,

[18] *National Legal Services Authority (Legal Aid Clinics) Scheme,* 2010 *accessed from https://legalservices.maharashtra.gov.in/Site/Upload/Pdf/scheme-clinics.pdf*

Social worker, Case worker and does not necessarily require a person with legal knowledge to do so.

– *Legal aid clinic shall work like a single-window facility for helping the disadvantaged people to solve their problems where the operation of law comes into picture.* Many of these children who were victims, needed to file cases against their perpetuator in the adult Criminal Justice court. It is here that CWC need help of legal aid to file and pursue cases.

These kinds of lapses can be attributed to the enthusiasm to provide services. However, such enthusiasm leads to concepts/machinery devised to function in an adult system, to get picked and placed in the context of a 'Children's system' without any modification of any sort. This kind of practice could prove detrimental for the system in the long run.

Need of Lawyers

JJA provided for any person aggrieved by the order made by CWC to go on appeal[19] to the Children's Court[20] or the District Magistrate, as the case may be. Ideally, it is here that the child/parent needs a lawyer to represent them in the larger adult court. Unfortunately, lawyers who practice in higher courts charge more. So only those who can afford, go for appeal. There are no official data in the country to state how many CWC cases have gone on appeal so far.

CWC members are often heard asking questions in conferences/training programs on positions they need to hold when a lawyer represents a CNCP in CWC. They generally get advised to 'hear out' lawyers and then finally take decisions as per the 'best interest of the child'.

Different courts follow different procedures for cases which go on appeal from CWC. This depends on the whether the judicial officer of the higher court view CWC as a formal or informal system. Judicial officers who consider CWC as a formal quasi-judicial body, call for case related documents, and assess the orders and reasoning behind the orders passed by CWC, before coming to their own judgment. Those officers, who consider CWC as an 'informal' entity, do not call for documents from CWC or look at SIRs to review or seek clarification on the ground for "why" the CWC felt the need to pass the said order. At such times, the appeal gets heard on the basis of the lawyer's capacity to argue the case rather than the social reality that enveloped the child which is paramount in JJS.

Some judicial officers, call for CWC to be present before them and ask for explanation for the orders passed by them. Three reasons could be stated for why this practices may not be healthy. One, in the appeal process, it is not standard procedure for higher courts to call for judicial officers of lower court to come to their court room and explain why they passed an order. Second, CWC are not equipped and do not have the support system or legal assistance to help them prepare to be present before the higher court. Lastly, getting called to give an explanation before the higher courts is viewed as CWC made to stand on trial for taking a decisions in the 'best interest of the child'. It is at times like this that the CWCs require lawyers, but do not get assistance of the same through official sources.

In several States, print media reported the setting up of LAC's for Child Welfare Committees[21] by Legal Services Authorities.

[19] *Section 101(1) of JJA.*

[20] *Section 2(20) of the JJA ""Children's Court'' means a court established under the Commissions for Protection of Child Rights Act,* 2005 *or a Special Court under the Protection of Children from Sexual Offences Act,* 2012*, wherever existing and where such courts have not been designated, the Court of Sessions having jurisdiction to try offences under the Act."*

[21] *http://cgslsa.gov.in/Statistical_Information/Legal_Aid_Clinic_In_CWC.pdf; Maharashtra set up its 1st legal aid clinic for CWC on 4th April 2021.*

Given no specific written directions for LAC regarding the role to play within CWC, these initiative remained a photo shoot event which died a natural death or remained a document on paper.

Charter of Duties for Legal Services Advocates at CWC

To add to the 'Child Friendly Legal Services to Children and their Protection) Scheme' of NALSA, the Delhi State Legal Services Authority (DSLSA), issued a 'Charter of duties for legal services advocates[22] at CWC[23]'. They appointed State paid panel of lawyers in CWC.[24] The concern raised is on how, the Charter too has tried to bull doze the system to accept the role of lawyers. The role of lawyers, as stated in the charter has been stated below along with arguments on why these stated roles are deemed against the spirit and letter of *JJA*. The charter states, lawyers have to—

- *Deal with cases pertaining to CNCP as per JJA 2000.*
- *File/move applications on behalf of CNCP before the Committee (for their restoration)*
- *Build a rapport with the child by taking a brief meeting before he would be produced before CWC so that the child is comfortable before the Committee.*
- *Inform/counsel CNCP/Parents about Child Rights and provisions of law governing them before the child is produced before CWC.*
- *If child is found to be of foreign country take legal recourse under Rule 79(6) of JJA 2000 for their restoration.*
- *Counselling child/Parents/Guardians to assist in getting Victim Compensation (VC).*
- *Inform/guide child/parents about VC Scheme and their legal rights to receive compensation from DSLSA for relief and rehabilitation.*
- *Supervise and regular follow up of child rehabilitated to family.*
- *Provide proper care and protection along with Counselling to child in Children Home and ensure medical needs of CNCP is taken care of.*

Dissension

The Charter wrote a whole new procedure, not contemplated in *JJA* and *Rules*. *JJA* and Rules does not contemplate procedure of "filing/moving of applications" by lawyers before CWC on behalf of CNCP for restoration because the CWC is mandated to do so with or without an application. The role of "informing" CNCP/parents about child rights and provisions of law, counseling parents/ guardians, writing to embassy, networking and coordinating with systems/individuals/legal Services Authority for relief, rehabilitation, compensation does not necessarily require legal expertise and has traditionally been done by Probation officers/CWC/NGOs under the direction of the CWC. Appointing "advocates[25]" for these activities, could send a subtle message that these activities require "legal" interventions which can be misleading. The concern also stems from the background of decline in appointments of PO's (with social work degrees) trained with social and legal skills to work towards the rehabilitation and reintegration of children. Also the Integrated Child Protection Scheme (ICPS)[26] has renamed the post of PO as Legal cum PO and individuals with law degrees are appointed to serve the

[22] *In India, advocates and lawyers are used synonym.*
[23] *http://dslsa.org/wp-content/uploads/2015/12/Charter-of-Duties-of-LSA-at-CWC.pdf*
[24] *http://dslsa.org/wp-content/uploads/2015/08/21.04.2015-Notice-regarding-Empanelment-for-Advocates-in-JJBsCWCs-and-All-India-Legal-Aid-Cell-on-Child-Rights.pdf*
[25] *Advocates and lawyers are used in synonym.*
[26] *The Integrated Child Protection Scheme (ICPS) is a centrally sponsored scheme aimed at building a protective environment for children in difficult circumstances, as well as other vulnerable children, through Government-Civil Society Partnership.*

purpose of rehabilitation. Rehabilitation of children cannot be seen from a legal lens. Expecting LAC to perform activities related to supervision, follow up, ensure care and protection in the children's home seem far fetched in expansion of roles being assigned.

Finally, the Charter stated that lawyers would—

– *check the violations, breach and omissions of any provisions of the Juvenile Justice Act and such other laws while CWC during counselling as well as during restoration process.*

Dissension

Would lawyers be assigned the task to check violations, breaches and omissions of the law by a judge presiding in an adult criminal court or a tribunal or a commission? If no, then it is unfair to do the same in the JJS. These roles create an environment of mistrust between CWC and children. It also creates a non-conducive environment for CWC to work in. The scheme seemed to be built on the assumption that 'CWC are not capable enough'. Even if the same is true, the question being raised here is "is lawyers the answer to this problem'? What could be the long term solution to deal with 'inefficiency' of members on CWC ?

Views in Favor of Legal Aid Representation in CWC: There are voices in the field who do support 'legal' representation of children in CWC. Some of the reasoning provided by them and its dissention are stated below.—

– *'There are no uniform standards for decisions that the CWC makes. Children before CWC are left on their own often without resources or possibility to participate in the decision making process. This clearly defies the right to participation and dynamic expression in article 12 of the CRC*[27]*'.* There cannot be 'uniform standards' for making decisions as every case before CWC are unique. Incompetence of CWC members or failure of State to appoint competent CWC members cannot be reason for developing a parallel or intermediary system for protection of children. Instead, energies need to be put in making CWC competent.

– *'CWC not being sensitive enough. No child-friendly mechanisms to ensure views of children are taken into account/'heard' during proceedings. Due weight not given to those views. Participation of children in their own cases is quasi absent. No one represent children before CWC or to convey their views to the CWC members'.* If the State felt that CWC was not sensitive and do not listen to the voices of children, then is the assumption that lawyers 'hear' children? Working experience suggest that lawyers listen to adults who hire and pay them. Children are tutored/advised by lawyers on 'responses' to be given to CWC when asked. Appointing lawyers may not be the answer to 'right to participation' or to 'not sensitive' CWC. Systems have provided for support persons, probation officers, social workers, case workers, NGOs to represent a child before CWC. A range of personnel under the Integrated Child Protection Scheme (ICPS) have been appointed to further augment the processes. There is a need to strengthen these systems. Only if each system does what it is supposed to do, will there be an effective and robust JJ system.

– *CWC members are empowered with status of a first class judicial magistrate by JJA. Hence CWC sitting is equivalent to a quasi-judicial hearing. CWC orders can be challenged in higher court of law. So this is a legal case and hence lawyers need to be present.* The intent behind empowering CWC members with the position of first-class judicial members was for systems/

[27] *Juvenile Justice in Karnataka: A Case for Systemic Change, June 2012 http://www.concernedforworking children.org/wp-content/uploads/JJ_ArguingforChange_Jun2012.pdf accessed on 20th January 2021.*

authorities like the police, government officials to take CWC orders seriously. This position does not empower them to address criminal cases or pass orders that are 'adversarial' in nature. There are no two parties involved, like 'child' V/s somebody/State as in criminal cases. Procedure for appeal is laid down under every system (be it judicial or administrative) to provide space for those not satisfied or who feel justice was not served. Finally, if *JJA* wanted CWC to function as a "court," they would have mandated the constitution of CWC to have judicial officer as the presiding officer like in the JJB. Hence the spirit of the *JJA* needs to be respected.

Conclusion

CWC, designated as competent authority, and conferred with powers to make decisions regarding protection and rehabilitation of CNCP, is a formal, legitimate system as per *JJA*. Orders passed by CWC are directions for social rehabilitation and have legal recognition. Appointing CWC to look after the best interest of the child and then appointing lawyers to represent children with the assumption that CWC may not look into the best interest of the child are contradictory processes.

A child has a right to be 'represented,' and 'participate.' Representation does not always mean legal representation. There is a world of difference between having the child speak to CWC directly, or having the child's views represented by support person's, guardian *ad litem*, probation officer etc, and having the child represented by a lawyer.

Schemes like the 'Child Friendly Legal Services to Children and their Protection) Scheme 2015', 'National Legal Services Authority (Legal Aid Clinics) Scheme 2010', 'Charter of duty of lawyers in CWC' are not in tandem with the ideology and principles of *JJA* 2015, Legal Services Authorities Act 1987 and the SC judgment in the case of *Sampurna Behrua v. Union of India* of 2011. No schemes or programs can overwrite legislations.

Ideally, every schemes and policy for children should be framed based on evaluative research studies and after due consultative processes with stake holders across different professionals from different states. National schemes should acknowledge social reality of different states and districts.

When authorities promote and legitimizes ingress of lawyers into CWC, and delegate legal professionals with roles that need skills and training of professionals like probation officers, case workers, social workers, counsellors, civil society organizations to lawyers, it creates an environment of unhealthy competition.

NALSA should concentrate on strengthening free legal aid services to individuals and agencies mandated by *JJA*, *POCSO* and judgement of *Sampurna Behrua v. Union of India (UoI)*. It can do so by closely monitoring the number of cases and quality of services provided through research/evaluative studies across. Working experience has shown a monopoly of lawyers practice in the JJS. Even the judicial officers in the JJB & Social work members in the JJB and CWC are intimidated by the lawyers and stay clear of any incident that can irk the wrath of lawyers. Attempts must be made to change this environment in the system.

Finally, there is a need for social audits, research studies, monitoring and evaluation of the working of the legal aid system and functioning of CWC. Research studies should not be limited to just infrastructure and appointments. Institutions and individuals must be encouraged to study procedures used/adopted, orders passed by CWC, support systems available for the implementation of the Act etc. There should also be dedicated funds to support such studies. Findings from these would help highlight practices (best practices, good and not so good practices), challenges in implementation which could help in effective strengthening of systems.

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IMPACT OF WITNESSING INTIMATE PARTNER VIOLENCE ON SELF-ESTEEM AMONG CHILDREN – A STUDY IN JODHPUR, RAJASTHAN

Ramyyata Tewari* and Rufus D.**

ABSTRACT

Family structure and values are something that deeply influences the child and sets out a course for their future personality. A dysfunction of any kind in the family greatly influences the development and self-image of the children. Congruently, witnessing Intimate partner Violence is a major stressor in a child's life and often has lasting implications. Intimate Partner violence (IPV) (also referred to as domestic assault, abuse, family violence or domestic violence) is a violence (Emotional, Psychological, Physical or Sexual) perpetrated by one intimate or romantic partner towards the other. A study by Kaufman and Henrich (2000) said family violence exposure may bring up feelings of fear, anxiety, anger, and distress in children.

The present study analyses the impact of witnessing Intimate partner violence on a sample of 50 adolescent children in the Jodhpur District of Rajasthan. The study implements the scale 'Children's Exposure to Domestic Violence (CEDV) – Dr. Jeffrey L. Edelson' to assess the prevalence of IPV in the household and compares the results to 'Rosenberg's self-esteem scale' to find the correlation between witnessing IPV and self-esteem of the child. The study was conducted in line with ethics of social science research at all times. The findings of this study should be taken into account while looking to prevent and mitigate the impact of IPV on Children.

KEY WORDS

IPV, Domestic Violence, Adolescent, Self-esteem, behavioural problems.

Introduction

Family structure and values are something that deeply influences the child and sets out a course for their future personality. A dysfunction of any kind in the family greatly influences the development and self-image of the children. Congruently, witnessing Intimate partner Violence is a major stressor in a child's life and often has lasting implications. Intimate Partner violence (IPV) (also referred to as domestic assault, abuse, family violence or domestic violence) is a violence (Emotional, Psychological, Physical or Sexual) perpetrated by one intimate or romantic partner towards the other.

Intimate Partner violence also occurs because the abuser grows up to consider that abuse in and intimate relationship is right, allowable, justified, or unworthy of even registration. Many people experiencing IPV do not consider themselves to be perpetrators or victims because their experiences are not out of ordinary from the experiences of generations of people in their families. Intimate partner violence and its knowledge, interpretation, meaning, and documentation vary widely between societies. Not addressing the plight of the children who grow up in such homes believing that domestic violence is the norm starts an intergeneration cycle.

Victims of abuse may have physical impairments, deregulated assault, chronic

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health conditions, mental illness, and limited financial conditions and reduced capacity to develop meaningful relationships. Children living in a violent household regularly have psychological problems, including avoidance, hyper-alertness to threats, and deregulated hostility resulting in vicarious trauma.

The Children who witness violence in their homes often see their parents in conflict. The child in such environment develops mistrust on parental affection and may form unhealthy attachments. The child who witnesses IPV tends to be oversensitive and sad for the victim parent (Baker, L.L., Jaffe, P.G. & Ashbourne, L. 2002). They also tend to be afraid that they will be hurt or may lose the victim parent; these children tend to believe that violence in their homes is their fault, and they have responsibility in causing it. Sorrow, disgrace, and little self-esteem are typical feelings of domestic abuse among children.

The youngsters who witness the abuse suffer from a variety of psychological consequences. Internalizing and externalizing behavior issues, as well as delays in cognitive and emotional growth, excessive withdrawal or anxiety disorders, hostility, and internalizing and externalizing behavior issues are all common in kids. (Barbee, Antle, Yankeelov, & Bledsoe, 2010). Children's reactions to domestic abuse and how it affects their behavior, adjustment, and expansion.

The concerns of children involved in households with domestic abuse have easily been ignored by the system for so long. On the surface, the children seem to do well, or the parents do their best to avoid violent incidents, but the effects of such incidents are detrimental in the long run (Pfouts, Schopler, & Henley Jr., 1982). It is also not necessary that only the events that child has witness hold value in terms of the impact. Many kids may describe very traumatic events they have heard but have never seen a real act of violence. (Meltzer, H., Doos, L., Vostanis, P., Ford, T., & Goodman, R., 2009). According to McGee (1997) a survey showed that children who are exposed to household violence have a psychosocial outcome that is significantly worse than those who have not experienced household violence. Everyone can be affected by the effects of domestic violence (Meltzer *et al.*, 2009). "The impact of household violence on kids can have many consequences, based on the severity of the abuse, beginning early, and ending in adulthood. (Curran, 2013)."

The present study explores the impact on the self-esteem of the children who witness Intimate Partner violence by comparing them against the exposure to IPV in the immediate environment of the child. Though many studies have been done analyzing the relationship of the impact of intimate partner violence its varied effects on children have been seldom identified. Ultimately, a conclusion was drawn with the juxtaposition of facts and figures after a thorough analysis of the subject. The study also provides some valuable suggestions to mitigate the long term effects of witnessing IPV.

Review of Literature

The impact of Intimate partner violence on social and emotional growth and the physical and physiological growth of children is endless, and research shows that the effect of witnessing violence in childhood goes beyond just sympathizing with the mother's distress (Howell, K. H., Barnes, S. E., Miller, L. E., & Graham-Bermann, S. 2016). Our social and emotional growth has an impact on our mind and behavior, like intellectual ability, mental activity, and actions. Physiological and physical development, such as anatomical brain or body differences, sexual orientation, and ageing, have an impact on our bodies (Robbins, Chatterjee, Canda, 2012). Children were found to have more likely negative behavioral and emotional outcomes than other forms of infantile stressors even if they felt a potential threat to their caregiver in a study with young children conducted by Scheeringa, M. S., Zeanah, C. H., Drell, M.

J., & Larrieu, J. A (1995), when compared to youngsters who had not been exposed to this, hyper excitement, fear, and aggressive conduct against peers were the most common symptoms.

Many children look up to their primary caregivers for basic needs, including protection and self-regulation. Studies show that the development of the other can be affected by risk in one of these areas (Sweden) and that consistent attention must be provided in a non-violent environment for growth (Howell *et al,* 2016). The caregiver's relationship has historically been a love-giving relationship that can, unfortunately, be interrupted and damaged by the effects of IPV.

When children reach pre-school age and witness IPV, they tend to be removed from socially inclusive behavior to be more anxious and more frightened. The impact of intimate partner violence also extends to academic performance of the children (Hornor, 2005). In a reported study, children whose parents reported spousal violence averaged 12.2 percentiles below in academic performance children with no IPV reported in their household (Peek-Asa, Maxwell, Stromquist, Whitten, Limbos, and Merchant 2007) Domestic abuse can be recognized in boys through exterior actions such as aggression or disobedience, whereas domestic violence is more internalized in girls. (Meltzer *et al.*, 2009).

Children display a range of emotions to cope with domestic violence. Sadness, anxiety, and fear were among these emotions. Different kids chose different coping strategies from these sentiments (Allen, N. E., Wolf, A. M., Bybee, D. I., & Sullivan, C. M. 2003). It is essential to recognize the ability of children to cope so that the various experiences they face and the relationship between them with their well-being can be understood. A general variation that appears in children's coping methods is its: either difficulty focused or emotional. The problem-concentrated meaning of coping is problem solving, and emotionally focused means that act in a way that alters the stress level or tries to manage the violence-related emotional distress (Allen *et al.*, 2003).

Research has shown that the violence might have a significant effect on the child's relationship with the childcare provider. In addition to the psychological effects of domestic abuse, children are frequently physically harmed (Antle, B., Barbee, A., Yankeelov, P., & Bledsoe, L 2010). Though kids may not be physically affected by domestic abuse, they are emotionally affected, and exposure to violence can have a significant influence on the child-caregiver bond. Children who witness domestic violence are frequently physically harmed as a result (Antle *et al.*, 2010). "Trauma invariably causes loss," writes Herman, J. L., & Harvey, M. R. (1997). She goes on to say that individuals who are fortunate enough to avoid physical abuse lose psychological frameworks. Those who have been physically threatened lose their sense of self and their ability to tell the truth about their bodies. Sadness and loss in children can force them to move about a lot. As a result, their friends, schools, and individuals they have come to trust and rely on are constantly changing. With various circumstances affecting the kid, the instability that domestic violence generates can be quite severe, increasing the need for care (Chen & Scannapieco, 2006).

The requirement for consistent care in a non-violent setting, on the other hand, is critical for development (Howell *et al.*, 2016). Domestic violence can disrupt and hurt a caregiver's connection, which has conventionally been one of support, love, and nurturing; nevertheless, the impacts of domestic violence can disrupt and harm that relationship. With so many elements affecting the child, the instability of witnessing violence in the home can be great; this increases the need for help. (Chen & Scannapieco, 2006).

In Southeast Michigan, Graham-Bermann and Perkins (2010) investigated 190 children and their moms. The authors used a study and intervention groups to ascertain the number of IPV episodes in the previous year, as well as the age at which the children were initially exposed to IPV. Early exposure had a bigger impact on the males' externalizing tendencies, whereas it had a smaller impact on the girls' total behavioral difficulties, according to the authors. To clarify, internalizing behaviors are defined as undesirable behaviors that are directed within. Fear, social disengagement, anxiety, depression, and somatic discomfort are examples. Externalizing behaviors, on the other hand, are defined as undesirable behaviors directed towards others. Aggression, low self-esteem, difficulty with peer interactions, vandalism, bullying, and arson are just some of the issues that might arise. Huang, C. C., Vikse, J. H., Lu, S., & Yi, S. (2015) used data from the Volatile Families and Child Well-Being Initiative to conduct a longitudinal study. The researchers looked at data from 2,410 kids and discovered that childhood development exposure to IPV had a substantial impact on the kids' delinquency when they were nine years old. Dutton (2000) claims that is harmful to an immature ego, preventing self-formation and quitting the people with affection troubles and uncertainty.

Methodology

Objectives of the Study

- To understand the exposure to IPV amongst school going children in Jodhpur.
- To understand the relationship of Exposure to IPV and self-esteem in children.
- To provide suggestions to mitigate long term effects of exposure to IPV.

Sample

The sampling of the study was done in multiple stages using mixed methods sampling. The study was limited in Jodhpur District of Rajasthan. The Universe of the study comprised of all School going children in Jodhpur, Rajasthan. In the first stage all the schools in Jodhpur Urban and rural localities were identified. 7 Schools were selected through convenience sampling. 4 schools were from urban region and 3 from rural. These schools were requested to permit data collection from their students which was later obtained during interview at their homes.

The consent for the study was obtained from the parents of the children and further accent was obtained from the children. All the children were briefed about the nature of the study and its implications and only the children who volunteered to participate in the study were included in the study.

Measures

Measure of Child Exposure to Domestic Violence

The children were assessed for exposure to IPV through 'Child Exposure to Domestic Violence Scale' of Jeffery L. Edelson (2007). "CEDV consists of 42 questions in three sections. Part I and Part II of the CEDV contain five subscales that measure (1) Violence, (2) Exposure to Violence at Home, (3) Exposure to Violence in the Community, (4) Involvement to Violence, (5) Risk Factors and (6) Other Victimization. Each question in the first two parts are answered using a four-point Likert-type scale with their choices being "Never," "Sometimes," "Often," and "Almost Always." A higher score indicates more violence, involvement, risks or other victimizations while the lower score indicates less of each category (Edelson J L, 2007)." Written permission was obtained from the author of the scale. The children were administered this scale through personal interview method.

Measure of Self-Esteem

The Rosenberg's self-esteem scale (1965) was administered to measure the general value of self-worth and self-esteem amongst the children. This is a four point scale the point scale consisting of 10 questions with range of scores from 0-40. The children were asked to answer the questions in the scale through personal interview.

Data Collection

The study was conducted during the period of July to August, 2021. The permission to conduct the study was first obtained from the schools of the participating children and further written consent was obtained from the parents of the respondents.

The data for the study was collected through personal interview method with the children who volunteered to participate. The researcher provided them with explanations for the questions in the scale wherever required. The children were assured that all information will be confidential with the researcher and they can choose to not answer or withdraw at any point during the study.

Analysis

The data was analysed using descriptive statistics and measure of correlation was found between variables to ascertain the degree of relationship. The data is presented through charts, tables and discussions.

Operational Definitions

The Study adopts following definitions for their respective expression:

- **Child:** For the purpose of this study the child will mean the person between the ages of 10 to 16 years.
- **Intimate Partner Violence (IPV)**: The definition of IPV is adapted from WHO (2012) excluding the sexual violence. IPV for this study will refer to any behaviour within an intimate relationship that causes physical, emotional and psychological harm to those in the relationship. Examples of types of behaviour are listed below.
    1. Acts of physical violence, such as slapping, hitting, kicking and beating.
    2. Emotional (psychological) abuse, such as insults, belittling, constant humiliation, intimidation (*e.g.* destroying things), threats of harm, threats to take away children.
    3. Controlling behaviours, including isolating a person from family and friends; monitoring their movements; and restricting access to financial resources, employment, education or medical care.
- **Self-Esteem:** The child's own sense of self-worth or confidence in their abilities.

Ethical Considerations

The Informed consent for the study was obtained from the Parents of the children participating in the study. Further accent was also obtained from each child participating in the study after explaining the study as whole and what is expected from them. The children were ensured that all information will remain completely confidential and they can drop out of the study at any point.

Limitations of the Study

- Due to constraint of time and finances, the study is limited to Jodhpur District of Rajasthan.
- The study undertakes only one variable of interpersonal skills *i.e.*, self-esteem so it requires further research to attribute IPV as pre cursor to all behaviour problems.
- There is always a chance of event's low salience for children. Which means that a child's account can be corrupted by passage of time, normalisation and under supervision.

Results and Discussion

Demography

Age Group

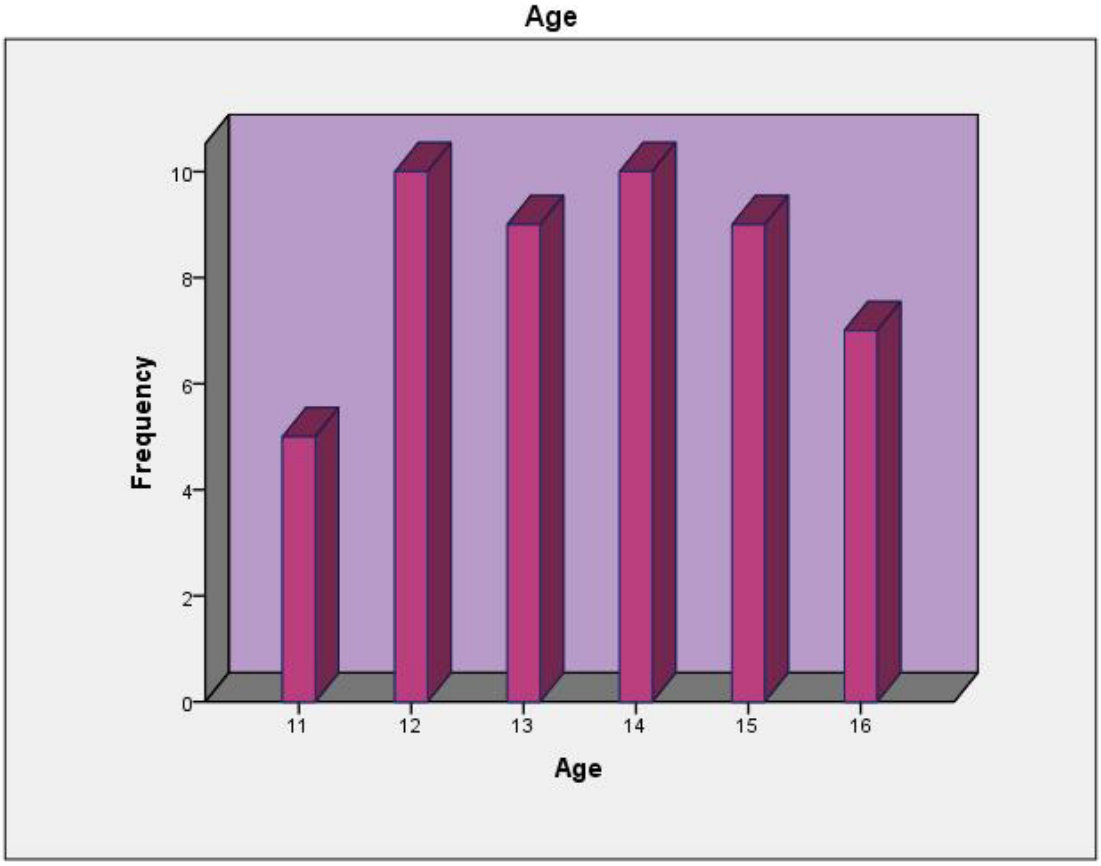

Figure 1: Age Group of Respondents

The study was conducted amongst the children between the age groups of 10 to 16. Out of the total children who participated in the study, nearly 3 quarters (76%) were in the age group of 12 to 15. There was no participant of the age 10. The frequency was highest for children in the age group of 12 and 14 at 20% each. It was observed during the study that the younger children were barer about the prevalence of violence in their families compared to older children. Overall the data was balanced from the point of view of age.

Gender

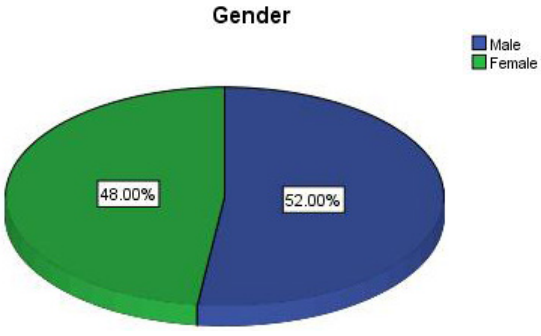

Figure 2: Gender of the Children

Of the 50 children who participated in the study 24 were females and 26 were males. The sample was balanced in terms of gender. This is, in fact, in consistency with other studies which found there is no significant difference in prevalence of abuse in male and female children (Banyard, Williams & Siegel, 2004; Kendall-Tackett & Simon, 1992).

Locality of Residence

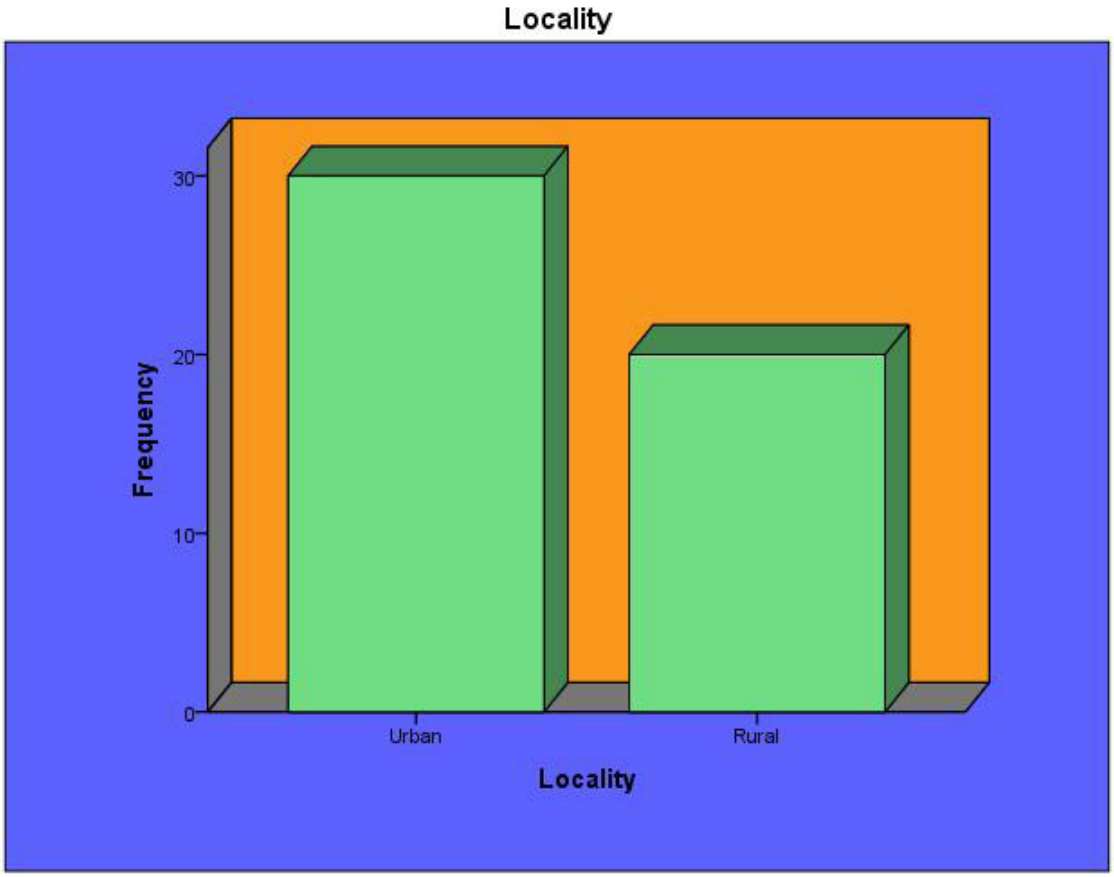

Figure 3: Locality of Residence

The majority of the respondents were from urban dwellings (60%). 40% of the respondents belonged to rural locality.

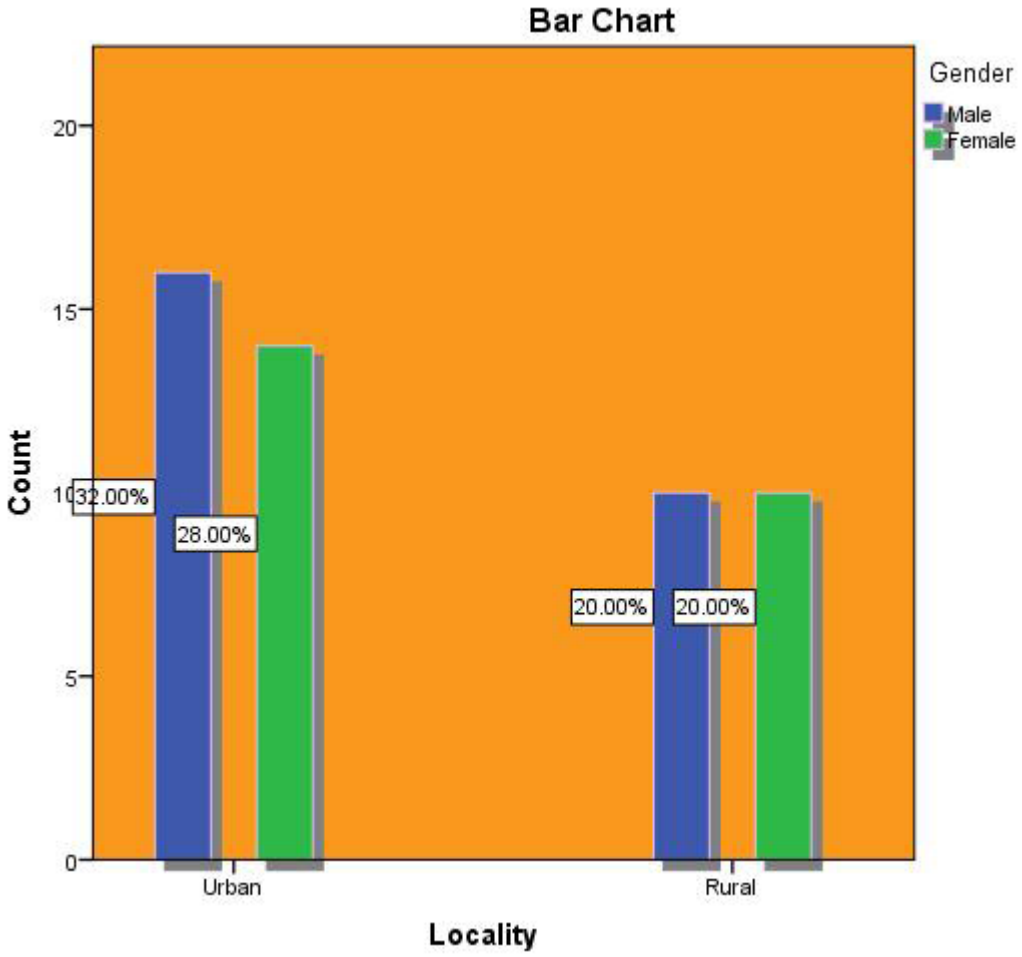

Figure 4: Age Group v/s Education Level

The respondents in the study were equal in numbers in terms of gender in rural locality. Whereas from the urban locality there were more boys who participated in the study compared to girls. The overall representation of both genders in urban locality was also similar.

Prevalence of Intimate Partner Violence

This section discusses the prevalence of Intimate Partner Violence and also discusses the effect of demographic variables to exposure to IPV.

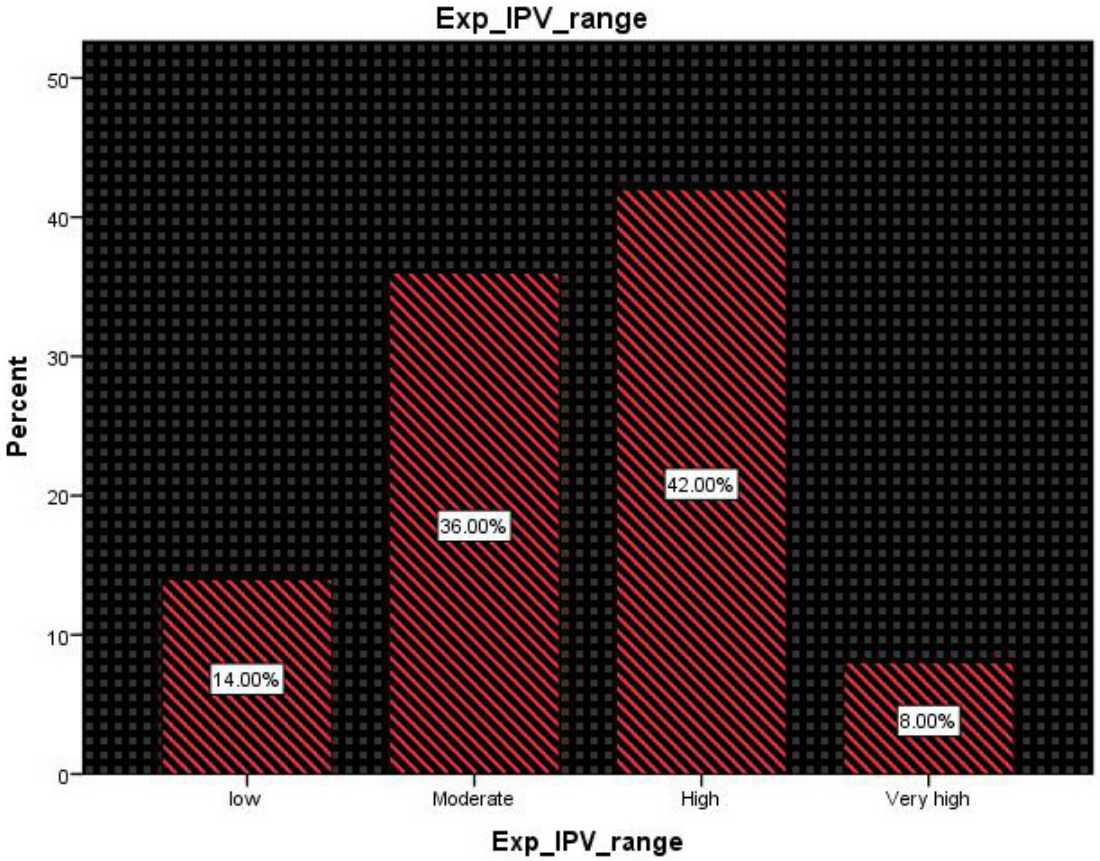

Figure 4: Exposure to IPV

Table 1: Exposure to IPV

Exposure to IPV		Frequency	Percent	Cumulative Percent
Valid	Low	7	14.0	14.0
	Moderate	18	36.0	50.0
	High	21	42.0	92.0
	Very high	4	8.0	100.0
	Total	50	100.0	

50% of the children were assessed to have been exposed to high and very high levels of Intimate partner violence in their homes and environment. 14% of the children reported to have had only low exposure to IPV whereas 36% reported to have been exposed to moderate levels of IPV.

Gender and Exposure to IPV

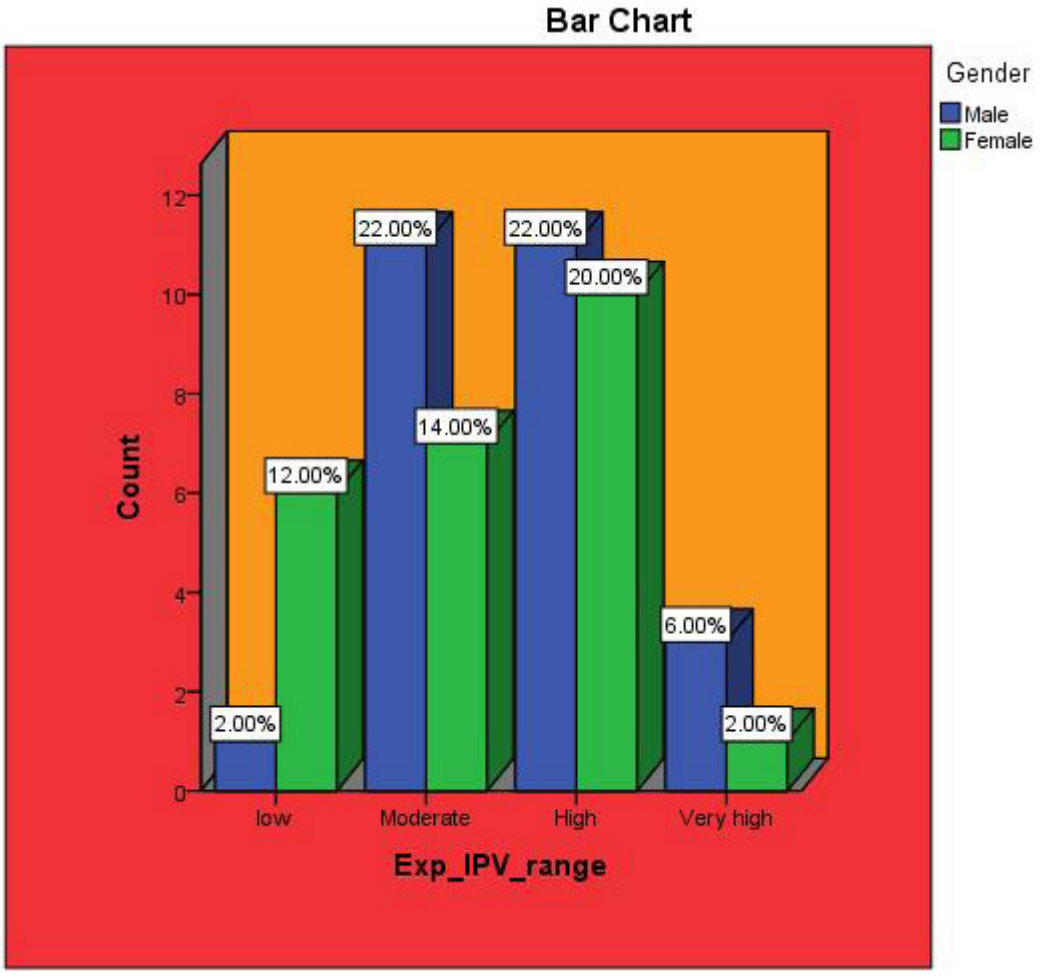

Figure 5: Gender and Exposure to IPV

Table 2: Gender and Exposure to IPV

Exposure to IPV	Gender		Total
	Male	Female	
Very high	3	1	4
High	11	10	21
Moderate	11	7	18
Low	1	6	7
Total	26	24	50

It was found in the study that boys were more exposed to high levels of IPV as compared to girls. 28% of the total boys reported to have had more than high level of exposure to IPV. Only 2% of the boys reported to have rarely witnessed IPV in their environment. Contrarily, 12% of girls reported to have witnessed IPV rarely. Only 2% of the girls reported to have been exposed to very high levels of IPV.

Age and Exposure to IPV

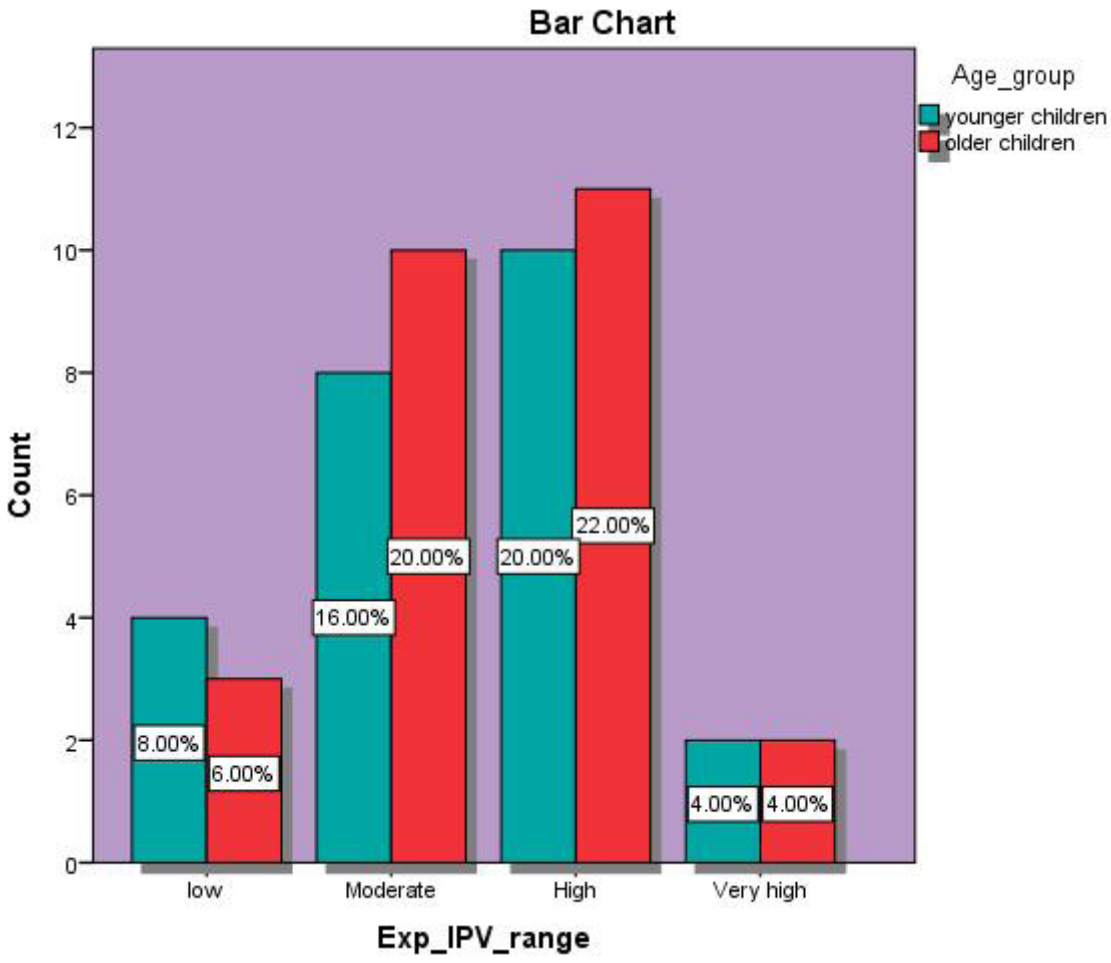

Figure 6: Exposure to IPV and Age of the Child

The study found that the age of the child was not a leading factor when it came to the level of IPV the child is exposed to. The findings were fairly consistent with all age groups showing similar patterns of exposure to IPV.

Exposure to IPV and Locality

Table 3: Exposure to IPV and Locality

Locality	Exposure to IPV				Total
	Low	Moderate	High	Very high	
Rural	71.4%	27.8%	42.9%	25.0%	40.0%
Urban	28.6%	72.2%	57.1%	75.0%	60.0%
Total	100.0%	100.0%	100.0%	100.0%	100.0%

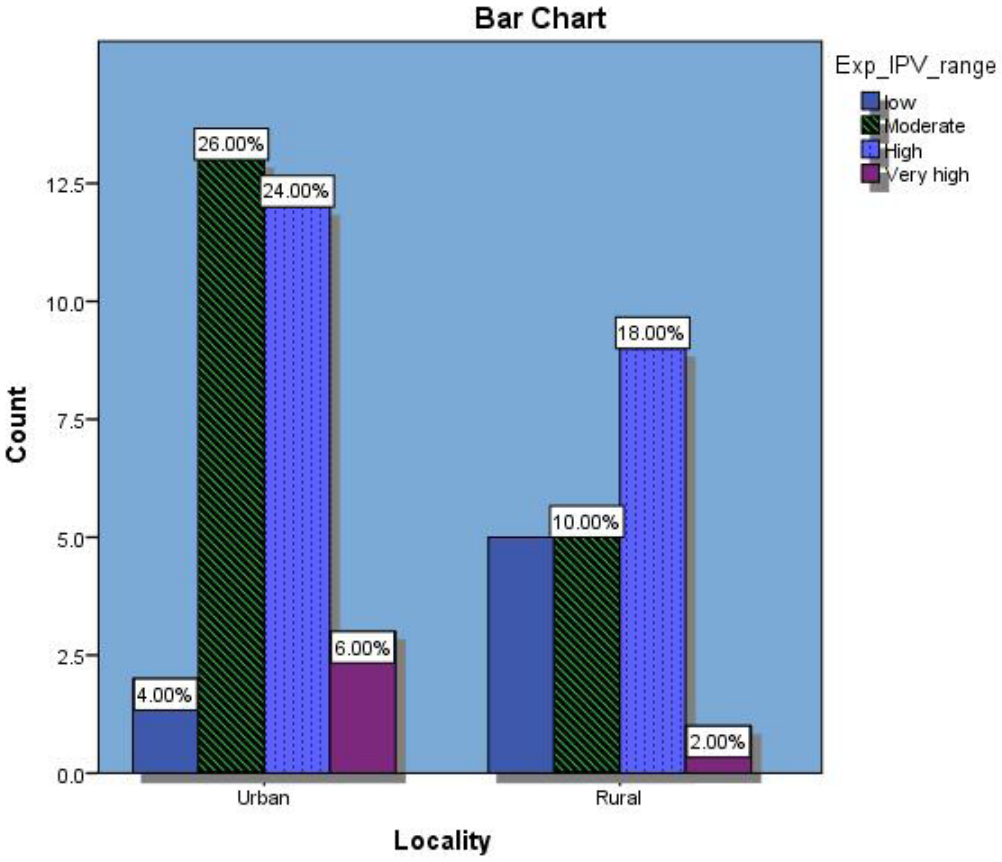

Figure 7: Exposure to IPV and Locality

The study found that exposure to IPV is significantly lower in the rural areas compared to urban areas. 71.4 % of the children who reported to have low exposure to IPV belonged to rural areas whereas 75% of the children who reported to have been exposed to very high levels of IPV belonged to urban areas.

Self-Esteem in Children

This section describes the level of self-esteem amongst the respondents of the study. It also covers the comparison of self-esteem against other demographic variables.

Self-Esteem

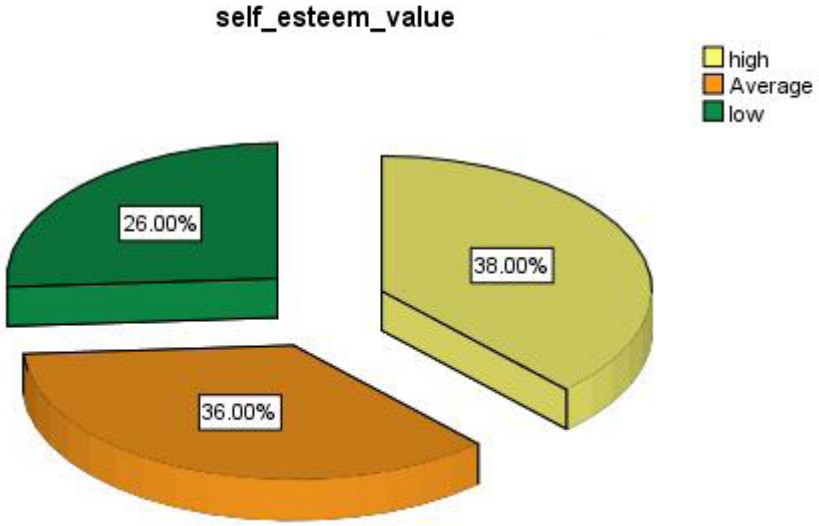

Figure 8: Self-Esteem in Children

38% of the respondents reported to having high sense of self-esteem whereas 26% reported low self-esteem.

Age of the Child and Self-Esteem

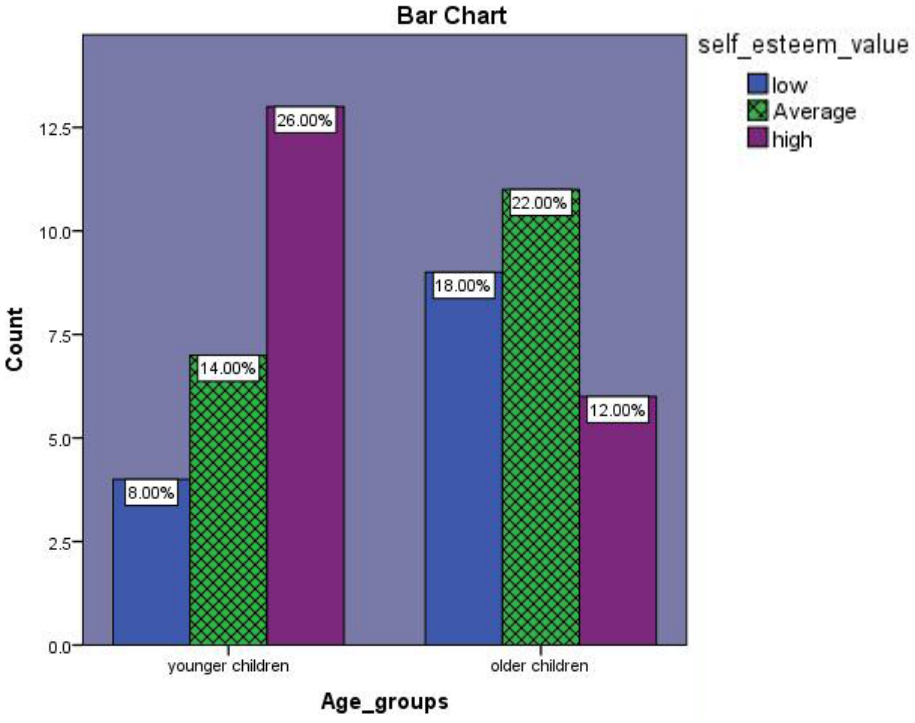

Figure 9: Age of the Child and Self-Esteem

The study found that younger children had higher concept of self-esteem than older children. The values for low self-esteem were significantly higher in the age group of 14 to 16.

Gender and Self-Esteem

Table 4: Self-Esteem and Gender of the Child

Self-esteem	Gender	
	Male	Female
High	34.6%	41.7%
Average	38.5%	33.3%
Low	26.9%	25.0%
Total	100.0%	100.0%

The study found that self-esteem was slightly higher among female children (41.7%) compared to male children (34.6%). The male children also reported a little more on low self-esteem (26.9%) than female children (25%).

Though the correlation value between genders and self-esteem was 0.036. This signifies that there is no significant correlation between gender of the child and self-esteem outcomes.

Locality of Residence and Self-Esteem

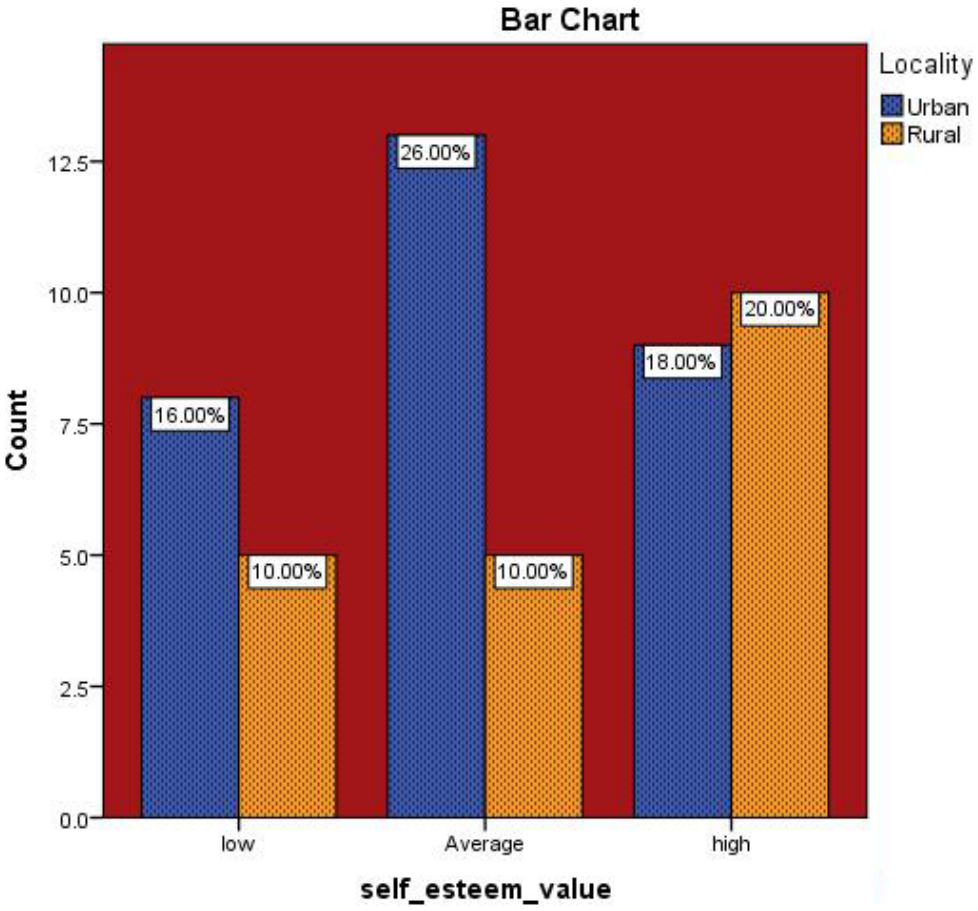

Figure 10: Locality and Self-Esteem

The correlation value of self-esteem and locality of residence was found to be .214. This shows that locality and self-esteem are positively correlated but the relationship is weak.

Relationship of Self-Esteem and Exposure to IPV

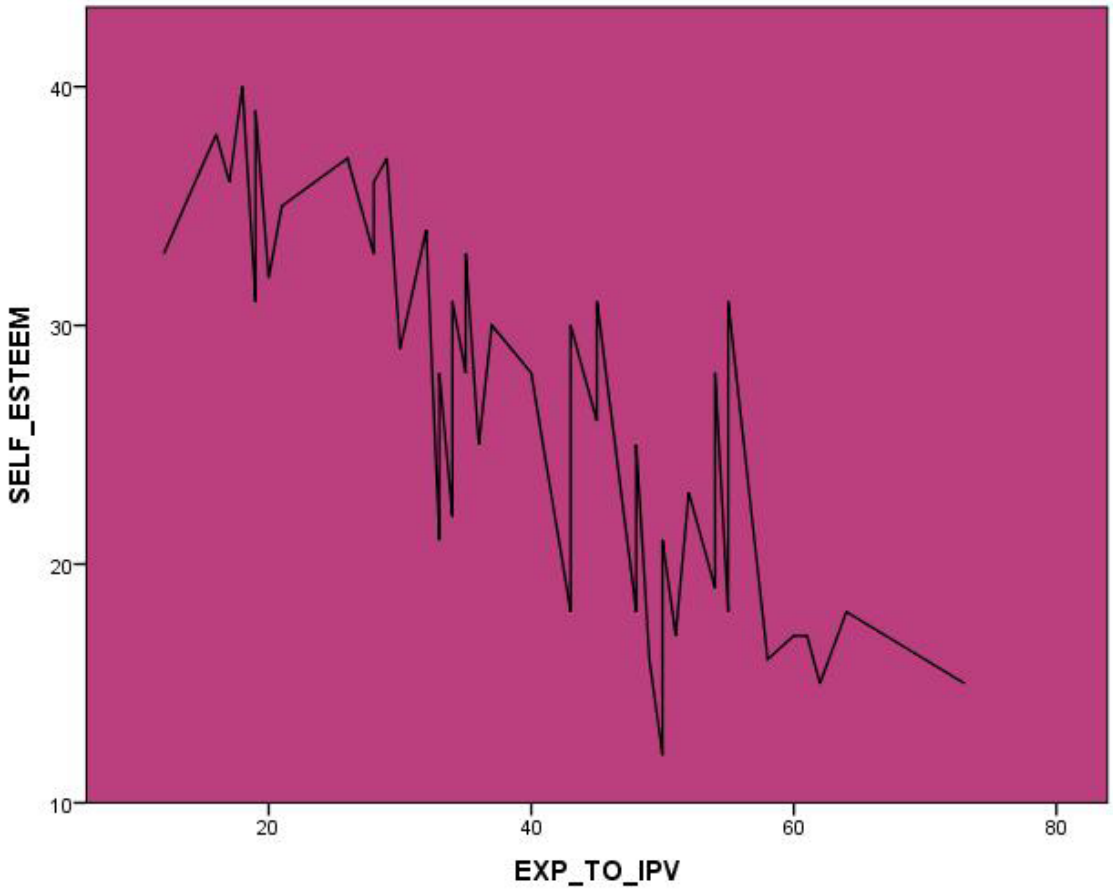

Figure 11: Self-Esteem and Exposure to IPV

The data shows correlation value of -0.813 calculated at 0.01% level of significance. This shows that Self-Esteem and exposure to IPV are strongly negatively correlated. Which means that with the reduction in exposure to IPV the self-esteem of the child increases and *vice-versa* is also true. The r square value (regression) for the data was found to be 0.661 which shows that about 66 % of the sample follows the pattern that self-esteem regresses with increase in exposure to IPV.

Chan (2011) also had the similar findings which highlight that the children who witness IPV "reported lower levels of self-esteem and higher rates of being aggressive and violent, and feeling threatened".

Suggestions

The preceding discussions support that the children who are exposed to IPV are deprived of love care and protection and have usually found themselves in abusive environments

at some points in their lives, as a result of which they show a lack of self-esteem and other pre cursors of lacking in interpersonal skills. This section provides suggestions on providing care and rehabilitation support to children who have been exposed to IPV and ways that nurture their overall growth. The suggestions are drawn from previous studies and observations:

- ***Removal from the Environment:*** It has been argued many times that rather than institutionalisation of children all efforts should be made to keep the child in family environment (McCall & Groark, 2015; IJzendoorn *et. al,* 2011; UNICEF, 2003), but it is not a possibility in every situation. Institutional care is the only major alternative available to children having adverse childhood experiences and hence we need to look at improving the quality of life in these institutions. "There needs to be a paradigm shift in the focus of institutional care in not just providing basic amenities to children but also promotion of wellbeing and improvement of quality of life of institutionalized children" (Padmaja, Sushma & Agarwal, 2014). One Such strategy is counselling for the children by professional therapist.
- ***Role of Caregivers:*** The children who continue to stay with the abused parent should be reintegrated into the social structure along with the parent. The children who have been previously traumatised are sometimes also failing to understand that violence, aggression; poor grades etc. are consequences of trauma. The care providers are the 'duty-bearers' for survival and development of these children and hence must be educated to create a safe environment for the child.
- ***Day/Residential Programs:*** Some studies have asserted that the children benefit greatly from alternate ways of therapy which channelizes their energy towards positive development (Azar and Wolfe, 1989). These may include arts based therapy, dance therapy, music therapy and family counselling services. The study suggests such alternate therapy measures should be mainstreamed and implemented in coherence with traditional psychological counselling.

Conclusion

The association between exposure to Intimate Partner Violence and Self-esteem of the children and later adults are very significant. It is need of the hour that exposure to IPV is understood through wider lenses and factors such as behavioural problems in the children, poor academic performance, lack of interpersonal skills and co -occurrences of various forms of abuse are taken into consideration when trying to understand the impact of IPV on children. Children do not always show the typical responses expected of a victim due to their lack of understanding or inability of expression but trauma manifests into other kind of problems.

The frontline responders and the parent/ guardian have an important responsibility to provide tools to the children in dealing with stress and trauma that follows the exposure to IPV.

Further researches exploring relationship of exposure to IPV and its impact on the interpersonal skills in children can also add to the knowledge and lead to development of coping strategies for the impacted children.

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RAPE VICTIM BLAMING: UNDERSTANDING THE DISCOURSE OF ONLINE COMMENTS

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ABSTRACT

Rape victim blaming is one of the most common practices and problems in Bangladesh. With the advancement of digital space, the culture of victim blaming has taken a new form where comments demonstrate many social discourses of power escalating legitimization and reinforcement of gender hierarchies. This paper examines rape victim blaming culture in a discourse analysis of online comments. This analysis is based on comments under rape related news posted by prominent Newspapers from Bangladesh on their Facebook pages. The result suggests that the blame is based on patriarchal ideologies, gender role attributes, defending the perpetrator and character assassinating the victim. This study also explores the theoretical and conceptual analysis of key terms related to rape and victim blaming attitude. A detailed discussion is included on the emerging themes related to online victim blaming at the end of the paper.

KEY WORDS

Rape, Victim Blaming, Rape Culture, Rape Myths, Online Comments

Introduction

> *"All rape is an exercise in power, but some rapists have an edge that is more than physical. They operate within an institutionalized setting that works to their advantage and in which a victim has little chance to redress her grievance."*
>
> **–Susan Brownmiller, Against Our Will: Men, Women and Rape (1975)**

Rape is a small word but the negative consequences it brings are long-lasting. A rape victim goes through social stigmatization, trauma, depression, physical consequences, and victim blaming after the incident. Rape culture and the institutionalization of rape myths have made people numb towards victim blaming. On the other hand, rapists hardly get the exposure or media attention which makes it easier for them to avoid the criminal justice system as people turn a blind eye towards them. During the second wave of feminism, scholars started acknowledging rape as a social problem. More rape related discussions begin during that time. The change brought in issues like oppressive social structures and patriarchal male violence and factors that facilitated rape and blaming of the rape victims (Mikkola, 2018). Before the advancement of digital media, victims were shamed and blamed personally and in social gatherings. The emergence of social networking sites has enabled people to exercise victim blaming in the online space where the blame can be acknowledged by millions of viewers. With almost everyone having a smartphone in their hand, it becomes convenient to add a comment using offensive and sexist language. Language is an instrument to understand judgments in a social context (Mason & Platt, 2006). It contains hidden power dynamics and layers of meaning that construct social reality. Similarly, discourse is a part of our daily life through which we represent our thought and topic with the help of language (Tayona. 2019). Facebook comments are such instruments that reflect realities. Although

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peoples' perception varies, the majority attitude reflects the dominating reality in any social context. This paper intends to discover the dominating discourse related to rape victim blaming in online space. The study is based on Facebook comments under rape related posts from various popular newspaper pages from Bangladesh. Previous works in this field generally covered the possible social causes and consequences of the crime of rape. They have mostly used vignette experimental designs that often reduced the characteristics of a rape victim and the culture of victim blaming. Most of the works are based on quantitative methods rather than a detailed method that explores the hidden contexts of the phenomenon. Current works on this issue cover theoretical aspects of rape victim blaming, such as connecting gender perspectives to rape culture or myths, technology or social media's contribution to escalating rape culture and how media portrays rape news in general (O'Hara, 2012; Bruggen & Grubb, 2014; Boux & Daum, 2015). However, the problem in the Bangladeshi context is still an unexplored area. In this present context, meaningful work on the process of rape victim blaming is very necessary. Therefore, the primary focus of this paper is to understand the victim blaming culture in online platform. This research tries to contribute to uncovering the characteristics of victim blaming discourse in online comments and to identifying the produced attributes of rape victim blaming.

Context of the Research

Bangladesh is burdened with thousands of social problems. Sexual crimes such as rape is one of them. Various forms of crimes are committed against women both in rural and urban settings here. Lifetime sexual violence in urban areas is estimated as 37% whereas in rural areas it is estimated as 50% according to the population survey data of 2001 in Bangladesh (Naveed, 2013). Rape is one of the silent crimes prevailing in Bangladesh. It has become a regular phenomenon although the existence of such crimes can be found throughout the history of Bangladesh. The victim and her family members remain silent about the incident because of various social stigma and legal barriers (Ali *et al.*, 2015). Ain-O-Salish Kendra (2021) suggests that from January 2021 to October 2021, a total of 1178 women have been raped all over the country. Of them, 955 were rape and 220 were gang rape cases. Besides, 43 victims were murdered, and 8 victims committed suicide after the rape during this timeline. Furthermore, a total of 1627 women were raped in 2020 alone and of them, 317 were gang raped. The number of attempted rape cases was 326 during that time. Also, a total of 53 victims were murdered and 14 victims committed suicide in the same year (ASK, 2021). One concern for Bangladesh is that many rape cases go unreported and unnoticed. Victims and their families prioritize their social prestige more and are left with concerns regarding the loss of family honor. The concept of honor is associated with many intersecting issues in South Asia (Centre for Peace and Justice & World Faiths Development Dialogue, 2021). Social stigma and religious prejudices are connected to the victim blaming tendency in rape cases. In most part of the Indian sub-continent, people believe that a girl's honor is associated with her body. According to them, when a girl is raped, the girl loses her dignity, and it is seen as an attack against the family honor. Rape victims are publicly blamed for losing their dignity and honor (Chowdhury, Ahamed & Rahman, 2020). Thus, victim blaming culture is deeply rooted in the history of cultural and religious values in Bangladesh. As a result, the victim and her family try hiding the incident rather than seeking justice. With the increasing number of internet users, such blaming takes place in digital space too nowadays.

Legal loopholes are also responsible for not getting proper justice in rape cases. Victims

often opt not to disclose any information to investigative officers especially if the officer is male. Also, a female victim must go through public shaming and complicated legal procedures which is why they prefer staying out of legal matters. Besides, the absence of a clear and appropriate definition of rape leads to many complexities in the process of getting justice. The definition of rape given in the Penal Code, 1860 excludes male rape, marital rape, a specific explanation of consent and the age of the victim. It is also legal for a defence lawyer to question the character of the rape victim which reinforces gender norms in the legal proceeding (Kabir, 2014). Moreover, in rural areas, local arbitration such as Shalish is very popular in dealing with rape cases. Perpetrators are hardly punished in those arbitrations. Often the victim is forced to get married to the rapist instead. And when the rapist is from a powerful local family, he can easily escape such arbitrations.

Theoretical Framework

Victim Blaming: Victim blaming has been a part of the recorded history although it has been pointed out as a dynamic to empower the perpetrators very recently (Schoellkopf, 2012). It has a psychological appeal that draws on philosophical and theological assumptions of why bad things happen to good people (Karmen, 2004). According to Michele and Brown (2012), the term 'victim blaming' is used for the tendency to blame the rape victims rather than the perpetrators for an incident of rape. Social psychologists have found that there is a tendency that rape victims are frequently blamed, bashed, stigmatized, and shunned more than any other victims of crime (Rich, 2014). Blame is a social process that must include a human action. It starts with the occurrence of any event having negative consequences. A theory of the attribution of blame asks 3 important questions to be answered in the process of attribution of blame. These are: (1) What is the cause of this event or action? (2) Is anyone responsible for its occurrence? (3) Who is to blame for this event? (Shaver, 1985). Janoff-Bulman (1979) divided the blame into two categories: (1) Characterological blame: where a stable factor, for example, personality such as appearance, sexual experience or occupation of the victim is blamed. Such traits are part of a human and very hard to control (Adolfsson, 2018); (2) Behavioral blame: which refers to factors that are not stable such as the actions and reactions of the victim (Bruggen & Grubb, 2014). It may include the dressing of a victim, flirting with the perpetrator or following him which could be seen as provocative in the eyes of the perpetrator (Adolfsson, 2018). A rape victim is often asked questions like 'what were you doing out that late at night?' or 'how much did you have to drink?' upon reporting the incident (Michele & Brown, 2012). Initially, such questions look innocent but gradually it shifts the focus on the victim rather than the perpetrator. Women also face the blame from third parties such as family, police, friends, acquaintance, prosecutor or even from juries in the process of justice (Michele & Brown, 2012).

The phrase 'Blaming the Victim' was coined by William Ryan in 1971 in his book "Blaming the Victim". Ryan's book was based on the then civil rights movement, and he used the phrase to describe the oppression and privilege exercised by the group in power. But eventually, it became popular in rape cases and among psychologists (Schoellkopf, 2012). Ryan (1971) found out that victim-blaming is a three-stage thought process: (1) Assumption: there is something wrong with the victim that makes them different from the unafflicted majority group; (2) Victim's Plight: the difference from the majority is the source of victim's plight and this is why they have been targeted for the attack; (3) Warning: to avoid future trouble, he or she should change careless, rash or inciteful patterns of behavior (Karmen, 2004).

Instead of making a preventative impact, the media often portrays rape incidents in

such a way that reinforces the popular rape myths in society. The focus of today's media is on the sensationalism of the news based on hegemonic ideologies. It prioritizes the need to attract a wider audience through controversial and violent crime portrayals (Meyers, 1997). Media portrayals often reinforce the rape myths with a detrimental impact, and it views rape as a random act rather than a social problem (O'Hara, 2012). In a study conducted by Phillips *et al.* (2015) on the gruesome gang rape of a Delhi medical student in 2012, media reports were examined and victim blaming instances were found several times. Out of 55 articles discussed, 10.9% had instances of victim blaming. They have also found blames such as not wearing a conservative dress, going out after sundown, and wearing skirts provoking rape incidents etc. prominent in news articles and different quotations used by public figures in those articles. The hegemonic power structure and dominant culture are reproduced by the framing of women's issues in the media. Media framing has the potential to shape the perception of rape and rape victims in society. Moreover, the media frames women in such a way that re-establishes the old submissive and passive role of a woman in society (Lumsden & Morgan, 2017). Therefore, it is important to understand the media's role in the process of victim blaming.

Understanding Rape Culture and Rape Myths: Rape culture and rape myths are two very important narratives to understand the process of victim blaming. Empirical works have identified many connections between these narratives and rape. According to Susan Brownmiller (1975), rape myths hide the true and brutal nature of rape. The intricate phraseology of male rape myths appears to be the cornerstones in most pseudoscientific inquiries into female sexuality that have been used by many experts regarding sex offenders. By mentioning Barthes, Mikkola (2018) stated that myth is a signifying practice that can be said as a semiological or meaningful concept used in an ideological form. It can be used as a written form also. It can also be said as a form of history having a complete artificial vibe. Rape myth is a cross-cultural issue that existed from the beginning of civilization and that endorse significant variability across times, locations, and subcultures. The emergence of the concept of rape myth took place during the 1970s when rape was analysed from the feminist perspective (Mikkola, 2018). In the United States, the concept emerged during the late 1970s and early 1980s with several measuring constructs (Rich, 2014). Rape myth has a lot of cultural and historical reasons related to it. It can be based on gender roles, misinformation or even normalization of violence in any society. Burt (1980) defined rape myths as prejudicial, stereotyped or false beliefs about rape, rape victims and rapists. This is a very popular definition of rape myth used by academicians. Some of the myths identified by Burt (1980) are 'women ask for it' and 'rapists are sex-starved, insane or both. Later Lonsway and Fitzgerald (1994) defined rape myths as attitudes and beliefs which are generally false but are held widely and persistently that denies and justifies male sexual aggression against woman (Iconis, 2008). There is the existence of many rape myths in the current world although myths can differ from one social setting to another. Blaming the victim is also a part of many popular rape myths (Ben David and Schneider, 2005). Formulated themes of victim blaming are – victim masochism or the attribution that they enjoy it, victim precipitation or that only specific women face it and victim fabrication or that they lie (Iconis, 2008). Institutions like religion, legal systems or the media perpetuate rape myths that help to reinforce and endorse unequal power relationships (Edwards *et al.*, 2011). Rape myths, very often, minimize the violence men are responsible for by putting more pressure on the victim (Barefoot, 2014). Thus, the rape myth makes it more of an individual problem rather than a societal one (Lonsway & Fitzgerald, 1994). The ego defensive and self-protective function of rape

myths create a bias that shifts the central focus on the victim from the perpetrator. Rape scripts and myths reinforce each other (Anderson, Beattie and Spencer, 2001). Rape myth is a misnomer as it holds stereotypes about rape behavior. Stereotypical scripts often strengthen the existing rape myths, for example, traditional scripts facilitate the fact that women are the gatekeepers of sexual activity or that men have higher sex drives (Sleath, 2011).

Rape myth is a part of the bigger picture named rape culture. It is a complex set of beliefs that encourages male sexual aggression and violence against women (Buchwald, Fletcher and Roth, 1993). Rape culture is beyond the act of rape and it carries historical, cultural and institutional ideologies that help to normalize the act of rape (Barefoot, 2014). Sheffield (1987) linked the idea of rape culture to sexual terrorism which according to him relies on male dominance over women through the process of fear. Cahill (2001) on the other hand argues that rape culture is not only supported by men but also women indirectly. Women are also part of spreading the culture by not abandoning it and believing in such culture from the very beginning.

Just World Hypothesis and Victim Blaming: During the 1960s, researchers started to look for the reason for devaluing another person (Adolfsson, 2018). The belief in the just world is one of many explanations of why people devalue another person. The concept was developed by Lerner (1980) and it was given the name 'Just World Hypothesis'. The just world hypothesis establishes victim blaming attitude in a person. Most people tend to believe that they live in a society where justice prevails (Lerner & Simmons, 1966). Lerner's (1980) just world hypothesis states that the world is fair and justice is based on the concept of deservingness. The idea that we deserve what we get, and we get what we deserve creates a sense of control. This helps people to abstain from doing wrong deeds and behave well. It means good people will encounter good events only. However, the world is not always just. When good people experience bad things, the just world hypothesis is threatened and results in cognitive dissonance (Adolfsson, 2018). At this point, they stick to their just world theory by justifying the act. People frame any incident in such a way that preserves their belief in the just world theory (Lerner, 1980). Sometimes they alter the information only to adhere to the idea of a just world. Blaming the victim is a way to justify the wrong act. If the victim is not innocent and did something that caused the harm, then that means he/she deserved it as the world is just. That is how people restore their belief in the just world (Delbert, 2009).

Lerner (1980) suggested strategies through which individuals convince or restore their belief in a just world. The protective strategies distinguish between just and unjust environments emphasizing ultimate justice. The rational strategies try to repair the injustice, for example by providing monetary compensation to the victims. Finally, there are four types of irrational strategies to restore the belief (Lerner, 1980). Firstly, blaming the victim is an irrational strategy where behavioral responsibility is imposed upon the victim. Secondly, victim derogation is another strategy that accuses the victim of having certain personal characteristics. The character of the victim is questioned, and it is held responsible for victimization (Janoff-Bulman, 1979). Thirdly, reinterpretation of the victimization by assuming that there is something positive to gain from the incident for the victim. Thus, the act is convinced as a just one. Finally, in the psychological assumption, the victim is viewed differently from most of observers (Lerner, 1980).

Online Space and Victim Blaming

Online space can be said as a double-edged sword that is instrumental for both proliferation of rape culture and strengthening the advocacy against its practices (Tanoya,

2019). Blaming a victim in the online space means that the victim will suffer from repeat victimization. The changing forms of technology and increasing popularity of various social media platforms have increased the likelihood of influencing others' lives in a readily public setting (Westerman, Heide and Spence, 2014). Online public space not only discusses issues but also discourses and texts are reconstructed in a new interpretive space giving a big public gaze. Digital cyberspace allows strangers to interact with one another. The result is heterogeneous participation by a heterogeneous audience. This gives a methodological advantage for the researcher by providing the potential of taking controversial stances. Moreover, online space is a critical but fluid platform. It produces meaningful layers of diverse viewpoints via texts and symbols with the process of interaction (Jaggi, 2014). The comment section allows users to express their opinion, both negative and positive and hold a point of view about the post (Cruci-Wallis, 2019). The absence of face-to-face interaction in online space potentially encourages a user to be outspoken about his/her real-life feelings on certain issues. A real-life interaction would have stopped that user from saying the same thing as there would be fear of backlash or direct consequences. Since the online space provides anonymity, it is easier to comment or express feelings (Cruci-Wallis, 2019).

Zaleski *et al*. (2016) explored the rape culture in social media forums through a naturalistic observation and constructed four themes along with other sub-themes. The four main themes found are victim blaming and questioning, survivor support, perpetrator support and trolling statements about law and society. Victim blaming and questioning was evident in half (50%) of the gathered data. The authors examined a total of 4239 comments and concluded that the most prominent theme found is victim blaming (Zaleski *et al*., 2016). Jaggi (2016) in her discourse analysis on the Delhi gang rape reports found that patriarchal attitude, more focus on the victim in reports than the accused and gender polarization were evident. The study notes that the anonymity of users in online space gives them the opportunity of side taking and making unpleasant comments.

The advancement of technology and social media has revolutionized the way one person interacts with another. Individuals can take pictures or videos of any real-life event and share with millions of people with just the use of their smartphones. Even if a person regrets sharing any information via comment and deletes it, chances are there that it has already been seen and shared by millions of others risking major social consequences (Daum & Boux, 2015). Stubbs-Richardson & Cosby (2018) analyzed tweets related to rape events and found victim blaming attitude prominent among the users. They formulated three themes related to rape incidents and these are the virgin-whore binary and the just world, informational retweets as subnews and rape myth debunking. The first theme revealed that users defend the just world hypotheses by blaming the victim for her own condition in the form of tweeting 'she asked for it' or 'she deserved it'. Their data also indicated that Twitter can decrease rape myth acceptance, cyberbullying, victim blaming behavior and increase support for rape survivors. Mikkola (2018) analyzed The Daily Mail's online comments in rape related news articles and found that pre-existing themes emerged from the study as well. Popular rape myths found include she asked for it, every woman deserves to be raped, better enjoy the rape and victims lying about the rape incident. Underage victims and victims traveling alone consisted of massive amounts of victim blaming comments and parents of the underage victims were blamed for the incident. Unfortunately, the rapist was not directly blamed in the comments. Both deontic and epistemic modalities were prominent regarding the discussion of what should be done in the study.

Methodology

This paper follows a qualitative discourse analysis of online comments under rape related Facebook news posts. Discourse analysis relies on language, words and texts from sources and their observations. This method builds a genuine hypothesis of online comments without interrupting the natural settings of the subject. Online comments are original texts that represent broad social and political structures. It also uncovers the expressions of power or how power is constructed in the online platform against the rape victims through blaming. I chose this method because online comments display the socio-political context of any trending issue. Also, victim blaming is shaped by the power dynamics, symbolic ideologies, and socio-political environment of the given topic. On top of that, the current technology-based exercise of expression is suitable to understand the discourse of online victim blaming comments through textual and semantic interpretations.

Sampling and Data Collection

For data (online comments), I used four newspaper's Facebook news posts from 2018 to 2019 on rape related news. These are Prothom Alo (15M likes in their Facebook page), The Daily Star (3.4M likes), Dhaka Tribune 1.5M likes), and Kaler Kantho (7.3M likes). The likes in their Facebook page indicate the popularity of these newspaper and this is one of the reasons I have selected these newspapers. I have selected two Bangla newspapers and two English newspapers so that I can cover all genres of readers and commenters. Some comments were in Bangla language. For this study, I have translated those comments into English without altering the original meaning and keeping the authenticity of those comments.

I used naturalistic observation of Facebook comments under news posts and collected the first 9 comments from each comment thread. I also deidentified those comments and posted them in a word file for the coding procedure. I did not take any consent from any commenter due to the vast number of comments I have gathered. However, I did not include the identity of any commenter for the ethical purpose. The units of analysis for this study therefore are the comments.

I have selected news posts from 2018 to 2019 that contained 'rape', 'rape victim', 'rape case', 'child rape' etc. keywords in their headlines. I used Facebook search button to select those posts. The search resulted in many articles. To avoid researcher bias and minimize the number of posts, I have selected news posts only based on the headlines that had 'rape' or 'rape victim' keywords. After identifying and deidentifying comments, I placed them in a word file and started coding. The coding aimed to find out victim blaming themes in those comments that reflect rape culture and myths, and many other theoretical concepts discussed in the literature review section. Initially not all the themes that emerged showed enough frequency. Finally, I have constructed 4 themes that showed consistency throughout the coding process.

Results

The data reproduced here are based on a selected 450 comments from the 50 news posts used in the original research project. These comments are not selected to provide a representative overview of the data, but to highlight a group of comments which provide interesting insights into the public's attitude towards rape victims. The themes that emerged here are not unusual in the sense that rape victim blaming is very common in Bangladesh, and it has become a symbolic way to reinforce patriarchal ideologies in online space.

I have clustered the themes into four categories based on the attribution of victim blaming:

Reflection of Patriarchal Ideologies and Gender Role Attributes

Patriarchal ideologies and fixed gender role attributes are very common in Bangladesh, where males are considered the backbone

of the family. Females on the other hand are restricted to roles like cooking, doing household chores, rearing children, and other reproductive activities. Consequently, fixed gender role attributes such as a girl must stay at home and are not allowed to go out, more specifically at night with friends, are quite common in the process of justifying rape incidents. The sample collected for this study gives us an idea that the vast majority of online comments on rape related news posts harbour a loud patriarchal and victim-blaming voice. People in their comments attack the victims' decision of going out. Their point is that men can go outside to earn their livings or for recreation, but women should not. According to them, 'good' girls do not go out. In a 2018 news post covering a rape incident at a birthday party, many comments displayed victim blaming remarks, such as—

> *"The girl who can go from Mirpur to Banani for celebrating boy friends' birthday, cannot be raped at least. She definitely had consent."*

Here the concept of consent is misrepresented by the commenter and the fixed gender role attribute is used to defame the victim. By using patriarchal attributes against women, men position themselves above women in society. It gives them the invisible authority to control women's lifestyle, body, actions, and the power to judge them without any strict consequences. Comments like this reproduce patriarchal ideologies and power relations through symbolic wordings and violent language too.

Another comment says—

> *"They did it right. The case should be filed against the girl. Don't you know girl how things are now? How dare you go there at 8 in the night? You wished to be raped. Such characterless girls should be beaten up. Those of us who are married, have kids and despite so, we do not dare to go out at night and she went there to celebrate a birthday. Proper punishment served for her."*

This comment was posted by a female user. It received more than a hundred of reactions including likes and love reactions in support of that ideology. Reaction buttons work as a facilitator in online comments. The comment can also include images and stickers bearing special meanings. The launch of the reaction feature by Facebook in 2016 has allowed users to be more expressive using Like, Love, Haha, Wow, Sad, and Angry buttons. Such emotion captures reality by constructing them. This comment is proof that patriarchal ideologies manipulate both men and women in the victim blaming process. It works as a mechanism that re-establishes women's subordination and unequal gender hierarchies. Facebook reaction buttons are symbols through which these gender constructions are validated and accepted.

In another news post where the incident of rape was recorded and shared online by the rapist, a female user was seen slamming the lifestyle of the victim in her comment—

> *"I'm a girl and I say that the main cause of rape is the modern lifestyle of girls these days."*

Simply put, such remarks from female users not only are disappointing but also show how gender discriminatory ideologies are internalized in our daily lives through facebook comments. It is a clear indication that all prejudices and stereotypes against women are deeply rooted in the value system of our society.

Blaming the Outfit of the Victim

Questioning the outfit of the victim is another key strategy used by online users to blame the rape victim. In Bangladesh, conservative Islamic ideologies regarding women's dress-up and movements are common. Most people believe that wearing covered dresses, such as hizab, niqab or not wearing any western outfits protect a girl from the 'bad' eyes of society and 'bad' events. Similarly, many people think that revealing outfits are provocative

and misrecognized as an invitation to rape. Because of this thinking, people are concerned more with what the victim was wearing at the time of rape rather than focusing on the bad intentions of the rapist. Such ideology increases the likelihood of victim blaming in online space too. Stranger people in the comment section like to instruct the victim on her clothing as a strategy to avoid rape. Interestingly, users comment on such things based on their assumptions of the victim. Some open fake IDs to comment negatively. The anonymous feature of the internet makes it easier for them to throw such questions without the chances of a direct backlash. To them, the only way to stop rape is by wearing conservative outfits. This attitude ignores other important factors which need to be addressed. In a post where the causes of rape were discussed, one user commented—

> "*God has ordered females to cover themselves up in public. But they do not follow it. They instigate sexual acts by wearing provocative dresses and thus get raped.*"

Another user commented,—

> "*The outfit of females is also a concern which the so-called intellectual public ignores most of the time. If the female body is covered in clothes, then how will the media earn their profit?*"

In any circumstances, the outfit of the rape victim has no relation to the occurrence of rape. These comments represent the narrow and prejudice-driven mindset of users who discuss the outfit of the victim but remain silent about the heinous crime which is destroying the security of the female population. Such conservative public discourse gives the rapist a sense of support and comfort. Also, the focus is shifted entirely to the wrong aspect which accelerates victim blaming culture in the online space.

Defending the Perpetrator

Another aspect of victim blaming is to shift the whole concern on the actions taken by the victim before, after and during the incident and provide a platform for the perpetrator to defend the crime. Internet users seem to put a blind eye to the intentions of the rapist and find out any tiny detail of what the girl was doing. Sometimes victims are held responsible for not reacting to the crime immediately. Comments are found to pay zero attention to the context of the crime. Most of the time, irrelevant topics are dragged into the issue. This indicates how our society is more concerned with a victim's lifestyle and how badly the victim's intentions are judged. However, the rapist remains under the curtain. The character of the victim is often blamed too. Bringing up irrelevant issues clears the path of a rapist. There is a tendency of some people to show support or justify the actions of the rapist with irrelevant explanations. Sometimes the male users get furious when the topic of toxic masculinity arises regarding any rape incident. Their male ego gets hurt and out of anger, they try to justify the crime and unconsciously show support towards the rapist through legitimizing masculine violence. This is a form of victim blaming too, if not directly but indirectly. This mindset can be found in online comments too. Whenever any girl is raped, an immediate search is carried out to see if the accused can be proved innocent or not.

Under the news post where a girl was raped and her video was published online, someone commented,

> "*If it was rape, then why did not they file a case immediately? Both had consent, hence, the sexual intercourse. Both should be arrested.*"

Users are seen denying the rape, equating it with an accident or carelessness of the victim. In another post where the news was about two sisters being raped for 20 days, a man commented,

> "*I think both girls' should be testified. I think there was a love relation between them, it's not rape.*"

The blame here is solely put on the victim and at the end of the sentence, the user denied the incident as rape. The next comment found under the news where a girl was kept hostage and was raped after the rapist tempted her with the assurance that he will make her an actress,

> "*Media first should prepare a definition of rape. The girl went to sleep with others for becoming an actress, how can this be called as rape? She enjoyed it for a long and now when her wish is not fulfilled, she is calling it rape. At first such characterless girls should be punished and then the accused.*"

Another comment reflected,

> "*In a crowded place like Dhaka, he kept a girl locked for two weeks without others noticing about it. That's impossible! I think there was a love affair between these two.*"

In this comment, we can see how the user is trying to find an excuse for the crime. Anything bad happens to a girl that means the girl is responsible. In the above incident, the girl was kept captive for days and the user questioned the validity of that incident. He totally ignored the fact that a girl is raped. Rather his focus was more on the fact to prove the rapist innocent.

In another incident, a boy raped a girl saying that soon he will marry her. The tendency to blame the girl and release pressure from the boy is also found in this case. The following comment is relevant,

> "*I think he (rapist) did it right because the girl slept with the boy before their marriage. She should have thought about it before. The girl is too responsible, not only the boy.*"

The hypocrisy of putting most of the blame on the girl is pretty much evident in this case. The boy gave false assurance and convinced the girl. Yet the question is thrown at the victim. By saying 'he did it right' the user gives an invitation to future rapes. He just supported the fact that a girl can be raped for any reason and should share half of the responsibility.

Character Assassination of the Victim

Traditionally, shaming a rape victim in a social setting is nothing new in Bangladesh. The concept of dignity is associated with rape victims in any patriarchal or conservative Muslim society. Some even consider that only 'bad' girls are raped and believe that these girls' gestures and postures are provocative. The existence of the 'good girl' and 'bad girl' dichotomy is also found in some comments. For example—

> "*A friend will invite his girlfriend to a party and the girl has to go there wearing heavy makeup? Are they good girls? This is not rape. The girl must have been a prostitute. She was paid less and hence the accusation of rape. This is a conspiracy by the girl. The girl should be hung.*"

People use labels such as prostitutes, call girls or any slang words to describe the character of a rape victim. Calling out the victim a prostitute for attending a party or labelling her character as bad because she maintains a love affair is a consistent theme found in online comments. The family background of the victim is another thing that is bashed for rape. Attacking the victim or her family using intense and violent words captures the symbolic attributes of power dynamics that construct victim blaming discourse. Although the user comments on the capability of a victims' parents hardly knowing them personally, the use of the negative terms to insult them is very fluent. For example,

> "*It is like I went to Tiger Point at Sundarban and wondered why the Tiger had attacked me! A boy invited me at night and I went there without any hesitation. We had fun inside a room the whole night and expecting the boy to not touch me at all? If I belong to a good family, then I would never get permission to go out at night. So, we can guess how the girl was. Why did the girl*

> *attend a birthday party? If the boy tried to rape her then why did not she shout? Hotel staffs are supposed to hear that.*"

In another comment, a victim's dress-up was linked with her character—

> "*Of course, the way they (females) dress up is responsible. Rapists' target those who wear short dresses. These girls are perverts.*"

The commenter generalized the fact that girls who wear short dresses are perverts. This is a direct insult to femininity and a clear representation of a misogynistic attitude. People seem to be busy instructing females how they should act instead of pointing their fingers at the rapist or the law-and-order system of the country responsible for the increasing number of rape incidents. This character assassination of victims runs deep into our society and even exists in our legal systems too. The belief that only 'bad' girls are raped acquits rapists from any responsibility and culpability.

Conclusion

The meanings in online comments represent many actions and social realities as well. It is safe to say that the online victim blaming comments re-establish and reinforce gender norms and discriminatory practices of blame in the online space. The patriarchal influence and the gender role issue became evident through this research. I believe this study will help understand various social constructions of blame and how stereotypical attitudes are formed in online space through texts, symbols, and other tools. But this paper has limitations too. The availability of a vast number of online comments and the prevalence of fake IDs create much complexity in selecting and analyzing online comments. For this reason, analyzing online comments is subject to ethical challenges that restrict a researcher from taking the consent of every commenter. However, I did not store or use any personal information (name or profile) of any commenter to maintain ethical considerations.

It is not easy to bring a change in the mindset of the whole online population in a very short time. The main flexibility online users get is that they can create fake IDs and comment anonymously under any news post. This often gives them the power to question a victim without facing a direct backlash. A better system where every user will need to use their original identity in the online platform may reduce the tendency to comment on anything and everything about a rape victim. Since these posts are public, they will sense guilt and abstain from commenting negatively. Online privacy is not on the user's hands always. So, educating the mass about the consequences of posting such comments is necessary. Awareness of rape myths, victim blaming and attacking victims through online commentary can bring a change. Online news portals need to be more professional in publishing news on rape incidents, especially Bangladeshi news portals should not use sensitive and provocative headlines while covering rape cases. They frequently use the photos and details of a victim which should not be the prime focus of the case. The media and news industry need to reveal details about the rapist. The family of the victim is also exposed sometimes. All such information gives online citizens an excuse to target the victim and her family and blame them for the incident. Besides, any form of trolling that represents victim blaming culture should be considered harassment. Online memes and trolls should not encourage rape or victim blaming. At last, the media should change the way they portray a woman or victim. They should make sure that the news they are covering does not support rape myths and victim blaming ingredients. Victim blaming attitude is such a matter which cannot be fully overcome with strict laws. However, the absence of laws makes any act legal. Educating the mass about the proper use of the internet and making them realize how derogative their remarks are to a victim and many others can stop the normalizing victim blaming online comments.

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