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Student Edition

School of Law

Edition – I

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IMS Law Review: Student Edition

Edition – I, July 2020

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FROM THE DESK OF CHIEF EDITOR

It gives us immense pleasure to present the readers with the first issue of IMS Law Review: Student's Edition of 2020, which is a novel effort of the School of Law, IMS Unison University to provide the students across India to present their writing acumen in the form of research articles, essays, case comments, book reviews etc. The Journal is the outcome of joint efforts of the spirited student researchers and the rigorous efforts put in by the student editorial team.

The objective of IMS Law Review: Student's Edition is to inculcate the spirit of scholarship amongst the students, and to encourage them to contribute their research work, focused on the on-going contemporary issues in both national and international arena. The students can submit their articles both individually and collectively for publication and utilize this platform for making themselves popular amongst the legal fraternity. To make the journal vibrant, engaging, accessible, integrative and challenging, all research articles will be published only after adopting blind-peer review process.

We acknowledge and express our sincere gratitude to our student contributors, members of the faculty and student editorial board and the faculty advisory panel whose untiring efforts have made the publication of the journal possible.

In solidarity

Prof. (Dr.) R. N. Sharma
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FROM THE DESK OF FACULTY EDITORIAL BOARD

IMS Law Review (IMSLRW) is a non-profit, student reviewed annual law publication. Law students from the world over face a peculiar paradox. On the one hand, law schools relentlessly goad them towards academic pursuits and, specifically, getting their writing published. On the other hand, only a disproportionately few journals accept student submissions. In response to this, many universities have opted to establish journals exclusively intended for students, which have given them an opportunity to continue healthy discourse regarding the relationship of law and public policy in current scenario. It seeks to create a platform where there is a flow of ideas and thoughts regarding issues mutually relating to law and the contemporary legal issues.

Editorial Board membership provides an opportunity to the students to discuss issues of importance in legal education, develop collaborative relationships with other students and alumnus, and gain editorial skills and scholarly publishing experience. The current board consists of our alumni and present students who hold -different positions in IMSLRW. The venture has been initiated to fulfil the mandate of promoting research and writing among law students; it accepts contributions on all areas of law and even social sciences issues bearing a legal slant. Undergraduate and postgraduate students of any discipline, not necessarily law, are invited to contribute.

All articles are selected, edited and published by the Review's Editorial Board. Additionally, almost every issue will contain at least one case comment or essay writing, authored by IMS Unison University School of Law‘s student, as selected by the Editorial Board.

Wishing all the readers success and health!

Faculty Editorial Board

FROM THE DESK OF STUDENT EDITORIAL TEAM

It gives us immense pleasure to introduce the first edition of IMS Law Review, Student's Edition 2020. It delineates illimitable ardour, passion, imagination and flair of the young minds. The journal endeavours to amalgamate academic excellence with a strong focus upon the on-going issues in the national and international arena.

The purpose of the journal is to publish high quality papers and to fill the gaps between point of views and application of various disciplines predominantly having focus on legal issues. It also aims to augment the learning experience of students. The journal stands out as a platform which accepts research submissions in the form of Articles, Case Comments and Legal Essays. Through this, we aim to promote the spirit of learning amongst the students all over the country.

Since this is the first issue of IMS Law Review, we faced lots of challenges,during the publication at various level. But the never ending efforts and enthusiasm of the Student Editorial Board made everything go smooth. We, also during the process, came to realise the importance of team work. Also, we would like to express our heartfelt gratitude to our Faculty Editorial Board which showed us the path and without which we would not have been able to accomplish the task. We wish to inspire more contributions from the students all over the nation in order to secure a continued flow of knowledge.

Suggestions and criticisms are always welcome as it is precious to us. We look forward to your response.

Hope you enjoy the read!

With Love and Regards to Readers,

Student Editorial Board

IMS Law Review: Student Edition

Edition – I, July 2020

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RECONCILING CORPORATE SOCIAL RESPONSIBILITY WITH SUSTAINABILITY: THEIR DETERMINATION, OUR PROGRESS

- Manisha Arora
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ABSTRACT

This paper titled "*Reconciling Corporate Social Responsibility with Sustainability: Their determination, our progress*" will discuss Corporate Social Responsibility and its relationship with Sustainable Development along with CSR impact on Health, Education, Sanitation and various other sectors. Both sustainable development and CSR are congruent to each other. CSR is basically a continuing commitment by the corporations to behave ethically and to bestow with economic development while benefiting the society at large. Tracing the history of sustainable development and CSR altogether, sustainable development as a concept originated in the 18th century when deforestation was allowed to a certain considerable extent for the long-lasting protection of forest trees. A new concept was evolved which is known as the New International Pyramid Model for the CSR. It is evident that CSR activities are being carried out globally by companies irrespective of any law but still, some laws can be enacted by other countries as well to ensure corporate sector's mandatory participation in activities related to CSR. Corporate Social Responsibility is not a charity, rather it is a method to connect with the main strata of the society and therefore it ensures sustainable development.

Keywords: sustainability, glocal, goodwill, transnational corporations, stakeholders

INTRODUCTION

Undoubtedly, disparity leads to downfall owing to which the corporations around the world are in a constant scuffle to meet the needs of the present generation without deteriorating the abilities of the future generation to meet their own needs. Public esteem (or the esteem that an organization adds to the general public) helps an organization to reconsider how it can convince the administration for the upliftment of the underprivileged sector.

While contemplating the idea of Corporate Social Responsibility (hereinafter referred to as "CSR"), one can note that it has been assumed since long back, that, for classifying any Corporation or Transnational Corporation (hereinafter referred to as "TNC") for instance, as responsible, its contribution towards sustainable development shall be taken into consideration. Primarily, both sustainable development and CSR are congruent to each other. CSR is ensnared with a healthy business tactic. One would have a thriving business if social and environmental issues are being taken care of.CSR is an outstanding method to show an organization's credentials by benefiting the economy, environment and society which are the three primary

concerns. Workers make the most of it by getting engaged in new jobs and even clients and speculators get attracted to an organization showing social obligation. CSR simply refers to the responsible action on the part of companies that includes the economic, environmental and social implications of their business. A company, prima facie is accountable to its associated stakeholders, they being, owners, customers, employees, community, partners, NGOs, public authorities. CSR is an ongoing continuous commitment by the corporations towards the helpless or weaker section of the society requiring attention from the privileged class, engrained with ethics and morals in order to give a pedestal to them and also acquiring ‗Goodwill' for themselves. It requires the enterprises to go beyond the minimal legal obligations for addressing the needs of the society, therefore, fulfilling their commitment to contribute to sustainable development in all possible ways. The companies display their social responsibility by working in collaboration with other enterprises or development actors, for example, NGO's to make the health, water, sanitation and education sector more viable. CSR has various development policies associated with it, a commitment to which integrates responsible practices into daily business operations. Some of the CSR's developing policies includes adopting core reforms to encourage judicious use of natural resources, diversity in hiring employees and curbing discrimination and incorporating policies in compliance with social and environmental factors.

CSR was defined in the international meeting of the World Business Council on Sustainable Development (WBCSD) as the *―continuing commitment by business to behave ethically and contribute to economic development while improving the quality of life of the workforce and their families as well as of the local community and society at large."*[1] Apart from this, the Commission of European Communities states that *―CSR is an idea whereby companies integrate social and environmental concerns into their business operations and interactions with their stakeholders on a voluntary basis."*[2]

Moreover, it was questioned whether the institutional investors and insurance companies are legally authorized to amalgamate the social, environmental and governance issues into their decision-making process and business practices. The United Nations Environment Protection Financial Initiative in its 2005 report deduced that *―integrating environment, social and governance considerations into an investment analysis so as to more reliably predict financial performance is clearly permissible and is arguably required in all jurisdictions."*[3] It is essential to note that CSR cannot be considered a charity. CSR is not a demonstration of philanthropy as organizations get long haul profits by CSR activities.

CSR AND SUSTAINABLE DEVELOPMENT: ESTABLISHING THE NEXUS

Tracing the history of sustainable development and CSR, it was observed that sustainable development as a concept originated in the 18th century when the deforestation of forests was allowed to a certain considerable extent for the long-term preservation of forests. As a result, it ensured the ample supply of woods to the present generation without compromising the availability of wood for the forthcoming generations. The term ‗sustainable development' came

1 PRANJALI BHAGWATt, *Corporate Social Responsibility and Sustainable Development*, RESEARCH GATE (May 10, 2020), https://www.researchgate.net/publication/227409922_Corporate_Social_Responsibility_and_Sustainable_Development/ .

2 *Id*.

3 *Id.*

into the picture in the late 1980s whereas CSR was established in the 1950s and 1960s. For the first time in 1953, Bowen defined CSR as *–an obligation to frame policies and make decisions keeping in mind the objectives and values of the society."*[4] In the beginning, instead of CSR, the term social responsibility was used. Caroll defined social responsibility as *–the social, economic, legal and discretionary expectations that the society has of a company and further the company will decide which aspect it should focus on.*"[5]

A new concept was evolved which is known as the New International Pyramid Model for the CSR. Economic, global, ethical, legal and philanthropic are four major responsibilities under the new model. It describes the behaviour of the company to be legal, ethical and philanthropic while contributing to environmental development globally. Majorly, the pyramid is helpful for the companies in achieving sustainable development goals. If we see from a larger point of view, CSR demonstration brings an _Unequivocal Benefit Package' to both the association just as the general public. The cash is spent for the benefit and it returns to the network and to the society material which applies to the association's eco-framework.

Sustainability is dependent on three pillars which are economic, ecological and social. In order to incorporate sustainability into business practices, the practices adopted by the company should majorly rely on _give and take' like ethical beliefs for the long-term success. As the company has many interdependencies in and outside its arena thus, it should fulfil its commitments in protecting the ecology by reducing its environmental impact. Best suited example regarding CSR can be taken from India as the laws in India, specifically, Section 135[6] makes it compulsory for all the companies having 5 billion net worth of rupees or more, or having a turnover of 10 billion rupees or more, or having 50 million rupees or more net profit or more in any of the financial years to utilize 2% of their average net profits made in the three preceding years on activities related to CSR. It is evident that CSR activities are being carried out globally by companies irrespective of any law to operate them, also, this type of law can be enacted by other countries as well, to ensure corporate sector's mandatory participation in activities related to CSR, considering the fact that without their participation and without any global initiative, the goal of sustainable development cannot be fulfilled. In certain purviews, partnerships are required to –econtribute" a specific measure of benefit. This is, truly, an expense, not a commitment. Where a few –ecommitments" are not legitimately required, it turns into an issue to be chosen by the board and at last, by the investors, since it is out of the esteem that generally would accumulate to them.

THE IMPACT OF CSR ON HEALTH, EDUCATION, SANITATION AND OTHER SECTORS

Firstly, for environmental protection, the emphasis is on searching a sustainable solution for the use of natural resources in such a way to reduce a company's impact on the environment. Over a period of time, other initiatives such as recycling, and energy efficiencies are also

4 *Corporate Social Responsibility and Related Terms,* SAGEPUB (May 11, 2020),https://www.sagepub.com/sites/default/files/upm-binaries/41167_1.pdf.

5 NAJEB MASOUD, *How to Win the Battle of Ideas in Corporate Social Responsibility: The International Pyramid Model of CSR*, SPRINGER OPEN (May 12, 2020), https://jcsr.springeropen.com/articles/10.1186/s40991-017-0015-y .

6 Companies Act, 2013, Section 135.

adopted by many companies. At a base dimension, CSR makes an organization to assume liability for its activities and its effect on the general public. It encourages the organization to provide/transfer assets to add to the wellbeing and welfare of the general public. A premier company in the history of entertainment, Disney has been ranked one among the list of ‗World's Most Admired Companies' for two years in a row by Fortune.[7] The company shows impeccable responsibility towards all of its social programs. It is a social program which deals with the strengthening of communities by providing comfort, hope and happiness to families and kids who are in need of them. This is one of the most admired companies in the world because of the efficacious social programs that it runs. Running such CSR programs that positively affect the roots of a society makes a company more admirable and trustworthy. CSR programs like these, helps a company to generate more profit from its consumers because of the trust that it gains. Companies like Bosch, Mahindra and Mahindra run various social programs related to health and sanitation. They along with several other enterprises and multinational companies have collaborated with several non-governmental organisations for proper and effective application of their social responsibility programs which ensures the reach of their programs. Treating the representatives reasonably and liberally is a piece of corporate social obligation. By giving regular employment, empowering high expert and imbibing good principles, the company increment representative unwavering, and by acquiring just those abroad items delivered at plants where labourers are dealt with morality, the company gains support among ‗Reasonable Trade' advocates which ultimately helps them in the long run.

A company can show its social responsibility regarding water and sanitation by the construction of innovative and efficient wastewater treatment plants. A well-designed sustainable sanitation can also be constructed for this purpose for the long-term use. Rainwater harvesting is an equally good initiative for improving sanitation. Adidas, one of the top sportswear giant battles to safeguard life underwater through its CSR program ‗Run for the Oceans'.[8] Adidas hosts running shows in different cities across the globe to aware the public and to turn their attention towards the devastating effect of plastic contamination on marine life. Adidas raises money from the runners who participate in this event and subsequently sponsors programs that are focused on cleaning the water bodies. This type of CSR program is very helpful in achieving sustainable development because of its uniqueness and approachability. This CSR program works great both for the present and for the upcoming generations.

Practices concerning one's business greatly affect the rights of the people associated which means that it becomes obligatory for the companies to eradicate gender-based, caste-based or any sort of discrimination from the workplace and to guarantee basic human rights to its employees. Keeping that in mind, as an illustration, it becomes imperative to provide clean and potable water along with proper sanitation facilities.

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7 *Disney Leads Industry on Fortune's List of ―World's Most Admired Companies"*, THE WALT DISNEY COMPANY (May 15, 2020), https://www.thewaltdisneycompany.com/disney-leads-industry-fortunes-list-worlds-admired-companies/ .

8 *‗Run For the Oceans' Returns- Adidas X Parley Harness the Power of Sport to Create Awareness for the Threat of Marine Plastic Pollution*', NEWS ADIDAS (May 16, 2020),https://news.adidas.com/running/-run-for-the-oceans--returns---adidas-x-parley-harness-the-power-of-sport-to-create-awareness-for-th/s/5b424d6e-a4ff-4f07-82b9-40cfaabf2543 .

Corporations in cooperation with the international organizations, public sectors or civil societies take various measures for supporting the victims of disasters by playing a major role in humanitarian disaster relief operations. Regarding health and sanitation, a company can support the affected people by providing them with clean drinking water and sanitation facilities. United Nations Development Program (hereinafter referred to as ***"UNDP"***) and multinational company Coca-Cola work together to rehabilitate the water and proper sanitation facilities in the tsunami-affected areas. The Coca-Cola Company and its bottling and packaging partners manufactured the bottled drinking water on a large scale and harnessed its distribution in order to outreach to the local communities of the tsunami-affected areas. The Company also funded UNDP with $1 million to take all possible tsunami recovery efforts in the region.

Some CSR programs have such an immense and positive effect on the people that they reciprocate the same to the companies, for instance, e-commerce giant Snapdeal's CSR programs which is highly commendable and recommended to major business giants. In 2011, Snapdeal installed 15 hand pumps in an Indian village named Shiv Nagar in Uttar Pradesh. The villagers earlier had to walk miles to fulfil their water requirement but after Snapdeal's initiative, the hardship of the villagers came to an end and in return, the villagers renamed their village to _Snapdeal.com Nagar'.[9] Such responsible CSR programs by the enterprises focused on the people in need all around the globe will help in achieving sustainable development and thereby fulfilling sustainable goals. Starbucks, the big name in the coffeehouse chain, started its CSR program which aims to supply the farmers millions of coffee trees as a part of the sustainable coffee challenge, such programs help in empowering farmers which in turn will lead to sustainable growth and without their empowerment, achieving the same is not possible. Starbucks flagship CSR program also aims to recruit about 10,000 refugees in its stores around the globe in about 75 countries over the next few years.[10] This arrangement is an augmentation of Starbucks progressing pledge to make pathways to significant work for opportunity to youth, veterans and military life partners. CSR programs of companies like Starbucks which deals with the empowerment of farmers and job accessibility for the refugees and youths who are in need of the same should be motivated and supported as accessibility to jobs, sustainable and collective growth is otherwise not possible.

Education is one of the key elements of sustainable development. Companies working together with the public sectors or civil societies can make an active contribution in providing quality education to children. Other than this, a company shall support development organizations in education campaigns relating to the advantages of sanitation. Procter and Gamble (P&G) company's flagship CSR program, _Shiksha (Education): Padhega India, Badhega India', can be taken as an example of a CSR role in education. It is an important part of the sustainable development program, now in its 8th year, Shiksha has helped 2,80,000 underprivileged children till date to get on their right to education. The program has supported and constructed more than 140 schools all over India, in collaboration with Non-Governmental Organisations like Navy Wives Welfare Association (NWWA), Army Wives Welfare Association (AWWA), Save the Children (STC) and Round Table India (RTI), among others. The program was started in 2005 to empower the consumers of P&G products to contribute

[9] MONI BASU, *Indian Village Named for a God Now Honors Snapdeal.com*, CNN(May 17, 2020), http://edition.cnn.com/2011/WORLD/asiapcf/06/17/india.village.name/index.html .

[10] *Starbucks Hiring Efforts for Military, Youth and Refugees*, STARBUCKS STORIES AND NEWS (May 17, 2020), https://stories.starbucks.com/stories/2017/starbucks-hiring-initiatives/.

immensely towards the education of underprivileged children by the simple consumption of their products. Also, the Parivartan program of P&G helps in educating millions of girls about menstrual hygiene in India.[11] Both of these programs are highly applaudable and their methodology must be adopted by the corporations across the globe that are running education-focused CSR programs, as these programs ensure sustainability and are impacting the main strata of the society by bringing issues like sanitation, health and education. A company can promote adequate health standards by providing a healthy and safe workplace to its employees. It should also show its interest in investment into health and sanitation promotion projects implemented with the assistance of development actors such as NGOs. These projects may help in raising awareness about the relationship between sanitation, hygiene and public health.

CONCLUSION AND SUGGESTIONS

CSR is not a charity. It is a method to connect with the main strata of the society, a method to gain trust, to become socially responsible, to help in making the world a better place to live in and to ensure sustainable development leading to a better place to grow and proliferate for the present as well as for the upcoming generations. Even the present applicants consider an enterprise‘s ethical compass as much as the pay package when looking for occupations, and contracting directors thinking cash alone will net the best individuals is not the situation any longer. CSR is beneficial in every aspect both for the corporate sector as well as for the general population and plays a very vital role in ensuring sustainable development for all, therefore, companies must prioritize it for their better functioning. Furthermore, sustainable growth can be ensured if companies come up with innovative global initiatives which would contribute towards enormous uplift.

[11] *Shiksha (Education) : Padhega India, Badhega India*, COMMUNITY IMPACT P&G (May 15, 2020), https://www.pg.com/en_IN/sustainability/social_responsibility/social-responsibility-programs-in-india.shtml .

SOVEREIGN LIABILITY AND EXONERATION IN PANDEMIC: EXPLORATION OF FORCE MAJEURE IN THE INDIAN CONTEXT

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ABSTRACT

When it so happens that the parties to a contract are unable to fulfill their contractual obligations owing to the fact that its performance has either become impossible or frustrated, one of the safeguards available to the parties in such matters is the principle of the force majeure clause. The force majeure clause also known as the risk allocation clause is added to a contract to avoid breach and to prevent the parties from non-fulfillment of its obligations. Various countries of the world have formulated their thesis and practice the application of the said clause in different ways such as the doctrines of impossibility and frustration. One of the key aspects subjecting to the application of the force majeure clause in most of the civil law countries is the fact that they have it codified in their laws, which does not make it necessary to include the force majeure clause explicitly into their contract. However, this cannot be said for countries such as India, England, etc. that follow the common law as they are strictly made to apply the force majeure only when it is drafted into the contract at its inception.

The spread of COVID-19 has had a massive and distinct manifestation in almost every sector contributing to the economy across the globe. Currently, all the contracts ever made are under the scrutiny of it being affected by COVID-19. It is safe to say that the only saving grace at this instance is the fundamental concept of Force Majeure and the Doctrine of Frustration to help revive the current economic disparities and variances.

Through this paper, an attempt has been made to help understand the finer nuances of the Force Majeure clause, its components and how it would be enforced in various types of contracts during the COVID-19 pandemic in India as well as other major countries of the world.

Keywords: Force Majeure, Covid-19, Doctrine of Frustration, Risk Allocation, Contractual Obligation, Pandemic, Law of Contract, Doctrine of Impossibility.

INTRODUCTION

If we were to go back in history to find the evidence of the first instance where the rule of ‗absolute contracts' was laid down, we might find the case of *Paradine v. Jane*[1], where it was held that any person who would bind himself by virtue of a contract to do something, would not be able to escape the impediment so caused by only citing that the events have turned to be impossible or futile.

[1] [1647] EWHC KB J5.

As time progressed, an intermediate contractual mechanism for risk allocation was brought in force such as the best endeavors clause or the reasonable endeavors clause. One of such mechanisms to exist is the force majeure clause that can be best understood as a risk allocation clause in a contract.

The term ‗Force Majeure' is a derivation from the French language, which roughly translates to ‗superior force'. However, in the legal jargon the term is related to a clause in a contract which would remove the liability in case of catastrophes, which are natural and unavoidable and thus, rendering the performance of the contract impossible and thereby, preventing the parties from fulfilling their obligations. Force majeure is a risk allocation clause in case of circumstances that are beyond reasonable and thus impeding on the performance of the contract.

This can be understood by the judgement passed by the U.S. Supreme Court in *Day v. U.S.*[2] which laid down the fact that whenever a person makes a contract he cannot possibly fathom the absolute intention of him being able to perform the contractual obligations when it is time. The court held that the very essence of the contract is the risk that the parties undertake within the limits to their understanding while entering into the contract.[3]

Force majeure first originated in the French language and was found in ‗Code Napoleon.' The application of this term can relieve the party from its obligation on the occurrence of certain events.

Circumstances which can be ruled out to be outside the control of the affected party such as Act of God, natural disaster, strike, war, lockouts, epidemic, Government's orders, etc are covered under the Force Majeure clause in order to provide relief to the party from undergoing the non-performance of the contract without any considerable breach of the contract.

In India, the Hon'ble Supreme Court in the case of *Dhanrajmal Gobindram v. Shamji Kalidas*[4] held that the primary aim of the force majeure clause is to safeguard the interest of the performing party in view of such circumstances which are out of control.

Under the statutory law of India, the concept of Force Majeure has not been explicitly given but rather a subtle reference has been provided for the same under Section 32 of the Indian Contract Act, 1872[5].

Section 32 of Indian Contract Act, 1872 talks about the authorization of contracts contingent on the happening of an event, i.e., contingent contracts are based on the fact that a dubious future occasion happens, which would then be considered not to be implemented by law unless the occasion has taken place. If the happening of the occasion gets to be impossible in itself then the occasion is void beneath this section.

Regarding contractual perspective, the force majeure clause gives a transitory respite to the parties to the contract from releasing their commitments upon the event of a force majeure

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2 245 U.S. 159, 38 S. Ct. 57, 62 L. Ed. 219 (1917).
3 *Id.*
4 (1961)3 SCR 1020.
5 The Indian Contract Act, 1872, No. 09, Acts of Parliament,1872.

occasion. It may be caught on a special case to what would something else be understood as a breach of contract.

However, under the Indian Contract Act, 1872 the concept of impossibility of an event i.e., Doctrine of Impossibility which is envisaged in Section 56 of the Contract Act, defines that a contract to do an act becomes inconceivable or illegal because of any circumstance under which one party fails to comply owing to the event being inconceivable.

THE DOCTRINE OF FRUSTRATION

Certain exceptions to the rule of ‗absolute contracts' have been laid down under the common law which are as follows:

a) ‗Implied term theory' which infers upon that if the contract was based on continued existence of a certain event or circumstance, it would be implied that on destruction or change of the said event or circumstance, the parties would stand excused from performance[6].

b) ‗Disappearance of foundation of contract theory' lays down that the parties would be free from the obligations if it is proven that the essence of the contract has been nullified because of change in the circumstances.[7]

c) ‗Just and equitable theory' is applicable where the court found that it was unjust and unreasonable to enforce the terms of the contract in light of the altered circumstances that were not contemplated by the parties.[8]

d) ‗Radical change of obligation theory' says the parties would stand discharged if due to the ensuing events, there was a thorough change in the obligations of the parties from what they had originally contracted for.[9]

These exceptions can be used to trace the evolution of the Doctrine of Frustration under the common law.

The Doctrine of Frustration, unlike the concept of force majeure, has been encapsulated in the Indian Contract Act,1872 under Section 56. This section is positive and exhaustive in nature and only applies to circumstances or events *de hors* the contract. Therefore, if there is any event that has been contemplated under the contract impliedly or expressly, it would be governed by Section 32 and not Section 56 of the Act. By virtue of Section 56, the entire contract is discharged.[10]Thereby, the test for the same is an objective one, and not dependent on the intent of the parties leading to the spontaneous performance of the contract.

While dealing with the concept of Doctrine of Frustration, the Hon'ble Supreme Court held that in case an ensuing event which is beyond the control and could not have been foreseen

6 *Taylor v. Caldwell*,3 B&S 826: 122 ER 309.
7 *W.J. Tatem Ltd. v. Gamboa*, (1939)1K.B.132, 137, 138.
8 *British Movietone Ltd v. London and District Cinemas Ltd*, (1952) AC 166: 44.
9 *Davis Contractors Ltd. v. Fareham Urban District Council*, (1956) A.C. 696,728, 729.
10 *Energy Watchdog &Ors. v. Central Electricity Regulatory Commission & Ors*, (2017) 14 SCC 80.

by the parties happens the very grounds upon which the contract rests is destroyed thereby the existing contract is decimated.[11]

The Supreme Court then reiterated the *Satyabrata Ghose v. Mugneeram Bangur & Co.* in another case[12] where it was decided that an alteration in the circumstances the contract was made in would not frustrate the said contract.

DIFFERENCE BETWEEN FORCE MAJEURE AND FRUSTRATION OF CONTRACT

a) Under Force Majeure, the parties come to the decision of including certain circumstances and a list of exhaustive events which would be then included if a situation arises that would attract the Force Majeure clause.

   While on the other hand, the contract is frustrated when an event which was not included at the time of making the contract occurs, thereby making it impossible for the parties to perform the contract.

b) The Force Majeure is a risk allocation clause so the rights of the parties are deferred until the event is continuing to occur but that typically doesn‘t absolutely excuse the parties from performing their contractual obligations.

   Contrarily, frustration of a contract to be conjured and applied requires the complete subject-matter or the basis for the contract shall be devastated. Doctrine of Frustration renders the contract void and subsequently all legally binding commitments of the parties desist to exist. Frustration of a contract could be a test *de hors* of a legally binding arrangement and is the concluding result of occasions emerging after the contract was executed.

   One of the key points to be noted here is that if a situation arises where a specific Force Majeure event is not explicitly provided for in the contract, in such a case the parties may claim for frustration of the contract. However, the same cannot be said if it is contrary.

CONTENTS OF A FORCE MAJEURE CLAUSE

The Force Majeure clause as specified before, is a risk allocation clause which diminishes the parties to the contract from performing their commitments related to the contract when certain circumstances emerge which makes the said execution inconceivable or unreasonable.

The following are the key elements of any Force Majeure clause:

1. <u>State the predicted events that may be construed as Force Majeure</u> -

When it comes to laying down the Force Majeure clause in a contract, the events have to be pre-specified. The courts interpret the force majeure clause narrowly to the extent of only applying it to the events covered in the list. Such events may include natural disasters like floods, earthquakes, tsunamis [Acts of God]. Apart from these, events like war, terrorism, epidemic, labour strikes etc are also covered under the clause.

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[11] *Satyabrata Ghose v. Mugneeram Bangur & Co.,* AIR 1954 SCR 310.
[12] *Naihati Jute Mills Ltd v. Khyaliram Jagannath*, AIR 1968SC 528.

2. Beware of restrictive language -

It is not off-base to say that the Force Majeure clause is language sensitive. It implies that indeed after the specified arranged list of Force Majeure occasions are specified, one should very carefully examine the language that comes before and after the list. Connecting words to the comma can strikingly change the scope of the said Force Majeure clause.

3. Underperformance many be excused due to Force Majeure-

A diligently written and carefully negotiated Force Majeure clause is an important tool in order to reduce the liability of non-performance in response to a disaster. One should be careful and take appropriate safeguards in the beginning to make sure to get the best defense ready for the future.

In this manner, it can be said that the Force Majeure clause ought to continue from a cause not brought by the defaulting party's default which ought to be unavoidable and unforeseeable thus, in a way making the execution of the contract completely and entirely outlandish.

VARIOUS CONTRACTS DURING THE PANDEMIC OF COVID-19

The onset of COVID-19 has caused several disruptions in trading, followed by a heavy loss to the hospitality and travel sector, putting the businesses whether small or large at the brink of recession.

The Prime Minister of India, Mr. Modi on March 24, 2020, imposed a 21 days lockdown on the citizens of India with exception to the movement for essential commodities.[13] This lockdown has the implication of businesses shutting down their operations. The parties to the contract have been forbidden to fulfill their commitments. Different businesses are looking to avail the force majeure clause to avoid a breach of contract. The Indian Department of Expenditure issued an Office Memorandum[14] which effectively classified COVID-19 as a ‗Force Majeure' event. It established that the force majeure clause would be applicable in contracts wherever considered necessary, albeit in strict adherence to the ‗due procedure'. The memorandum would hold persuasive value but not binding on the parties. The final call would be made on the basis of how the said clause is written down in the contract and if such provisions would provide protection to the parties.

Discussed under are the effects of the COVID-19 on certain major types of contracts in India:

a) Real Estate -

The stakeholders in real estate, whether they are builders or the lessors, have suffered a massive hit owing to the current pandemic. The Builder Agreements have the force majeure clauses already embedded into their structure whereas the same cannot be said

[13] Order No. 40-3/2020-DM-I (A), dated March 24, 2020 of the Government of India, Ministry of Home Affairs.

[14] Office Memorandum No. F. 18/4/2020-PPD, dated February 19, 2020of the Government of India, Ministry of Finance, Department of Expenditure, Procurement Policy Division.

for the rent agreements where even Section56 of the Indian Contract Act does not come to the aid of the parties at such an instance.

Having the force majeure clause does not defer the obligatory nature of the performance of the parties to the contract. It is assumed that the parties would act in consonance to their part in the contract, without getting interrupted by any force majeure circumstance. The parties under the contract may have the right to terminate such agreement if covered under the mechanism of mitigation of *force majeure* events and/or also clear them by penalty provisions.

b) Lease Agreements -

Keeping the present situation of COVID-19 in mind, the existing rent agreements are under scrutiny. The parties to the rent agreement would claim that they are incapable to pay the lease/ premium owed by them to the lessor. In a nutshell, the tenants would be incapable to pay the lessor what they owe to them to maintain their end of the deal and would hence need to claim defense under the provision of either constrain majeure or frustration.

To claim under force majeure, the parties need to have included the clause in their original contract agreement and also if the contract specified a clause under Section 56 then they would not be able to attract the force majeure defense. It should be also noted that the force majeure clause is only applicable in India in cases of lease if it is completely damaged.

Similar to the force majeure clause, the Doctrine of Frustration is additionally troublesome to prove and apply within the Indian legal context. It has been held that just because the execution of the contract has gotten to be grave and burdensome, the said contract would not be frustrated. The three-judge bench of the Supreme Court decided that Section 56 of the Indian Contract Act would not be pertinent when the rights and commitments of the contracting parties emerge under a rent agreement.[15]

c) Employment Agreements -

Since the onset of COVID-19 in the country, the entire state has been put under lockdown which has made it difficult for the service sector to function. A _work from home' policy has been issued to ensure nationwide safety and health. According to the _advisory'[16] passed by the Ministry of Labour and Employment due to the non-operation of the workplace, the employees would be considered as being _deemed to be on duty' and would have no consequential deduction in wages.

d) Aviation Sector-

Prior to the deadly outbreak of the worldwide pandemic, the aviation industry was among the biggest loss-making sectors of the Indian economy. The Central Government has

[15] *Raja Dhruv Dev Chand v. Harmohinder Singh & Anr*, 1968 AIR 1024, 1968 SCR (3) 339.

[16] Ministry of Labour & Employment, Government of India, https://labour.gov.in/sites/default/files/Central_Government_Update.pdf.

issued a new ordinance[17], bringing about an amendment in the CGST Act by inserting a new Section, i.e., Section 168A. This new section would henceforth provide an extension of time limit in force majeure cases. The ordinance has included an epidemic so as to deal with the current COVID-19 situation.

e) <u>Hospitality Sector</u> -

The hospitality sector had never been hit with such an unprecedented attack. This makes the sector pretty vulnerable to the future damages and losses that are to come their way.

Owing to the current situation, there has been a worldwide travel ban imposed which has led to the total shutdown of travel and tourism all over the globe.

It would be advised that the players of this sector impose the force majeure clause to be able to exclude themselves from their pending contractual liabilities.

APPLICABILITY OF FORCE MAJEURE CLAUSE IN A GLOBAL PERSPECTIVE

The World Health Organization **(WHO)** declared the COVID-19as a global pandemic and Public Health Emergency of International Concern (**PHEIC).** Almost all the countries of the world have been hit by the monstrosity, some more than the others but there is not even one part of the globe that has not been affected by this virus.

Owing to this situation, it is safe to say that the entire global market machinery has taken a massive hit. The commercial travels, supply chains and other commercial relationships have been strained and changed the discourse for the years to come.

Every country has their own ways of dealing with this pandemic and laws framed to determine the applicability of the force majeure clause in establishing new contractual dynamics.

THE UNITED STATES OF AMERICA -

In the States, the power has been vested in the hands of the Courts to decide the applicability of the force majeure clause and the rights and liabilities of the contracting parties if they cannot come to the conclusion as to whether that event is a force majeure event or not.

a) **New York:** The Courts in New York have laid down the strategy in case the parties look to maintain a strategic distance from their legally binding commitments, they must exhibit that they put in the reasonable endeavours to fulfill such commitments but due to the presence of force majeure occasion were incapable to do so. The party conjuring the clause ought to appear that the occasion was not as it were unforeseeable but was moreover the direct cause of the parties‘ failure to perform. A party looking to invoke force majeure ordinarily must also show that there is no alternative means for performing under the contract.

b) **California:** Under California law, the parties are required to illustrate their sensible and adequate endeavours to dodge their circumstances of the force majeure

[17] Ministry of Law & Justice, The Taxation and Other Laws (Relaxation of Certain Provisions) Ordinance, 2020 on 31st March 2020, http://egazette.nic.in/WriteReadData/2020/218979.pdf.

event. Courts have found, for example, that force majeure does not pardon a drilling company from its legally binding commitments where the company might not get essential devices since its supplier was on strike. In spite of the fact that, strikes were among the force majeure occasions enumerated within the clause, the court found the company was obliged to source the devices from an alternate provider, indeed in spite of the fact that doing so would cause the company to incur extra expense.

c) **Texas:** Texas Courts ordinarily will not pardon performance whenever a force majeure occasion was apparently predictable at the time of the contract being made, however, it is not particularly counted within the force majeure clause. Contrasting from New York and California, Texas does not require the party conjuring force majeure to illustrate that it exercised ―reasonable diligence" to dodge the disturbance unless such ―reasonable diligence" is explicitly required by the force majeure clause itself.

THE UNITED KINGDOM -

The force majeure can be said to be a creature of contract under the English law, where the courts specify on certain situations that would be constituted as a force majeure event.

This, however, would be subjected to a number of filters or checkpoints to determine whether such parties would be relieved of their contractual obligations or not.

In this manner within the United Kingdom, for a force majeure clause to apply, the execution of such obligation must be ―physically or lawfully impossible, not only more difficult or unprofitable." [18]

AUSTRALIA-

One of the key aspects of the applicability of the force majeure clause under the Australian Law is that it does not have a definitive meaning in the common law but it exists only as a civil law concept. The force majeure clause may relieve a party from liability arising from their inability to fulfill their contractual obligations due to circumstances beyond their reasonable control.

The circumstance must be unforeseeable, unavoidable and must make performance impossible such as ―Acts of God" (for example tornado, flood, tidal wave, etc.).The effect of a force majeure clause is that it enables the non-performing party to escape liability for failing to perform as a result of the force majeure event.[19]

CONCLUSION

In conclusion, on this subject, an English case[20] is reiterated as it very carefully defines the instances and lays down the applicability of both the Force Majeure and the Doctrine of Frustration in a wider range of circumstances which must deal with the incorporation of the same.

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18 *Thames Valley Power v. Total Gas & Power,* [2006] 1 Llyod's Rep. 441.
19 *Matsoukis v. Priestman & Co.,* (1915) 1 KB 681.
20 *J. Lauritzen A.S. v. Wijsmüller B.V.,* [1990] 1 Lloyd's Rep. 1.

The current situation arising out of COVID-19 has been termed as a pandemic and thus, it would be construed to be included in the typical force majeure clauses as far as the events bringing it to life are included in the terms of the contracts.

It would be interesting to see how the various clauses in terms of the contracts subsisting would be interpreted by the courts in view of COVID-19 in different contracts to ensure the safest dispensation of the contractual obligations.

The COVID-19 can be described uniquely in the sense of disruptions it has caused, i.e., the pandemic itself and the government's response. Over the last week of March 2020, India was not the only nation which imposed a lockdown; other nations such as the United Kingdom and Australia have also imposed such national lockdown as a measure to prevent the spread of the disease. Businesses across the globe are facing difficulty in executing their contracts. Therefore, it becomes of the utter necessity for all businesses to understand the scope of force majeure clause in their respective jurisdictions to protect themselves from causing the breach of contract.

COLLEGIUM SYSTEM IN INDIA- THE CONTROVERSY OF JUDICIAL TRANSPARENCY VS. JUDICIAL INDEPENDENCE

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INTRODUCTION

Brief History of Appointment of Judges

Dr B.R. Ambedkar once said, ―that judiciary has to be insulated from political pressure and political influence". A genuine, effective and autonomous legal executive is basic for the endurance and working of our popularity-based framework, for the security of the key rights and freedoms of the individuals and for the solidarity and respectability of the nation with moderate assurance of the privileges of the minorities. The arrangement of arrangement of judges have experienced different changes so as to accomplish such productive legal framework. The Supreme Court has assumed a significant job in rolling out such improvements. The Constitution was revised in the year 1976 by 42nd amendment. The intensity of Judicial Review was put to an end and 2/third lion's share was ordered for striking down any enactment. Despite the fact that, it was later invalidated by the Constitution (44th Amendment) Act, 1978. In 1981, the political administrators again endeavoured to recover the intensity of the exchange of the High Court makes a decision about prompting the well-known first Judge's Case.

In *S.P. Gupta* v. *Association of India*[1], the Apex Court set down that the suggestion for arrangement made by the Chief Justice of India isn't pre-famous and his proposals can be turned somewhere near the decision legislators at the Centre, at the same time, just for 'Fitting' reasons, this case was also known as *First Judge's Case*[2].

Later, in the year 1993, in Advocate on Record Association v. Union of India, the Supreme Court rescinded the ruling laid down in S.P. Gupta's Case and created the Collegium system under which appointments and transfers of the judges are decided by a forum of Chief Justice of India and two senior most judges of the Supreme Court,, this case was also known as the *Second Judge's Case*[3]. But, in many cases, Chief Justice of India took unilateral decisions, without consulting the other two judges and the President became only an approver. It would be pertinent to mention that, earlier too, when the Constitution was being drafted, the Hon'ble member of the Drafting Committee, Mr. Mahboob Ali Baig Sahib, had moved an amendment exactly on the same issue ―that in the first proviso to clause (2) of Article 103 of the Constitution, for the words _the Chief Justice of India shall always be consulted' the words _it

1 2 SCR 365, (SC:1982).
2 *Case Analysis*, Global Freedom of Expression, https://globalfreedomofexpression.columbia.edu/cases/s-p-gupta-v-union-of-india/.
3 *Plea to review Second Judges case order dismissed*, THE HINDU, https://www.thehindu.com/news/national/plea-to-review-second-judges-case-order-dismissed/article29902091.ece.

shall be made with the concurrence of the Chief Justice of India‘ be substituted.” But the proposed amendment was rejected by the Constituent Assembly.

To manage this insufficiency, in 1998, President K.R. Narayan, gave a reference to the Supreme Court with regards to what the expression "interview" implies in Article 124, 217 and 222 of the Constitution which are identified with the arrangement and move of Supreme Court and High Court judges. In answer to this, the Preeminent Court set down different rules for the exchange and arrangement of judges and firmly strengthened the idea "power" of most elevated legal executive over the official, also known as the *Third Judge‘s Case*[4].

Legislative Initiative

Different advances were taken to evacuate the deficiencies of the Collegium framework and to present an equivalent cooperation of Judiciary and Executive in making arrangements, so as to make the framework increasingly responsible. The Constitution (98th Amendment) Bill, was presented in the Lok Sabha, in the year 2003, looking to make a National Judicial Commission. The Law Commission in its 214th report proposed an equivalent job for legal executive and official, in determination and arrangement of Supreme Court and High Court judges. The Judicial Appointments Commission Bill, 2013, was presented in Rajya Sabha, in any case, the bill ends up being insufficient and neglected to turn into a law. At last, the National Judicial Appointments Commission was presented by the Constitution (121st Amendment) Bill 2014, which was at long last settled in the Constitution (99th Amendment) Act. Together with the Constitutional Amendment Act, the National Judicial Appointments Commission Act, 2014, was likewise passed by the Lok Sabha and the Rajya Sabha and hence, consented by the President on 31st December 2014. The National Judicial Appointments Commission Act, 2014, has set out the strategies for the choice of judges of higher legal executive. Be that as it may, this revision was held to be unlawful in October 2015, by a Constitution seat of Supreme Court, in the case of *Supreme Court Advocates-on-Record Assn. v. Union of India*[5], in this case, the Supreme Court said that the NJAC is unconstitutional and that the old collegium system of making appointment as judge of Supreme Court would continue to be valid[6].

99th CONSTITUTIONAL AMENDEMENT ACT, 2014

Establishment of NJAC

Discussion around the National Judicial Appointments Commission (NJAC) has frequently been emotive as opposed to impartial, with the talk running from senior lawyer, Ram Jethmalani considering it an "abhorrent silliness" to Attorney General, Mukul Rohatgi, highlighting judges, who routinely turned up late in court as motivation to discard the current collegium framework to choose the judges. Outside these black-and-white arguments, the more complex reality is that, this is one of the most difficult tasks the Supreme Court has faced in recent years. While, the legal fraternity continues to be sharply divided over the matter, of how, to select the nation‘s senior judges.

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4 *The Three Judges Cases: How Three Judgements Made the Modern Indian Judiciary*, THE LOGICAL INDIAN, https://thelogicalindian.com/story-feed/awareness/collegium/.

5 *Supreme Court Advocates-on-Record Assn. v. Union of India*, AIR 117, (SC : 2016).

6 *What every Indian should understand about how Judges are appointed in India*, I PLEADERS, https://blog.ipleaders.in/what-every-indian-should-understand-how-judges-are-appointed-in-india/.

The National Judicial Appointments Commission (NJAC) was built up by the Union legislature of India, by correcting the Constitution of India, through the 99th Constitutional Amendment Act, 2014. The Amendment Act was passed by both the Houses of Parliament, with two-third of larger part in August 2014. Along, with the Amendment Act, the NJAC Bill, 2014, was likewise passed by the Parliament. The Bills were affirmed by the 20 State governing bodies and President of India, gave his consent to the bills in December 2014. The two Acts came into power from thirteenth April 2015.

The National Judicial Appointments Commission (NJAC) built up under the NJAC Bill 2014, supplanted the two-decade-old collegium framework which was being followed for the arrangement of the judges of the Supreme Court and the 24 High Courts. The base camp of the Commission was in New Delhi.

Provisions and Functions of NJAC

The 99th amendment of the Constitution inserted a new Article 124A in the Constitution, which provides for the composition of the NJAC. According to this, NJAC would consist of:

-Chief Justice of India (Chairperson);

-Two senior most Supreme Court Judges next to the Chief Justice of India;

-The Union Minister of Law and Justice;

-Two eminent persons (to be nominated by a committee consisting of the Chief Justice of India, Prime Minster of India and the Leader of Opposition in the Lok Sabha or the leader of the single largest opposition party in the House, where there is no such Leader of Opposition);

Of the two eminent persons, one person would be from the SC/ST/OBC/minority communities or be a woman. The eminent persons shall be nominated for a period of three years and shall not be eligible for re-nomination[7]. Agreeing, to another Article 124B of the Constitution, the elements of the NJAC will be: Recommending people for the arrangement as the Boss Equity of India, judges of the Supreme Court of India, Chief Justices of the High Courts also, other judges of the High Courts. Suggesting the move of the Boss Judges and different Judges of the High Courts from one High Court to some other High Court, guaranteeing that the suggested people have the capacity and uprightness.

Procedure for Selection of the Chief Justice of Supreme Court

The Act commands the NJAC to suggest the name of senior most adjudicator of the Supreme Court for the arrangement as the Boss Justice of India. Given, he must be viewed as fit to hold the workplace.

Procedure for Selection of the Other Judges of Supreme Court

NJAC will suggest the names of people based on their capacity, merit and other rule determined in the guidelines.

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[7] *What is the Collegium System and how it works?* , JAGRAN JOSH, https://www.jagranjosh.com/general-knowledge/what-is-the-collegium-system-and-how-it-works-1525257473-1.

Procedure for Selection Chief Justices of High Court:

The NJAC is to suggest a Judge of a High Court to be the Boss Justice of a High Court, based on status across High Court judges. The capacity, merit and other rules of appropriateness as determined in the guidelines would likewise be thought of.

Appointment of Other HC Judges:

In the event that, of arrangement of a standard Judge of a High Court, the commission will likewise look for sees in composed from: The Governor of the State, the Chief Minister of the State, the Chief Justice of High Court, Veto Power of NJAC individuals. The individuals from NJAC have veto power in determination of different adjudicators of SC and HC. The NJAC will not suggest an individual for arrangement, if, any two of its individuals don't concur to such suggestion.

Power of President to Require Reconsideration

The Act engages the President, to re-evaluate the suggestions made by it. In the event that, the NJAC makes a consistent suggestion after such re-evaluation, the President, will make the arrangement as needs be.

NJAC WILL ENDANGER INDEPENDENCE OF JUDICIARY: THE JUDGEMENT OF THE SUPREME COURT BENCH ON NJAC

The NJAC Act, was tested in Supreme Court by Supreme Court Advocates on Record Association (SCAORA) and others battling that, the new law is unlawful, and it is planned for harming the autonomy of legal executive. In the wake of, tolerating the appeal, on October 16, the five-part established seat of Supreme Court headed by Justice J.S. Khehar, with 4:1 dominant part, has proclaimed the National Judicial Appointments Commission and the 99th Constitutional Amendment Act as ‗unconstitutional and void[8]'. The Constitution (Ninety-ninth Amendment) Act, 2014 and the National Judicial Appointments Commission Act, 2014, is proclaimed unlawful and void. The arrangement of arrangement and move of Judges of higher legal executive, as existing preceding the Constitution (Ninety-ninth Amendment) Act, 2014 (called the "collegium framework"), is announced to be usable. The conditions gave in the alteration are deficient to save the supremacy of the legal executive, an essential element of the Constitution. Consideration of Law Minister in the commission encroached both on the autonomy of the legal executive just as the regulation of partition of forces between the legal executive also, the official. The seat additionally dismissed for reference to a bigger Bench, and for re-evaluation of the Second and Third Judges cases. To think about presentation of fitting measures, assuming any, for an improved working of the ―collegium system[9]".

CRITICAL ANALYSIS ON COLLEGIUM SYSTEM OF APPOINTING JUDGES

Why Collegium Is Necessary to Maintain the Independence of Judiciary

The provisos in the revisions are deficient to save the power of the legal executive and the consideration of the Law Minister in the NJAC has encroached on both the freedom of legal

[8] *National Judicial Appointments Commission*, G.K. TODAY, https://www.gktoday.in/gk/njac-act-2014-99th-amendment-of-indian-constitution/.

[9] *All you need to know about NJAC*, LIVE MINT, https://www.livemint.com/Politics/rcsu24yGQ0frdanyQ9fVVL/All-you-need-to-know-about-NJAC.html.

executive and the convention of partition of forces, which are the fundamental highlights of the Constitution. It likewise affirmed that; the better working of the legal executive must not be made sure about to the detriment of its freedom.

By, striking down the Constitutional correction, the Supreme Court has looked for to guarantee that the official doesn't have a state in the arrangement of the higher legal executive. In India, government is a significant defendant in essential cases. In such a circumstance, incorporation of law serves speaking to the official for the arrangement and move of judges, brings about irreconcilable situation. The official may look for response from legal executive for selecting their top choices. The open trust in the legal executive will likewise be lost, if the significant disputant has a job in arrangement and move of judges. Under NJAC Act, the official tried to carry two prominent people into the democratic procedure, with veto powers. The seat said that this will advance the "corruption". As, there is no specific basis to conclude who is a famous individual, the prominent people might be unspecialized individuals without legal experience. The choice board with CJI, the Executive and Leader of Opposition as individuals, has given significant job to political class. The veto intensity of prominent people will diminish the significance of the Chief Justice of India and the Executive in the appointing process. The eminent persons may exercise veto, without giving any reasons and it will disturb the appointment process[10].

NJAC SUFFERS FROM VARIOUS STRUCTURAL DEFECT

However, the collegium framework was fruitful in making a free legal executive, it bombed pitiably in building up a responsible one. Those, for the foundation of the NJAC have proposed that, the framework is idiot proof and guarantees responsibility and straightforwardness in the legal arrangements process. In any case, we have to get that, the NJAC in its present structure despite everything experiences deserts. Along these lines, so as to guarantee this new component of arrangement gives the solution for this current issue, it is inescapable to fix these imperfections. The creators accept that, the Act can possibly strikingly change the current framework.

The Missing Element of 'Merit'

In the assessment of the creators, one of the significant components required to evacuate the current murkiness is to present, the idea of "merit". Legitimacy, which can be viewed as likely the most significant model for making legal arrangements, has not been explained upon by the drafters of the Act. What comprises merit is, in this manner, to a great extent obscure. The Act, neglects to set out a legitimate model, based on which the adjudicators will be chosen, and, along these lines, this leaves a space for discretion. The Act doesn't make reference to any sort of target rule, on which the Commission must depend, while making the arrangements. In this way, it is basic to incorporate explicit legitimacy-based basis, which is to be trailed by the individuals from the NJAC before making any suggestions. In any case, it is critical to remember that, legitimacy can never be a totally target part of determination.

[10] *National Judicial Appointments Commission*, G.K. TODAY, https://www.gktoday.in/gk/njac-act-2014-99th-amendment-of-indian-constitution/.

The Eminent Persons Under NJAC was Threat to Judiciary

Article 124 A of the Constitution sets out the structure of the National Judicial Appointments Commission and imagines the nearness of two "prominent people" on the NJAC, who would be named by a board of the Prime Minister, the CJI and the pioneer of the restriction or on the other hand the single-biggest resistance in the Lok Sabha. One of the prominent people must be a lady or somebody having a place with a Scheduled Caste, Scheduled Tribe, Other Backward Classes or another characterized minority. Who precisely, is a prominent individual under Article 124 A of the Constitution is somewhat ambiguous on the grounds that no basis of determination has been given? The advisory group's perspectives on who is prominent could be profoundly not quite the same as the perspectives on the overall population, or even, there could be a contradiction inside the advisory group, so as to choose who is prominent, without general rules. Famous people could represent a hazard to the freedom of legal executive, particularly, in the event that, they have personal stakes in the official, since they have the viable capacity to destroy the designation of any applicant. Prominent people would not have the option to decide the capacity of an appointed authority, in the event that they have no involvement with the field.

Inclusion of The Law Minister Under NJAC

In India, the legislature is a significant prosecutor in essential cases. In such a circumstance, incorporation of law serves, speaking to the official for the arrangement and move of judges will brings about irreconcilable circumstance. The official may look for response from legal executive for designating their top choices. The open trust in the legal executive will likewise be lost, if, the significant defendant has a job in arrangement and move of judges. Incorporation of the Law Minister in the NJAC has encroached on both the freedom of legal executive just as the teaching of partition of forces, which are the basic features of the Constitution.

NJAC: THE CURE FOR THE AILMENT?

The genuine inquiry which emerges for thought is, regardless of whether the development of NJAC truly fixes the infirmities that the collegium framework experienced? In any case, the NJAC certainly fixes the prior claims of illegality which emerged because of the official's sentiment, having no weight in contrast with the legal executive. The NJAC comprises of three legal officials and the Union Law Minister, alongside the contribution of a few political bodies.

The proposal is at long last made to the President. Thus, the NJAC gives significantly more supremacy to the official, instead of the legal executive. Besides, somewhat it can likewise be said that the issue of legal responsibility has been explained as the legal executive would now be responsible to the official in the matter of its arrangements.

Be that as it may, aside from the abovementioned, it doesn't score in some other path over the collegium framework. It doesn't fix the absence of straightforwardness. The contemplations and system of arrangement would even now be covered in riddle. Alongside the models of arrangement explicitly accommodated, in the arrangements of the NJAC Act, the words "some other reasonable rules" will keep on manage the cost of adequate measure of nepotism and bias to the individuals from the NJAC.

Additionally, the NJAC Act gives that among six individuals from the NJAC, at least five people need to concur with the proposal, without which, the suggestion can't be made. This greater part isn't just in excess of a basic dominant part (half), in any case, considerably in excess of an exceptional larger part (67%) as pondered in the Constitution for passing of the money bills.

Moreover, the long technique of constant discussions and conversations commonly going before the death of enactment in the nation, have likewise not been followed for this situation. The death of the enactment in such a rushed way, have likewise been seen with doubt, charging the absence of jurisprudential application. Separated, from these downsides of the collegium framework, which the NJAC Act neglects to survive, it has a few escape clauses and illnesses of its own.

The legality of the NJAC Act and the 121st Constitutional Amendment is a subject of concern. The NJAC Act and the change leave the intensity of legal arrangements, in the possession of the official, nearly completely. Legal arrangements have consistently been related with the autonomy of Judiciary, which has on numerous occasions been perceived to be a piece of the fundamental structure of the Constitution. Giving such significant power to the official in the arrangement procedure, it prompts the weakening of the freedom of legal executive just as it very well may be viewed as a shook to the fundamental structure of the Constitution.

Another apparent lacuna in the arrangement of the NJAC, is the consideration of "prominent people", with no measures of uncommon information. In different Acts, for example, the Consumer Protection Act, 1986, the standards of "famous people" is set down as having some unique information, foundation and standing. Without such a models, being set out, the board of trustees comprising of the Prime Minister, the Leader of Opposition and the Chief Justice will be allowed to choose people without responsibility of benefits and different components, which will, as a result, lead to maltreatment of the arrangement. In particular, there is no arrangement for expressing the reasons of determination of either "prominent people", referenced in the Act. Further, there is no arrangement for expressing the reasons for recommendation of candidates. This can lead to the abuse of power by the members[11].

THE WAY FORWARD: THINKING OF NEW ACCOUNTABILITY MECHANISMS

What is the solution? On one hand, the judiciary in India has defended its independence fiercely, particularly, after past attacks from strong executive power. But, equally important to its functioning and independence, is a holistic and workable accountability mechanism. Since, the appointments are such a controversial issue, the problems and solutions often start with a discussion, on how to improve and streamline the judicial appointments procedure in India.

The idea of a performance evaluation system for the higher judiciary was also being floated in India. Any potential performance evaluation system would also have to withstand the test of judicial independence, as laid down in numerous Supreme Court judgments. However, for any of these solutions to be manifested into reality, India‘s judiciary must be truly independent from politics, and not just in theory, i.e., not only by insulating the executive from the system of

[11] SHAMBHU SHARAN AND GUNJAN CHHABRA, *India: The National Judicial Appointment Commission- A Critique*, MONDAQ,http://www.mondaq.com/india/x/647748/trials+appeals+compensation/The+National+Judicial+Appointment+Commission+A+Critique.

appointments. While, the system of appointment seeks to root out any executive involvement, the fact that politically unfavourable judges are being transferred arbitrarily, and the continuing opacity in the appointment system, begs the question of how independently the judiciary actually functions. India‘s understanding of judicial independence, must look beyond the constitutional interpretation in the context of appointments and also seek to understand the issues it faces in reality that threaten its independence from within.

CONCLUSION

In the words of Mr. Soli Sorabjee

―If you don't mind recollect no framework can be great. You can't guarantee autonomy, you can't administer freedom. An adjudicator must be autonomous, even of himself, of his predispositions, biases, inclinations, assumptions. However, the thing is, it is a human framework, it's anything but an ideal framework. I figured that, I would prefer to go with the collegium framework, make it wide based, it to be mulled over in arrangement of judges, as opposed to, scrap it inside and out. I would prefer to confide in the adjudicators than the executive[12]‖.

An oversimplified comprehension may make the collegium framework look rather hazy, particularly on the grounds that lone legal executive has the ability to choose future adjudicators. Nonetheless, this is additionally an approach to make legal executive autonomous of governmental issues. Having been kept outside of the law-making body and official, the framework is accepted to keep the determination of future appointed authorities free from outside impedances. It maintains the status of applicants and should submit to the standards of detachment of forces in the Constitution. With the administration's contribution, many dreads, that the legal executive may need to settle on its independence[13].

[12] SHAMBHU SHARAN AND GUNJAN CHHABRA, *The National Judicial Appointment Commission- A Critique*, SINGHANIA AND PARTNERS LLP, https://singhania.in/njac-act-national-judicial-appointment-commission/.

[13] FAIZAN MUSTAFA, *Collegium System is a lesser evil than the NJAC*, HINDUSTAN TIMES, https://www.hindustantimes.com/analysis/collegium-system-is-a-lesser-evil-than-the-njac/story-X7pvxvm0XQFhA2W4oYJkxL.html.

NEED TO RECOGNISE MALE SEXUAL ABUSE

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ABSTRACT

When we hear the word _rape' the first thing that pops in our head is a woman soaked in blood. Why it never comes to our mind that the victim can be a male as well. No, it is not our fault, but that is how we are brought up in the society. None of us ever heard of a male getting raped or if we ever do why it is difficult for us to digest. This article talks about how our society closes their eyes when it comes to discussing any taboo and one of the considered taboos of our society is _Male Sexual Abuse'. We all find it comfortable listening to the assault that happened to our female companions, but why we never ask our male friends to share what they have gone through. Neither the law of our country nor society is ready to recognize male sexual abuse. In our society, we never teach boys to come up and discuss what they are going through in life, all we ever say to them is ' you are a man and man do not cry' this phase take all the guts they have to come, say and cry over their problems.

The author in this article will conclude the need to recognize male sexual abuse. I will discuss the impacts after a male is abused and how difficult it becomes for him to say aloud in the society.

Keywords- Rape, Male sexual abuse, Taboo, Victims and Law

INTRODUCTION

When we look over the society we live in, we see all the great things present in it. Happy faces all around us, but when we look deep into the reality of the society, we would be able to see flaws present. A smiling face does not mean if that person is living to the best life it imagined. That particular individual may have suffered in its life or, there can be a huge possibility that its suffering may not have ended to date. We live in a society that teaches us to stay quiet if anything unusual happens to us.

Rape is taboo in our society. We are ready to stay with it but not ready to talk about it. This society has developed a sphere and asks people to live within that defined line. It has made it hard for a rape victim to go out in public and confess about what has happened because there will be ten people supporting the victim and a hundred of them judging.

When female rape victims are coming out of their houses to ask justice, male rape victims are still in vain to do so. It is not easy for a male victim to come out in the light and confess. There are many social stigmas upon the males of our society; anything which questions their manhood is taboo. This stigma never gave male victims the confidence to come up and speak out. This does not only affect male victims in their present life but also harm their future. These effects include anger, trust issues, and some possible sexual problems as well.

KEY FACTS OF LESS RECOGNITION OF MALE SEXUAL ABUSE

The silence around the world for male sexual abuse is because of less awareness and no platform to talk about it. The lack of knowledge of male sexual abuse is because of a shortage of laws, effects, and less awareness for male victims need to do for justice. Cultural myths and social values about sexual abuse are considered as the main obstacle for recognizing of male sexual abuse. Some key facts which should be known before considering the myths of the society for male sexual abuse are:

- Muscularity does not imply the fact that men cannot be maltreated.
- If a guy gets sexually aroused during the exploitation that does not mean that he wanted or liked being abused.
- Sexual exploitation harm both men and women in similar as well as in complex ways, but equally devastating.
- Sexual abuse takes away a child's vulnerability.
- Whether a guy is homosexual, gay, bisexual, or straight. It is not the result of sexual abuse.
- Girls and women can also be sexual offenders.

Myths of our society which make it even more difficult for recognizing male sexual abuse evolved from initial days.

- **The myth that men cannot be raped-** We have always seen women as victims, we never focused on the fact that a male can also be a victim. It centers on their masculine personality and their strong nature of living. The myth keeps saying that if a man is sexually abused, he will never be a real man. Our society expects males to protect themselves as well as protect the people around them. Males are expected to be physically strong and less vulnerable.

  Many men who were sexually abused feared to tell their stories because they thought that they will be less of a man and these things will question their muscularity. Being a society, we have failed to protect the boys of our society, as well as we have also hampered their confidence to confess what went wrong by providing these myths.

- **The myth that if a man has been through sexual abuse may have wanted it**- The myth that has always been in people‘s heads is that if a male is getting into an intimate relationship, then he is enjoying the sexuality of the relationship. Getting sexually aroused during an abuse form an emotion of guilt in male survivors. This guilt in them makes them feel that sexual abuse was their fault. Therefore, this guilt never lets the victim confess and the victim does not feel safe to talk about it.

  It is very important to understand that men can respond to a sexual touch with an erection or even have an orgasm, that does not eliminate the fact that it is not painful for them. Those who sexually abuse guys know the fact of erection and orgasm. They usually represent the victim that if they are willing to engage in the abuse if they have an orgasm. This fact makes it more challenging for the victims to acknowledge the abuse.

- **The myth that sexual abuse is less harmful to men-** The long-term effect of sexual abuse can be dangerous for both men and women. Anything unusual happening to any person leaves a physical as well as mental damage in a person. The effect of damage caused due to sexual abuse does not vary from gender to gender. Generally, it depends on the identity of the offender, duration of offense, and the intensity of the offense.

  Whether the victim has told about the offense to anyone or not, also affect the mental damage of the victim.

  Many boys suffer also harm because they would have told about the abuse to anyone and those people could have helped him, but with the probability that those people would not have trusted him, asked him to keep quiet and even if they have trusted they would have not helped him out in a manner help should have been provided.

These are some of the myths that everyone has grown up listening to. Usually, without even giving a thought about the myths we start believing it. As we all have somewhere in life have heard about it and never questioned it. Many males, as well as female victims, have suffered. So as long as a society will believe in these myths and parents teach these myths to their young ones, these myths will not get banished from society and many more victims will suffer in vain. As long as the victims themselves will carry on believing and support these myths of our society, it will give more power to the offenders and these will never change. Believing in these myths will never help the male rape victims.

LAWS RELATING TO MALE SEXUAL ABUSE

We have always lived in a society that never discussed male rape instances. There has always been a myth that men cannot be raped. Rape does not affect male victims, and male rape cases are not as important as female rape cases. That is why neither our society nor our legislative system ever recognized male sexual assault.

Sodomy, anal intercourse has been criminalized in many countries for the world, but the issue of male sexual abuse has recently discovered as sexual exploitation.

In the initial days, English common law defines rape when a man has sexual intercourse with a woman with force. Later it was defined if a man has sexual intercourse with a woman with force or the threat of kidnapping or the threat of murder or torturing or extreme pain or bodily injury. In the 1970s, the law of the United States became more gender-equal and started identifying abuse done to males in society. Regarding all the permanence provided to male victims in the legislature, there are many crimes in which male victims are not identified. For instance, in many states, anal intercourse is brought under _sodomy' and not _rape'. So, the case is treated under sodomy and does not give benefits of laws relating to rape in the country.

Additionally, many countries do not believe in the fact of female penetration thus, they do not recognize male sexual abuse done by female offenders. Many countries do not consider mistreatment of a male by a female as an offense. The whole world considers that females are always the victims of society and everything harmful done to them is done by males around them. No one ever understood the fact of the victimization being vice versa in the society as well. Just because of the Taboo regarding male rape, the number of males who were abused, could not confront the accused. Rape laws introduced and criminalized rape when the penetration

is done by a penis only. When a male is raped by another male it creates the myth of homosexuality. Therefore, the victim does not prefer defying a male offender as well.

Chief Justice Warren E. Burger emphasized historical negative attitudes toward sodomy, quoting Sir William Blackstone's characterization of sodomy as "a crime not fit to be named" Chief Justice Burger concluded, "To hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millennia of moral teaching."[1]

To understand more male sexual abuse victims, a study was brought by the United Kingdom to assess male rape survivors. The study suggested that more than 10-15% of male rape victims went to report the assault and less than half of them felt that police were helpful. The victims who were ill-treated by the police mentioned that police were unsympathetic towards them, mock them, and even kick them out of the police station.[2]

Main barriers to recognition of male sexual abuse, they are-

- Not accepting the fact of male rape in society
- Viewing male rape as a less important offense
- Not blaming the offender
- Following the myths gave by society.

LAWS IN INDIA RELATING MALE SEXUAL ABUSE

In India, where men are considered and expected to maintain the household and fulfil their family needs, it is impossible to think about the fact that these men can also have suffered exploitation in their lives. We as in Indian society have always failed to protect females and when every aspect of offenses is evolving around the world, we have also failed to protect males of society as well. Not just the society, not even the Indian law system recognizes the fact that a male can also be a rape survivor. So nowhere under the definition of rape in India, a male rape offense is mentioned.

We all are following these myths that it has become so hard for us to understand the fact that the male victim is also in society. The saying "that men enjoy sex" becomes more difficult for a male rape victim to confess the offense. As rape is forceful intercourse it is never believed that males can also be forced to have sex. Men not just get raped, they are exploited and humiliated from another male or a female as well.

If a male victim will go to a police station to report a rape case, he will either be mocked away or there will be no investigation. Most of the male rape cases are not investigated because the victim is not able to prove forceful intercourse and the fact that he was not willing to have and intercourse. Also, full erection during sexual intercourse disqualifies the offense to be rape.

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1 *Bowers v. Hardwick*, 478 U.S. 186 (1986).

2 TURCHIK, J. A., & EDWARDS, K. M., *Myths about male rape: A literature review,* PSYCHOLOGY OF MEN & MASCULINITY, *13(2), 211–226.* doi:10.1037/a0023207.

Section 375 of the Indian Penal Code (IPC) defines ―rape". ―A man is said to commit rape if he has forceful sexual intercourse with a woman under the six defined descriptions." Indian law doesn't consider male rape as forcible intercourse. Due to this provision, most male rapes go unnoticed in India. In several other countries, too, rape only constitutes ―sexual intercourse forcefully done with a female". Many people accuse the male victim that they would have enjoyed the abuse.

Rape is rape, it is traumatic for both male and female. It hurts both males and females in the same way. Making it gender biased does not support the fact that consecutive another gender will not face the problem in his life. Making rape a gender-biased offense does not help with the fact that males will not experience rape. It just makes it more difficult for a male rape victim to bring the offense in the eyes of society. Rape is a crime and an unacceptable offense, the offender be it a male or a female should be punished. But our legislature does not give female offenders recognition that they could also be the offender thus, it does not punish them. Laws should be more transparent in order to give opportunity to every citizen in the country.

It is high time now and change has to come in the mere future. Making the law gender-equal and accepting the fact that males are not some different creatures in society. They too have feelings and they have the right to talk about it. Making it a taboo is not supporting the victims and society as well. Awareness, acceptance, and punishment should be the motive of our society.

The Indian Government has defined Child sexual abuse in 2007. A survey was conducted for children who reported experiencing severe sexual abuse, including rape or sodomy, 57.3% were boys and 42.7% were girls. More recently, the Delhi-based Centre for Civil Society found that approximately 18% of Indian adult men surveyed reported being coerced or forced to have sex. Of those, 16% claimed a female perpetrator and 2% claimed a male perpetrator.

―He was lured into a room near where he played cricket, a man then shut the door and window, and raped him. That's what a 14-year-old Mumbai boy told his mother from his hospital bed last July. " the case happened in Mumbai. An elderly man rape 14'year old boy. The boy confessed about the rape to his mother and committed suicide after the assault. No law regarding the male rape present in the society, that is why the offender was not prosecuted and is still free.

―Navi Mumbai: Man gang-raped after stopping for a cigarette on the way home. Police registered a case under section 377. The man was kidnapped from a deserted spot and was taken behind some trees when he had stopped for a cigarette while going home. He was sexually abused and beaten by five men. _The doctors at a private hospital have had to conduct multiple surgeries.'

FACTORS AFFECTING RECOGNITION OF MALE SEXUAL ABUSE

First, the ratio between girls' rape victims to the boys' rape victim is 2.5:1. As we compared female and male abuse, female victims get more attention. The females are at higher risk of sexual abuse than boys. Limited exposer to male victims who have experienced it made it difficult to be recognized by victims.

Second, when it is difficult for a situation to be recognized or the victim is hesitating to confront the doer and is unwilling to disclose abuse done to him. This gives power to the rapist

to continue the act. It has resulted in the fact that the males who have been accused believed that the sexual abuse done to them is because of their own weaknesses and failures.[3]

Third, in most of the families of our society, as compared to girls, boys are given more independence and are allowed to do things which girls are not allowed. So victim boys may hesitate to mention abuse for fear of losing their independence.

Fourth, the personality of the offender may also influence the victim not to confront him or her. Many boys are abuse by the person of the same age, people of their own family, or people close to their family. Offenders may also torture kids and threaten them to tell others.

In such instances, males try to minimize their social group and keep themselves away from sharing what they have been through in life. It not only affects their present but also messes up their future. He may never be comfortable in sharing what he is going through in life and may have trust issues.

THE EFFECTS OF CHILDHOOD SEXUAL ABUSE

An individual who goes through sexual abuse not only gets physically harmed; he gets equal mental damage too. Offenders harm a person not knowing the fact that it will taunt the victim through the rest of his life, studies show that when a person talks about what he has been through in the past makes him feels better and help the victim to cop-up with the offense.

While men portray that their sexual childhood abuse does not bother them anymore, one must not assume that they are over it. The ones who have been sexually abused can go through numerous health and mental issues like, stress disorder, anxiety, trust issues, depression, self-injury symptoms, and many more. The world has seen that sexually abused kids are prone to these symptoms more than non-abused kids.

- **Sexually abused females and males**

The area of male sexual abuse has recently begun to recognize in public. Both the gender may relatively have the same reaction over the offense, but the way of dealing is different. A Male deal it with aggression and female are seen into depression. Despite any difference in the nature of abuse, both male and female victims of sexual abuse carry similar impacts.

Society as in whole has let us down by making such myths and yelling out loud that males cannot go through such circumstances. It takes the power of male victims to speak up and gives power to the offender to commit an offense. Similarly, as we have recognized female sexual abuse and support the victims, it has given the power to female victims to confront the offender.

So when we do not give male victims a platform to speak, we push them into a black hole where they feel isolated. It turns a person more aggressive. While we compare sexually abused genders, it is seen that the abuse will affect both the genders equally. The difference will be in the intensity of dealing with the situation.

[3] RYAN, et al., *Juvenile sex offenders: Development and correction*, CHILD ABUSE & NEGLECT 11, 385 ± 395.

- **Depression**

It is marked as the most common symptom in sexually abused people. Male victims try to overcome the situation by isolating themselves from people around them, or they try to act as an aggressive person in front of others to show their manhood and let the offense sink into them. Depression is one of the most acknowledged symptoms.

The victims experience a different level of sadness over the abuse. Where the abuse is done by a family member, the victim may develop a self-blame guilt. Besides, when the duration and intensity of the abuse are increased, the feeling of guilt develops too which results in depression.[4]

- **Guilt and self-blame**

It is also a common symptom of sexual abuse. When anything unusual happens, you don't feel comfortable talking about it. Individuals may assume that being a sexual victim was their fault. They may also think that they may have done something which led them into such situations.

Additionally, the victims need to know that was not their fault. Bad things do not randomly happen to every individual in a row. Self-blaming and guilt is not a healthy way to overcome the situation. One should accept the fact that it was just the offender's fault for whatever has happened and does not blame himself. However, many victims do not have any feeling to blame neither for the offender nor for themselves.

- **Anger**

One feeling that guys appear to be ready to effectively recognize and express his outrage at having been a casualty of sexual maltreatment. In society, we are living anger is given as a label of pride for the males. The male has permission to get angry in any situation. It often becomes the sole emotion and consumes every other emotion within the victim. Being angry and showing anger in public identifies that the man is not weak. Hence, the guy can keep the label of manhood presented by culture.

It seems relevant for a sexually abused victim having a feeling of anger because (a) they may have several reasons to get enraged by the injustice done to them, (b) they ordinarily never received a chance to express what they feel about the exploitation, and (c) they may feel powerful with anger and do not want others to see their weaker side.

The male victims have this ongoing anger within themselves about what happened to them and how they could not prevent it. The feeling of revenge arises.

- **Sexuality issues**

When a male has been through sexual abuse, he may get sexuality issues in the future. The biggest concern in male victims is of homosexuality. Some of the male victims consider the abuse that happened to them is because of their female traits.

[4] Pescosolido, F. J. (1988). Sexual abuse of boys by males: Theoretical and treatment implications. In S. M. Sgroi (Ed.), Vulnerable Populations: Vol. 2. Sexual abuse treatment for children, adult survivors, offenders, and persons with mental retardation (pp. 85 ± 109). Lexington, MA: Lexington Books.

Once you go through a traumatic circumstance, your mind becomes traumatized. When Any state near to that circumstance comes to you again, it becomes painful to stand through it. The mind will not be capable of determining the situation and makes you paralyzed throughout the moment. One may think that they have moved on from the abuse, but unless your mind and mental health are over the maltreatment. It will be difficult for a victim to undergo sexuality later in life.

The victim may provoke sexuality in life or may become dominant on the bed. When a victim has been through the pain, rape, assault, hurt, he may develop a tendency to observe others in pain as well. Therefore, the victim becomes dominant and fantasies about rough performance during intimacy.

EXPERIENCES OF RAPE VICTIMS

The characteristics and qualities possessed by rape victims being male victims or female victims depend a lot on the scenarios in which the sexual abuse has done to them. Many studies have taken place to understand the intensity of effect done to the victim from the situation they have suffered. Thus, understanding the outlines is important.

- **Duration of sexual abuse**

Sexual abuse is an offense even if it is done once twice or multiple times. It is a hideous offense and the number of times it is committed should not affect the punishment of the offender. As we talk about the victims, the duration of the abuse affects them a lot.

When an absolutely disturbing thing happens to someone in which he had no role. The victim will try to move on with life and he will try to forget things, but when the abuse happens to him regularly it makes it much challenging for the victim to move on. When undesired things happen to him, again and again, the victim tries to develop a numb feeling for the act and prefers to endure the act without. The victim in his mind will make a thought that whatever is happening to him will continue for long and if he will argue the offender to stop, he may end up getting hurt. So, the victim tries to make himself comfortable with sexual abuse.

Later, once the abuse stops and the victims get in a position to think about what has happened to him in the past. It puts the victim in the more unwanted situation from which it becomes difficult for the victims to come out from that thought of disgust. Similarly, if the duration of the abuse was less, the victim would have got more time and less trauma from the maltreatment which would have helped him out to get over the sexual assault in time.

- **Age of the victim**

Every study shows that the age of female victims and male victims differ. Overall, the age of child sexual abuse victims is between 7 and 10. As young as you are, it is more difficult to judge the surroundings and identify what is right and what is wrong for you. You agree to do most of the things where there is any elders' guidance. You do not have that mental capacity to know what is wrong for you. You have been always taught by guardians that you can trust the family. The society we live in does not teach children to question their elders. At a young age when it is difficult to understand what is wrong and what is right, how can a child be capable to understand the fact that the offender is doing some unusual thing to him? Thus, children are easy treats of the offenders.

- **Relation with sexual offender**

We know the fact that females are more likely to be sexually abused by a family member. There are 63% of male victims to be abused by a family member as well. It was also brought in a study that a victim abused by natural fathers are equal in both the sexes. It concludes that the investigation in a male abuse case should be more intense, as it may not be as rare as it seems.[5]

We have been taught by our parents that one should not trust a strange, but we were never informed to be careful by our family members, close relatives, and friends as well. We used to believe the fact that our parents are always right, and if they are asking us to trust someone, we blindly follow them. Mentioning the fact that parents never want bad for their child, but they should make their child aware of bad touch and good touch. When an offender has a close relationship with the victim, he often experiences greater traumatic situations. When an unknown person does something wrong to the victim it would not similarly affect him, as when it is done by someone he trusts.

- **Intensity of sexual abuse**

A bad touch or rape, it should be known that everything done without anyone's' consent is wrong. The frequency in which sexual abuse is done affects the victim in great intensity. From the study, it was brought to the notice that the duration of sexual abuse of a male victim is usually shorter than compared to female victims, because of several explanations,

(a) As most of the male rape victims are raped by the offenders outside the family, those offenders do not get easy and continuous access to the victim,

(b) Male victims may suffer greater physical trauma which would require immediate medical consultation, and

(c) As boys grow up physically stronger, they may be able to stop their offenders to commit the offense.

The Study of victims shows that the victims who have been abused for a longer period were prone to less self-confidence and poor self-worth.[6]

Duration of rape may not affect greater negativity as compared to the intensity of the rape can affect. Many cases have been brought into notice that the victim bleeds endless which may become the reason for mental and physical problems as well. Many offenders do not only rape the victim but also torture them by beating them during the abuse.

CONCLUSION

We are at an alarming stage the victims have suffered in disguise to date and, they do not deserve to suffer anymore. Yes, male rape is a fact and we should take the responsibility to make the legislature, society, people, victims, and offenders aware of it. The need for justice for the male rape victims is still a dream to catch, but to make them comfortable and allow them to speak out about it in the society without being judged is in our hands.

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[5] ROMANO, E., & DE LUCA, R. V., *Male sexual abuse. Aggression and Violent Behavior, 6(1), 55–78.* doi:10.1016/s1359-1789(99)00011-7.

[6] MENDEL, M. P., The *male survivor: The impact of sexual abuse*, THOUSAND OAKS, CA: Sage.

Male rape is not a new thing in society. It has been existing since way back, the only difference is that the news related to male rape is not hidden anymore.

When the #MeToo movement was going on many men came forward and confessed their story as well. What happened after confessing? Exactly, nothing happened. Once a victim came forward and confesses too there is no law regarding male rape in our society. No one supports the victim. No proper police investigation takes place. Rather, what we do? We mock the victim, we believe the myths rather than the reality, and the most important reason is simply that our society does not want to accept this fact. We do not want to talk about it all we look forward is to ignore the bitter truth and move with our lives.

Male rape victims are not different from female rape victims. They too suffer the same torture, violence, abuse, insult, humiliation, self-blame, guilt, embarrassment. When someone's boundary of sexuality is forcefully infringed by any other person, it shatters their belief in humanity. All the rape victims are under the same umbrella and they suffer proportionately. In India‘s rape offense _section 375 IPC‘ does not even recognize male rape offenses, the only hope they have to fight for justice is under _section 377 of IPC‘ Therefore, gender-biased laws should not prevail in society. Every citizen has the right to feel safe and should have the feeling that the legislature will help them in every situation.

INTERFACE OF PERSONAL LAWS AND CONSTITUTION OF INDIA

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ABSTRACT

Legislations and legislative methods were first introduced in India by the British. Since that very time, it was observed that the British never legislated on the Indian Personal Laws apart from those established for the Christian Marriage and Divorce provisions. This was due to the fact that the concept of personal laws because of its large private and non-secular nature was considered as a quite sensitive topic to breach upon. Personal laws are of a unique nature especially due to the fact that they are binding only on one part or section of the community. They owe their preservation and continuance largely to the religious practices and customs and their unrestricted and untouched power on the rule of precedents regarding this matter which has been seen in a large number of cases. The question that arises largely in this study is how the rights conferred by the constitution are violated by the personal laws and how they can be modified or rationalised such that this discrimination is dealt within an effective manner. Apart from this an emphasis has been given on points where judicial review of personal laws has been done in order to maintain constitutional validity.

INTRODUCTION

A. Background of Personal Laws in India

Personal laws can be of various sorts, to be specific, religious practices, customs and uses, rules in the idea of common laws and legal understandings if there should be an occurrence of ambiguities. For instance, as for legal translations if there should arise an occurrence of ambivalence, we see that however the inception of personal laws or family laws in India can be traced from time immemorial. Most of the personal laws that are still followed in India are under the ambit of ―Religious Freedom" under Article 25 of the Constitution of India.

This is clearly observed in the case of *Commissioner Hindu Religious Endowments (HRE), Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt*[1] in which the Apex Court stated that:

―The guarantee under the Constitution of India not only protects the freedom of religious opinion but it also protects acts done in pursuance of a religion and this is made clear by the use of the expression *practice of religion* in article 25 of the Indian Constitution."

A clearer classification on Personal Laws is mentioned below:

1. Religious Practices[2]

[1] *Commissioner Hindu Religious Endowments (HRE), Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt*, AIR1954, 282.

[2] Religious practices can be recognized and protected under Article 25 of the Indian Constitution if those are found to be essential to a religion. It mostly covers un-codified part of personal law.

2. Customs[3]
3. Statutes
    a. Regarding codification
    b. Repealing already existing laws
    c. Secular provisions dealing with personal matters
4. Judicial Interpretations

Personal Laws play a very important role of keeping the society with its prescribed limit. Though each community, sect, caste or section of the society is governed by an intricate set of rules that somehow fall under the domain of personal laws. The issue that we are confronting today is that despite the fact that at present these laws are working effectively, such method will not be appropriate in the long haul**.**

B. Effect of the Post-Constitutional Period

A new age phenomenon of ―codification" was introduced with the advent of development of legislations, along with which the concept of ―reformation" was also given serious thought. This was the period when the state has just begun to exercise its legislative powers and actually begun to recognise the responsibility given to it by the Constitution. As such during the underlying period of acknowledgment of Indian Constitution, number of enactments or laws had either got changed or revoked, attributable to their logical inconsistency with that of the arrangements of Indian Constitution. Personal laws were not an exception to the process, irrespective of whether they were codified or un-codified, customary or already in practice. In contrast to different resolutions or enactments, which were revoked in early time of acknowledgment of Indian constitution, repealing of personal law was not the simple errand for either the Legislature or the Indian legal executive.[4]

This is because of Article 25 of the Constitution; the word ―practices' in the provision acts as a safeguard to all the individual personal laws in the country. There was no specific interpretation of the phrase that could be relied upon by the judiciary while giving a decision, thus even if they had to repeal the law they had to do so in a manner that the constitutional validity of the law was not challenged with respect to violation of fundamental rights.

In brief one can say that during the immediate post-constitutional period Part III of the Constitution was acting as a safeguard but at the very same time other provisions of the very same part such as Article 14 or Article 21 of the Constitution were being violated. Thus, in a way the Personal Laws were causing the judiciary to question the provisions of the Constitution like never before.

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[3] Customs and usages can be a part of personal laws governing family relationships. But ―Customs" and ―Usages" so part of, must have legal backing. In the sense it must not have been specifically prohibited by law. In cases where personal law is codified, usually there is less scope for the custom or usage.

[4] *Article on Personal Law in India*, Vol. 2, Issue 3, SOUTH ASIAN JOURNAL OF MULTIDISCIPLINARY STUDIES (SAJMS) ISSN:2349-7858.

INTERFACE OF PERSONAL LAWS AND CONSTITUTION OF INDIA

Because of being based on ancient systemsthere are several aspects of personal laws which are not in consensus with some of the provisions of the Constitution. Time and again, the aspects of these laws which are incompatible with the Fundamental Rights have been questioned in the court of law. The Court has seemed to have adopted an oblique attitude while dealing with such cases, i.e., not interfering in these policies for the sake of the susceptible groups to whom these laws apply to. The courts have adopted two strategies for the same purpose[5]:

1. In some cases, the courts have found some features of the personal laws are not incompatible with the fundamental rights, specifically with reference to Articles 14, 15, 25 and 26 of the Constitution.

2. While in some cases the courts have denied that the scope of Article 13 of the Constitution extends to the personal laws due to which they do not come within the ambit of judicial review.

State of Bombay v. Narsu Appa Malli[6] was the first case where the personal laws were observed to be in clear violation of Part III of the Constitution. This case deals with constitutional validity of the ‗Bombay Prevention of Bigamous Marriage, Act, 1946. The Act was said to be in violation of Articles 14, 15 and 25 of the Constitution. The Bombay High Court ruled that:

―Personal law was not included in the *law* referred to in Article 13 (3) and was not the *law in force* saved by Art. 372 (3) of the Constitution. It was also declared that Bombay Prevention of Hindu Bigamous Marriage Act, 1946 is not violative of Article 14 of the Constitution as the State was free to embark on social reforms in stages."

A similar question was brought up when the Madras Hindu Bigamous (Prevention and Divorce) Act, 1949 was introduced, in the case of *SrinivasaIyer v. Saraswathi Ammal*[7]. Here however the difference is that rather than questioning on religious grounds with regard to religious practices it directly questioned Article 14 on the basis of religious discrimination on the basis of religion. Here the court held that:

―the court said that it didn't segregate among Hindus and Muslims on the ground of religion, as State was enabled by ideals of Constitution of India to either order (enact) or to revoke or change personal laws."

SCOPE & EXTENT OF JUDICIAL REVIEW

The doctrine of ‗Judicial review' is reflected in Article 13 of the Constitution of India unequivocally. The Constitution of India explicitly provides for the doctrine of judicial review[8] according to which if any law is inconsistent with the Fundamental Rights, would be declared as unconstitutional and ultra vires the Constitution by the Supreme Court of India[9]. The Indian

5 M.P. JAIN, INDIAN CONSTITUTIONAL LAW 867 (7th ed., Lexis Nexis).
6 ILR 1951, Bom 775.
7 1953, Mad. 78, (52) A.M. 193.
8 M.P. SINGH, INDIAN CONSTITUTIONAL LAW 1563, (5th ed., Wadhwa Publications 2006).
9 *Article on Personal Law in India*, (Jan 16, 2017, 5:25 pm), http://sajms.com/wp-content/uploads/2015/08/9-Article-on-Personal-Law-in-India.pdf.

courts are under a Constitutional Obligation to scrutinise and check the validity of every law with respect to the constitution. The leading case law regarding Judicial Review states that:

"It is the function of the Judges, to pronounce upon the validity of laws. If courts are totally deprived of that power, the fundamental rights conferred on the people will become a mere adornment because rights without remedies are as writ in water."-*Minerva Mills Ltd. v. Union of India*[10]

Kesavananda Bharati v. State of Kerala[11] brushed upon the necessity of judicial review:

"As long as some fundamental rights exist and are a part of the Constitution, the power of judicial review has also to be exercised with a view to see that the guarantees afforded by these rights are not contravened".

When the same is applied in the context of the Personal Laws in India, the judiciary appears to be at crossroads, as mentioned in the above section, there are two main points where the constitutional validity of a personal law can be questioned. Now the problem arises when these points overlap each other, .i.e. when a law has to be struck down due to violation of fundamental rights but in doing so a restriction is placed on their "religious freedoms".

In other words, these are the issues that a court has to deal with when it comes to Judicial Review of Personal Laws with respect to Article 25.

- "What is essential part of a religion?
- What is protected under Article 25?
- What rituals & ceremonies can be protected as an essential practice under Article 25?"[12]

JUDICIAL REVIEW OF PERSONAL LAWS

In this unique circumstance, there are some other areas where either the legality or sensibility of certain laws has been questioned. The judiciary has always found it challenging to strike a balance between its concerns for gender justice, the fairness of law and the religious based personal laws.

Even though there were discussions about how Personal Laws should come under scrutiny it was not until the case of *Md. Ahmed Khan v. Shah Bano Begum*[13], which actually shed light on how important it is that Personal Laws are substantial for the sake of Constitutional Sanctity. The Supreme court of India needed to conflict with existing personal laws and needed to think about certain transient and secular aspect. This is perhaps the dawn of the judicial review in personal laws in India.

Shah Bano, a Muslim woman, had been divorced by her husband. She filed suit for maintenance under Section 125 of Cr.P.C. When the case reached the apex court, the court ruled in her favour and stated that the case held a substantial question of law. This was one of the first

[10] AIR 1980 SC 1789.
[11] AIR 1973 SC 1461.
[12] *Supra* note *1*.
[13] AIR 1985 SC 945.

cases where a judgement was given in favour of upholding a provision of law and stating the injustice that will occur if Personal Laws prevail. The court ruled against the tenets of Muslim personal law which prohibited maintenance of Muslim divorced women and upheld the right Muslim divorced women to claim maintenance as per Section 125 of Cr.P.C.52. The Apex Court expressed hope that Parliament would take steps to enact Uniform Civil Court as enjoined under by Article 44 of the Constitution.

In similar ways there are various cases that were scrutinised in the same manner, leading to the striking down of provisions of personal law:

- **Monogamy**

  ***Sarla Mudgal v. Union of India*[14]**

  This is another significant judgment in relation to the personal laws, their constitutionality and UCC. While the issue under the watchful eye of the Court was that of polygamy of Hindu men and the legitimacy of their marriage contracted preceding change, it fundamentally tended to the issue of the UCC. The approach of court was in the context of the nation, national integration and minority identity.

- **Restitution of Conjugal Rights**

  ***T. Sareetha V/s. T. Venkataubbiah*[15]**

  In this case the contentious matrimonial remedy, ‗restitution of Conjugal rights' was challenged. Not merely the reasonability even the constitutionality of this provision was challenged by the petitioner in this case.

  However, in a similar case, *Harvinder Kaur v. Harminder Singh*,[16] the Delhi High Court had upheld the constitutionality of the provision. Finally, Supreme Court of India, in *Saroj Rani v. Sudarshan Chaddha*[17] had overruled the Andhra Pradesh High Court's judgement in the T. Sareetha by upholding the decision given by Delhi High Court and ruled that Section 9 is constitutional.

- **Discriminatory ground of divorce**

  ***Ammini E. J. v. India*[18]**

  The constitutional validity of Section 10 of Indian Divorce Act was questioned on the grounds of burden of proof being greater on the part of wife to prove two grounds at the same time in a petition for divorce. This was found to be arbitrary and discriminatory by Kerala High Court and as such struck down as unconstitutional. As a result of it, Legislature has amended the Section 10 by substituting it with the new one by virtue of Indian Divorce (Amendment) Act, 2001 and removed the discrimination.

[14] AIR 1995, 2 SCC 635.
[15] AIR 1983, 5 AP 356.
[16] AIR 1984 Del 66.
[17] AIR 1984 SC 1562.
[18] AIR 1995 Ker. 252.

- **Discriminatory property inheritance norms**

  ***Mary Roy v. State of Kerala*[19]**

  This is another case that involves the constitutional validity of personal laws in the light of Article 14 and Article 15. In this case the provisions of two statutes-Travancore Christian Succession Act, 1910 and Cochin Christian Succession Act, 1922 which discriminated against daughters, were challenged. The Supreme Court of India struck down the discriminatory provisions since Articles 14 & 15 of the Constitution, were violated.

- **Right of Maintenance upon Divorce**

  ***DanialLatifi* v. *Union of India*[20]**

  This case is a direct result of the Shah Bano Case[21]. The Muslim Women (Protection of Rights on Divorce) Act, 1986 was enacted as an outcome of the Shah Bano Case. In the Danial Latifi Case the constitutional validity of the act was challenged. Supreme Court upheld the constitutional validity of the Act and justified by making it more gender sensitive.

- **Discrimination in guardianship laws**

  ***Githa Hariharan* v. *Reserve Bank of India*[22]**

  The nature of this case is slightly different as in this case instead of striking down a provision the Supreme Court used a mode of interpretation by means of which it was added that the mother is the ‗natural guardian' of the child.

- **Exercise of judicial restraint**

  ***Ahmedabad Women's Action Group (AWAG)* v. *Union of India*[23]**

  This case can be considered as a sort of an exception as it is an example of judicial restraint. One can say that this case is the other extreme of the Shah Bano Case. This case challenged the Muslim personal law of polygamy and of oral divorce by uttering the word ‗talaq' thrice, which is popularly known as triple talaq, on the ground that they violated the fundamental right to equality. The Court held that the question fell outside its jurisdiction since the petition raised questions of social policy

ENACTING OF THE UNIFORM CIVIL CODE AS A SOLUTION

In almost every case pertaining to the constitutional validity of personal laws the courts have emphasised the importance of the Uniform Civil Code and recommended the legislature to start enacting a provision for it. The UCC has been mentioned in Article 44 of the Constitution of India as a Directive Principles of State Policy, however since the DPSPs cannot be enforced this provision cannot be legally enforced on the Legislature.[24]

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19 AIR 1986 SC 1011.
20 AIR 2001, 7 SCC 740.
21 *Supra.*note13.
22 [1999] 2 SCC 228.
23 AIR 1997 SC 3614.
24 INDIAN CONST. art. 39.

The Constituent Assembly Debates on Article 44 of the Constitution raised concerns on behalf of the representatives of the Muslim community among other minorities, that an attempt to establish a Uniform Civil Code would lead to enforcing a Hindu Code on the majority of the population. Dr. B.R. Ambedkar, in his response to these concerns, clarified that Article 44 should not be taken to suggest that a Uniform Civil Code would be made enforceable immediately and that any attempt to create such a code would be contingent on the views of the minorities.[25] In, the Shah Bano Case, the Supreme Court expressed hope that Parliament would take steps to enact UCC as enjoined under by Article 44 of the Constitution. The Muslim fundamentalists were agitated by that decision due to which the then Rajive Gandhi government keeping in mind political considerations refused to act on the recommendation.

UCC aims to provide a common code for all the citizens, irrespective of their religion. It aims to codify affairs related to marriage and divorce.

However, as an alternative to the concept of UCC there is one more school of thought:

That is the direct ‗rationalization' & ‗reformation' of existing personal laws without having to enforce an UCC. This recommendation is slightly more viable at this point where it can be seen that the Indian society has not evolved enough to understand and accept the concept of Uniform Civil Code.

CONCLUSION AND SUGGESTIONS

From the approach of the courts in most of the cases cited above one can see that, the courts have taken an extremely cautious approach in determining the validity of provisions of personal laws. From the above analysis we can also see that there needs to be a clear distinction as to what can come under the ambit of ―religious practices" under Article 25. ―Keeping in mind the Constitutional limitations on the court, not to exceed its function under the grab of ‗Judicial activism'[26] or ‗judicial review', one would definitely appreciate the crucial role of the judiciary", especially of the Supreme Court of India. The courts have adopted activist approach and have declined to manage zones which are totally the area of the State, when and as necessary, as seen in the case of *Naz Foundation v. Govt. of NCT of Delhi*.[27]

After analysing the judgements and the provisions of law, one thing is clear, the route to getting Part III of the Constitution and Personal Laws to coexist is not an easy one. The suggestions that can conclude this debate are:

1. Enacting of Uniform Civil Code.

2. ‗Rationalization' & ‗Reformation' of existing personal laws.

[25] *Constitutional Scrutiny of Personal Laws*, (Jan 17, 2017, 7:35pm), http://www.supremecourtcases.com/index2.php?option=com_content&itemid=5&do_pdf=1&id=21577.

[26] *Supra.* note13.

[27] WP(C)7455/2001.

AN ANALYSIS OF RESERVATION POLICY IN EDUCATION SYSTEM: A POLITICAL JEOPARDY

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ABSTRACT

Meritocracy is aimless without equality. Every person has the right to be brought to a uniform level, whether it lifts one or decelerates one. India's constitution started the farthest-reaching corroborating action plan, promising the underprivileged not only equal opportunities of equality but also reserved places in the educational system, government jobs and seats in parliament and state assemblies. Reservation policy was vindicated by a means of making up serenity among people which was exploited by the prejudice of upper caste people based on presumably immutable caste identities which were prevailing that time throughout our country. The makers of the constitution trusted that some people were historically oppressed on the basis of their caste and were denied equal opportunity. After bringing in reservation, it got related to the vote bank politics and shifted its main motive of uplifting the needy, and till now it is being habitually extended without any free and fair provisions. Reservation is now a political requirement, though it does subvert the quality of education system, but it has helped many students to get uplifted with their talent. Caste based reservation system only sustains the notion of caste in the society rather than eroding it as being a social evil and becomes a tool to meet narrow political ends. Giving out quotas in a form of caste biasness and not actually helping the needy is totally contrary to the Right to Equality. Education should be determined by a student's potential, intelligence, skill, and flair rather than like the current system which promotes religion, caste, or creed. Reservation policy has now become a mere political affair which is now being difficult to be terminated or amended.

Therefore this paper with the title –An Analysis Of Reservation Policy In Education System: A Political Jeopardy" focuses on the Reservation, Nuisance Politics and overriding effects of Election with the objective to know the causes of reservation policy, social needs then and now, understanding the current scenario why it reservation is harmful for the education system.

Keywords: Meritocracy, Reservation Policy, Politics, Underprivileged, Political Jeopardy.

INTRODUCTION

India has a deep connection with today's system of reservation policy, as there is a lot to do with its bygone caste system as well as the contemporary political and social influences. The constitution of India promises justice and equality of opportunities to all its nationals. It all

recognizes that equal opportunity implies competition between equals and not unequals. Conceding the inequality in our social structure, the makers of the constitution rowed the argument that weaker sections have to be dealt with on a privileged footing by the state. A special responsibility was placed upon to provide shelter to the rights of the frail section of the society.

The Hindu society is subdivided into many castes based on occupation, class, and social standing in society. The Manusmriti from 1000 B.C. defined the caste-based upon karma (actions) and dharma (duty). The society was thus, divided into 4 main groups: the Brahmins at the top, the Kshatriyas at second, the Vaishyas on third, and lastly the Shudras. The text divided things between these groups such as laws on marriage, property, food, etc. This system made Dalits outside the box, the untouchable. They were barred from sharing food, marrying people from upper castes, and couldn‘t even brush the Brahmins from their shadows.

- **Brahmins:** They were the highest in the caste system having the duty of being a priest or teacher. The Britishers gave them influential jobs too.
- **Kshatriyas:** They were the warriors, protectors and were traditionally the military class.
- **Vaishyas:** They were influential in trade, traditionally the cattle-herders, agriculturalists, artisans and merchants.
- **Shudras:** They were the lowest of all that they were banned to study the Vedas. At present they are known as scheduled caste giving them the title as they have been historically disadvantaged.
- **Dalits:** They were not even considered to be the part of the hierarchy of caste, were thus associated with occupations related to impure rituals. They were regarded as untouchables.

HISTORY OF RESERVATION SYSTEM IN INDIA

- **1831:** Under the British Raj, the Madras Presidency had quotas.
- **1882:** William Hunter along with Jyotirao Phule thought of the caste-based reservation system for the first time.
- **1901:** A part of the above was implemented by Chhatrapati Shahuji the prince of Kolhapur. Whereas Mysore and princely states of Travancore and Kochi supported the reservation idea in educational institutions.
- **1927:** The term scheduled caste was first coined by Sir Simon Commission.
- **1932-1933:** The British Prime Minister Ramsay Macdonald, presented the Communal Award where special provisions were made for the Muslims, Sikhs, Indian Christians, Anglo-Indians, Europeans, and the Dalits. Mahatma Gandhi was the first one to protest against it. Whereas B.R Ambedkar and other minority leaders supported the introduction of reservation policy. After all the negotiations between Mahatma Gandhi and B.R Ambedkar, they signed the Poona Pact and decided to have a single Hindu electorate with

certain reservations in it. Electorates for other communities like Muslims and Sikhs remained separate.

Post-Independence: The reservation guidelines were modernized at a great extent after the independence where Scheduled Caste (SC) and Scheduled Tribes (ST) were marked separately and the government took several actions to reserve seats in public jobs and government funded educational institutions for them. In the Constitution of India the terms SC and ST have been defined by the makers as [1]–Scheduled" meaning Scheduled to the constitution; [2]–Scheduled Castes" meaning those defined under article 341 of the constitution; and [3]–Scheduled Tribes" meaning those defined under article 342 of the constitution.

1992: Other backward classes (OBC) a new section of caste was made to 27%. Today 50% of seats are reserved for the SC, ST, and OBC's in public sector jobs and educational institutions. Further in 2019 10% to the economically weak section in the general category has been passed.

The Mandal Commission: Mandal Commission is one of the pillars of the reservation system. According to the Indian Constitution, there were provisions for the reservation of backward classes but no criteria for whom to include in it. To solve the issue of inclusion of people in the backward sector the Mandal Commission was setup in 1979 with the aim to identify the socially or educationally backward classes. Further, the B.P Mandal commission report based on the eleven economic, educational, and social indicators said that the 52% of the country's total population comes under the Other Backward Classes. The total quota reserved for SC, ST, and OBC was set to be 49.5%.

Further, in 1990, the V.P. Singh government decided to approve the recommendations of the Mandal Commission. Massive protests were held by the students and other effected people against the government. Rajiv Goswami immolated himself and became the anti-Mandal face that time though still the recommended reservations came into force. In 1992 the biggest landmark judgment for the reservation system was in the case of [4]Indra Sawhney v. Union of India (the Mandal Commission case), where the court laid the cap of 50% in reservations. In this case the reservation in job promotions were held unconstitutional but still allowed it till 5 years. [5]The court said that all the sections of the society who are rendered weak due to various causes including poverty and natural and physical handicaps. And the _weaker section of the people' is wider than _backward class of citizens' or SEBC's or SC's and ST's.

CONTEMPORARY PRECIS OF RESERVATION POLICY

In 1950, the Indian Constitution provided 12.5% reservation for the SC's and 5% for the ST's but subsequently, in 1970, the reservation policy was enhanced to 15% and 7.5% for SC

1 INDIAN CONST. art. 366, cl. 23. –Scheduled" means a Scheduled to this constitution.

2 INDIAN CONST. art. 366, cl. 24. –Scheduled Castes" means such castes, races or tribes or parts of or groups within such castes, races or tribes as are deemed under article 341 to be Scheduled Castes for the purpose of this Constitution.

3 INDIAN CONST. art 366, cl. 35. –Scheduled Tribes" means such tribes or tribal communities or parts of or groups within such tribes or tribal communities as are deemed under article 342 to be Scheduled Tribes for the purpose of this Constitution.

4 *Indra Sawhney v. Union of India & others*, AIR 1993 SC 477, 1992 Supp 2 SCR 454 (India).

5 V.N. SHUKLA, CONSTITUTION OF INDIA 311 (Mahendra P. Singh, 10TH ed. 2001).

and ST respectively which were specified for the fields of government jobs, colleges and universities, the central and the state legislative assemblies. Later the public undertakings and the nationalized banks were included in the policy too.

[6]In, 1999 January, Kocheril Raman Narayanan, the then president of India said that the judicial appointments with the effect of special quota should be there for the unprivileged sections of the country such as women, SC, ST for the posts of High Court judges and Supreme Court judges. But this led to a debate on meritocracy versus protective discrimination. The issue aroused for the President having constitutional power to suggest changes in the selection process of the judiciary appointments. Also, the then chief justice of India argued that the merit should be the basis of the judicial appointments, and should be also applied to educational institutions too and if, the President has logics for the reservation policy then why not to extend it to the armed forces, formation cabinets and other fields too. The reservation for OBC's was then accepted for 27% in November 1992 and the Supreme Court established the ceiling of the reservation limit at 50%. But in 1993 the Tamil Nadu Reservation Act was passed by the Supreme Court which raised the reservation to 69% whereas the 85th amendment[7] of the Indian Constitution to take things beyond judicial review opened the door for state government. The main motive of this amendment was to extend the opportunities of the reservation system in the matters of promotions with consequential sonority to any class. [8]The total proportion of Scheduled Caste in India is 16.2% and Scheduled Tribes is 8.2% according to the 2001 government census data. Other than this, the total OBC as per 2001 data were 51%, economically weaker section from the general category 10% so does that mean 75.4% people add upto being backward, which is actually not the truth if we are talking about giving opportunities to the needy. [9]According to the 2019 extension of reservation policy by the Government of India, reservation is provided to SC's for 15%, ST's for 7.5% and OBC's for 27% in jobs by open competition in the country which makes the total reserved seats of 49.5%. And, in recruitment, other than open competition SC's have reservation of seats for 16.66%, ST's for 7.5% and OBC's for 25.84% making a total of 50%. Whereas, _The Rights of Persons with Disabilities Act, 2016', provides reservations for Divyang's are for 4%. People belonging to (EWS's) Economically Weaker Sections from the General category who does not have any reservations get 10% reserved seats in direct recruitment in civil posts and services in the Government of India.

CONSTITUTIONAL OVERVIEW

The preamble of the Indian Constitution secures economic, political, and social justice for all the citizens. It abolishes all the discrimination among every citizen on the grounds of religion, sex, race, caste, etc and also provides protection to them to stand equally in society. The aim of

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6 PUJA MONDAL, *Essay on Reservation Policy in India*, YOUR ARTICLE LIBRARY,http://www.yourarticlelibrary.com/essay/essay-on-reservation-policy-in-india/39175.

7 INDIAN CONST. art. 16, cl. 4(A). Nothing in this article shall prevent the State from making any provision for the reservation [in matters of promotion, with consequential sonority, to any class] or classes of posts in the services under the state in favor of the scheduled castes and scheduled tribes which, in the opinion of the state, are not adequately represented in the services under the state.

8 T 00-005: Total Population, Population of Scheduled Castes and Scheduled Tribes and their proportions to the total population, OFFICE OF THE REGISTRAR GENERAL &CENSUS COMMISSIONER, INDIA, 2001,http://censusindia.gov.in/Tables_Published/A-Series/A-Series_links/t_00_005.aspx.

9 *Reservation Policy*, MINISTRY OF PERSONNEL, PUBLIC GRIEVANCES & PENSIONS, (February 13, 2019, 4:39 PM by PIB Delhi), https://pib.gov.in/Pressreleaseshare.aspx?PRID=1564231.

such protection is to uplift the weaker sections of the society i.e. Scheduled Castes, Scheduled Tribes, and Other Backward Classes. Though these laws are violative when it comes to equality in today's India.

- [10]The Indian Constitution abolishes discriminations on any grounds specially caste and religion as our country has history upon such differences, the caste system, and reservation policy go hand in hand in India.
- [11]The 1st Constitutional amendment act of 1951 provided the protection of SC, ST and OBC by allowing the states to make special provisions for their advancement.
- [12]It also provides that the state should reserve seats in favor of backward classes for the appointments or posts of government jobs.
- Other than this, the PART XVI of The Constitution of India provides Special Provisions Relating to Certain Classes which include scheduled castes and scheduled tribes for the reservation of seats in the house of people and in the legislative assemblies of the states, representation of Anglo-Indian, their claims in services and posts, special provisions in respect of educational grants to them, set up of the national commission for SC and ST, etc.

A person belonging to the Hindu and Sikh community is only privileged to be benefitted with the reservations and not the other two communities of Muslims and Christians. If a Hindu or Sikh person belonging to the SC section converts into a Muslim or Christian, then his right of reservation will be taken. This is not the same when it comes to Scheduled Tribes. Also, these reservations were introduced for the period of 10 years by B.R Ambedkar, i.e., only upto 1960. However, it is being continuously extended by the political parties and is being bartered for votes. In 1999 the 84th Constitutional Amendment Act extended and enhanced to provisions of reservations for 10 years, then again in 2009 and in 2019 too.

RESERVATION SYSTEM IN EDUCATIONAL INSTITUTIONS

If, we talk about the Right to get Educated, the constitution of India provides the safeguard of this right as being a Fundamental Right of every citizen. The Education system has made reservations its intrinsic part. Over these years SC's, ST's, and OBC's have been admitted in universities and colleges on the basis of reservation policies. [13]Indian Constitution protects the right of citizens to get enrolled in educational institutions and no one can deny admission to anyone on the basis of religion, race, sex, caste, language, etc. The reason behind this then was the poor financial background of most of the people and the caste discrimination that was prevailing in the country, so the reservation policy for those students in the education system was

[10] INDIAN CONST. art. 14. Equality before law- The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.

[11] INDIAN CONST. art. 15, cl. (4). Nothing in this article or in clause (2) of article 29 shall prevent the state from making any special provisions for the advancement of any socially and educationally backward classes or citizens or for the scheduled castes and the scheduled tribes.

[12] *Supra* note 3.

[13] INDIAN CONST. art. 29, cl. No citizens shall be denied admission into any educational institution maintained by the state or receiving aid out of state funds on grounds only of religion, race, caste, language or any of them.

a boon as it helped them to step forward to make their stands strong in the society and get educated. [14]Under the Directive Principles of State Policy part IV of the Indian Constitution Act, there is a provision for states in which they can give special care to the educational and economic interest of the weaker section of the society and protect them from injustice happening to them in the areas of education exploitation. [15]In spite of the first amendment which introduced clause 4 in article 15, in [16]M.R Balaji case, the S.C emphasized the need for balancing the interest of SC, ST and OBC covered by article 46.

The Reservation system in the education system basically refers to quota in the seats of universities and colleges for students belonging to SC, ST, OBC or who are economically weak. The category wise student enrolment system includes all the reservations. The total reserved seats in an institution are 49.5% which means the seats unreserved for the general category is only 50.5%. The deserving students are not able to get an opportunity in education because they belong to a category for which seats aren't reserved and they have to struggle in separate-selected out seats only.

According to the average statistics students applying for higher education, the passing percentage for a competition is much higher for the general category than students of SC, ST or OBC category. The difference is double which is not only affecting the quality of education system but also the mindset of the students who are struggling more than those who have reserved seats. Due to this discrepancy, people think that the reservation system should now be removed because the new India doesn't need reserved seats.

[17]According to the reports in the year 2018-2019, the enrolment of minority community has increased in the last 5 years. But the students from general category who have no reserved seats are only 43.3% whereas SC, ST and OBC students have enrolled in the percentage of 14.9%, 5.5% and 36.3% respectively. This means a total 56.7% seats were reserved. These statistics are the proof that how the general category students are getting affected and deprived of the deserved opportunities. This is the reason why the younger generation is moving abroad exploring work in other countries, instead of serving their own. Reservation in education system is agreeable to an extent.

ISSUES AND FLAWS OF RESERVATIONS IN ADMISSIONS

- **Financially sound students manage to make use of the reservation quota easily:** Reservation was introduced to help the backward classes who were suppressed and denied basic rights and naturally these people had poor financial backgrounds. But today students who are of SC, ST or OBC background, often have good financial resources are making use of the reservation system to claim their reserved seats just because they hail

[14] INDIAN CONST. art. 46. The state shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Tribes and Scheduled Castes, and shall protect from social injustice and all forms of exploitations.

[15] V.N. SHUKLA, CONSTITUTION OF INDIA310-311 (Mahendra P. Singh, 10th ed. 2001).

[16] *M.R. Balaji v. State of Mysore*, AIR 1963 SC 649, 664 (India).

[17] *All India Survey on Higher Education 2018-19,* MINISTRY OF HUMAN RESOURCE DEVELOPMENT(Aug, 2019), http://aishe.nic.in/aishe/viewDocument.action;jsessionid=EED90A8BE0D796E6E726978DF6EE34E9?documentId=262.

from that particular community which was once named as backward. Students from humble background are denied seats and the financially sound students are getting reservations.

- **Capable students from general category have to struggle and compromise:** Students from reserved category dodge the creamy layer criteria easily just because they can present the necessary documents required for the reserved seats and students who deserve often compromise their seats. The reservation helps the financially well off and less deserving students jump the queue.

- **Incapable students often drop out:** In cases of professional studies such as engineering, MBBS, etc., the below average students coming from the general background are not able to manage to bag seats in government colleges and students who get entry through reservation usually lack the skills and aptitude to handle these courses, thus they often get detained, repeated, a good portion of the students even quit college mid-way. There is no point in giving seats to the undeserving or the less deserving while denying seats to the students who deserve those colleges.

- **Lack of transparency:** The government list of the categories is not well updated. There are people from SC, ST, OBC category and financial backward who are not receiving the benefits. This shows the lack of transparency on behalf of the government and the media.

- **Migration of talent:** The deserving, talented and students with skills are not getting seats in proper colleges and enough job opportunities, thus better career options are making them migrate to other countries. The reservation system in our country is letting other countries use our young minds.

- **Contradicting equality:** Our constitution talks about equality among every citizen, but the point of reservation goes totally against the idea of equality. It is similar to internal partition as it builds a wall against inter-caste issues. You can‘t make India caste-ism free until and unless reservation is made caste free.

- **Biggest enemy of meritocracy:** By admissions through a relaxed entry system, we are fueling inflation of credentials as opposed to the promotion of merit-based education. The reservation system is based on merely two points, the class of citizens is backward, and the said class is not adequately represented. In the case of [18]Balaji, the Supreme Court held that the caste of a person can‘t be the only sole criteria for determining whether he is backward or not, determinants such as occupation, poverty, place of habitation, etc. may be relevant factors to be taken into considerations. And if a caste is backward, it will not be held backward forever, the government has to review and if the caste reaches the state of progress it should be deleted from the list.

[18] *M.R. Balaji v. State of Mysore*, AIR 1963 SC 649, 664 (India).

RECOMMENDATIONS FOR ALTERATION/TERMINATION

1. If the idea of reservation system hasn't yet improved the conditions of the weaker sections so far for 50+ years, then why are we persistent with such an ineffectual arrangement? The reservation policy was introduced for a period of 10 years, which is continuously being extended. An approach which was said to improve the condition of people over 10 years, is then failing if we are still relying on it for improvement and have not reached to the satisfied level. It is now high time to make changes in such a weak policy.

2. The extension of reservation policy period after every 10 years is merely a political rapacity. Reservation is being bartered for votes. The political parties have made an agenda to attract the votes of particular communities by supporting them which is the reason caste-ism is not getting abolished in the country. No caste but income should be given importance when it comes to equality in getting opportunities.

3. The creamy layer concept should be made stringent and applied to the reserved categories as the people with financially stable background and high paid respectable jobs belonging from the unprivileged categories are no more unprivileged. Reservation should be based only upon the financial background of the students and their family.

4. Reservation should be applied and restricted to only the first-generation beneficiaries. The main motive of this policy was to help a person grow and come to an equal level as of general and common people, if he gets that opportunity it means he has gained equality among others then why his next generation gets the benefits too. The list should be strictly revised on the set basis and the documents should be well checked making sure no foul play is involved.

5. Education should be mandatory and free for all till the age of 14 strictly as per the fundamental right for the backward classes to bring changes in the system from the root level because if education is not properly provided at the primary stage then on what basis are the reservations provided at a subsequent stage.

6. We don't need reservations based on caste and creed, instead of it aids should be provided such as books, uniforms, etc, who need them and have minimal resources giving the merit equally.

7. Reservation should be abolished or decreased each year by some percentage to eliminate this system and get over the backwardness in the country.

CONCLUSION

Education should be intended by a student's intelligence, skills, capability & desire to get educated and not upon religion, class, caste or creed. This reservation policy has now become a political weapon and with time it is becoming more far strenuous to terminate this system. However, if not terminated, it could be altered or minimized to a level to make education uniform for everyone who wants to study and provide opportunities to all regardless of their caste and social category. Caste and creed can now go back to take their seats. To remove caste-ism we have to fight the reservation.

JUDICIAL SUPREMACY OVER PARLIAMENT: A CRITICAL ANALYSIS OF COLLEGIUM SYSTEM VERSUS COMMISSION SYSTEM

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ABSTRACT

The primary emphasis of this paper is on the Legal framework for the selection of judges to the Higher Independent Judiciary. The Indian Judiciary is often defined as the ―guardian" and ―protector" of the rights and freedoms of individuals and as the ―guardian" of our Constitution, as in many cases the judiciary upholds the rights and freedoms of individual.

Over the years, it has become customary to nominate judges to higher courts on the basis of seniority. The lack of a standardized guide, the absence of a set of eligibility requirements, the incomplete release of the meeting records-all of these factors contribute to the assumption that the collegium structure is not only vague as it was but exacerbated. The flaws in the collegium system and the conflict between the judiciary and the executive led to a number of disputes which opened way for the NJAC, which aimed at rendering the selection and transition of judges more open and responsible. Through this Article, the author makes a careful effort to discuss the current literature on the selection of judges to the Higher Judiciary in India and to answer and evaluate the problems and concerns relevant to the recruitment of judges to the higher judiciary.

Key Words – Judiciary, Appointment, Commission System, Collegium, NJAC, SC, CJI

INTRODUCTION

―Throughout history, it has been the inaction of those who could have acted; the indifference of those who should have known better; the silence of the voice of justice when it mattered most; that has made it possible for evil to triumph." ----Haile Selassie

The main focus of this paper is on the Constitutional framework for the appointment of judges to the independent higher judiciary. Indian judiciary is always described as the ―guardian" and ―protector" of the rights and liberties of individual and the ―keeper of our Constitution" as in many instances, the judiciary has upheld the individual's rights and liberties.

Over the years, there was a custom of appointing judges to higher Judiciary on the basis of seniority. The senior most puisne judge of higher judiciary has always been appointed as the CJI and this process is known as the ―Consultative Process" between the executive and judiciary. But, this custom was suppressed, when the senior most judges were dominated in appointment as the CJI in 1973, when Justice A.N. Ray, was appointed to the highest judicial post by superseding three senior most judges and in 1977, during the time of emergency, when Justice M.H. Beg was appointed superseding Justice H.R. Khanna. Even, with the best explanations by

the executive, they could not submerge the public feeling of injustice been done. Subsequent instances have led to the decision that, the Apex Court has the final say in the appointment process.[1]

BYGONE BACKDROP OF APPOINTMENT OF JUDGES

Prior to Independence, the Government of India Act of 1919 & the Act of 1935 prescribed that, the appointment of judges was in absolute discretion of Crown and their tenure was based on "Pleasure Doctrine".[2]

After, India got its freedom back from the Britishers, the Constituent Assembly was set up to discuss and form the Constitution of India. The Constituent Assembly had a whacking debate on the process and procedure of appointment of judges. Three different procedures were laid down before the assembly for the appointment –

1. The President should appoint Judges with concurrence of the CJI;
2. Appointment by the President should be passed by 2/3rd majority in Parliament;
3. Appointment to be made with the consultation of the Council of States.

But, Dr. B.R. Ambedkar, the Chairman of Drafting Committee, answered to these propositions by saying that, "there is no doubt that, the Chief Justice is a very eminent person. But, after all, the Chief Justice is a man with all the failings, all the sentiments and all the prejudices which we as common people have; and that is why, to allow the Chief Justice practically a veto upon the Appointments of Judges is really to transfer the authority *to the* Chief Justice which we are not prepared to vest in the President or the Government of the day."[3]

The Constituent Assembly laid down a unique procedure for appointment, instead of the intact procedures, laid before it by the members of the assembly called the "Collegium System." The emergence of collegium system has its genesis in a series of judgements called the "Three Judges Case". Over the span of three cases, the court had propelled the standard of judicial independence, to infer that the legislature and the executive would have no say in the appointment process.

The lack of written manual, no laid down selection criteria, the selective publication of records of meetings- all these points lead to the fact that, the collegium system is not only opaque as it was, but it has worsened. The flaws in the collegium system and the tussle between the judiciary and the executive led to various controversies. This, further, paved the way for the NJAC, which sought to make the appointment and transfer of judges more transparent and accountable.

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1 *Higher Judicial Appointments in India,* LAW TEACHER (Jan. 29, 2019, 10:04 AM), https://www.lawteacher.net/free-law-essays/constitutional-law/higher-judicial-appointments-in-india-constitutional-law-essay.php#:~:text=%E2%80%9C(1)%20Every%20Judge%20of,and%20%5Bshall%20hold%20office%2C%20in

2 Section 101 and 102 of Government of India Act, 1919 and Section 200 and 220 of the Government of India Act, 1935 provided for the procedure of appointment of judges of higher judiciary before the present Constitutional provisions in this regard.

3 See Constitutional Assembly Debate. Vol. VIII, 24th May 1949.

CONSTITUTIONAL FRAMEWORK IN APPOINTMENT OF JUDGES

The Constitution of India under Article 124(2) and Article 217(1) of the Constitution lays down the procedure for the selection of judges for SC and HC of various States.

1. Supreme Court Provisions-

The establishment, composition and jurisdiction of the Apex Court are given under Articles 124 to 147 of the Constitution of India. Initially, during 1950s, the Court consisted of a Chief Justice along with 7 more Judges. They all sat together, heard cases and passed the Judgement. Gradually, over the years the judges rose in number.[4]

Article 124 Clause (2) of the Constitution provides –

"Every Judge of the Supreme Court shall be appointed by the President by warrant under his hand and seal after consultation with such of the Judges of Supreme Court and of the High Courts in the States as the President may deem necessary for the purpose and shall hold office until he attains the age of sixty-five years:

Provided that in the case of appointment of a judge other than the Chief Justice, the CJI shall always be consulted."[5]

The Qualifications of the person to be appointed as Judge of the Apex Court is provided under Article 124 Clause (3) of the Constitution, which provides that a distinguished jurist can be appointed as a Judge of the Court, provided, that he is so in the opinion of the President. So, even the non-practicing lawyers can be appointed as a Judge.

Further, Article 124 Clause (3) of the Constitution reads inter-alia as-

"A person shall not be qualified for the appointment as a Judge of the Supreme Court, unless, he is a citizen of India and –

a. has been for at least five years, a Judge of a High Court or of two or more such Courts in succession; or

b. has been for at least ten years, an advocate of a High Court or of two or more such Courts in succession; or

c. is, in the opinion of the President, a distinguished jurist."[6]

2. High Court Provisions-

There is no specific provision regarding the total strength of judges to be appointed in the High Courts. As, all the States vary in their population, the number of proceedings that may arise in some States in a year, may be less than those, filed in a day in other courts like in Prayagraj of

[4] POLYEYES STAFF, *Introduction to the Supreme Court of India,* POLYEYES (Jan. 29, 2019, 10:04 AM), https://www.polyeyes.com/Article/An-Introduction-To-The-Supreme-Court-Of-India-

[5] INDIAN CONST. art. 124, cl. 2.

[6] INDIAN CONST. art. 124, cl. 3.

Uttar Pradesh. ―Every High Court consists of a Chief Justice and such other Judges as the President may, from time to time, deem it necessary to appoint."[7]

Article 217 Clause (1) of the Constitution, reads inter alia as –

> ―*Every Judge of a High Court shall be appointed by the President by warrant under his hand and seal after consultation with the CJI, the Governor of the State, and, in the case of appointment of Judge, other than the Chief Justice, the Chief Justice of the High Court, and shall hold office, in case of an additional or acting Judge, as provided in Article 224, and in any other case, until he attains the age of sixty-two years."*[8]

The qualification of a High Court Judge is set out in Article 217(2) of the Constitution, which reads as under-

―A person shall not be qualified for appointment as a Judge of a High Court unless he is a citizen of India and –

a. has for at least ten years, held a Judicial office in the territory of India; or

b. Has for at least ten years, been an advocate of a High Court or of two or more such Courts in succession."[9]

Articles 124 and 217 of the Constitution, specifically mentions about consultation. Article 124 of the Constitution lays down two types of consultation, one is discretionary and the other is mandatory; while Article 217 of the Constitution, lays down only the mandatory consultation, that the President is bound to follow. Therefore, it's clearly opined that the process of appointment is not an independent decision, left entirely to the discretion of the President.

THE APPOINTMENT OF CHIEF JUSTICE OF INDIA

Article 124 of the Constitution is silent about the appointment of the CJI. The seat of the CJI is filled by the conventional practice, being used since a long time i.e., the senior most judge of the Supreme Court to be appointed as the CJI. But, this established conventional practice which was ignored by the government in 1973, when Justice A.N. Ray was appointed as the CJI superseding the three senior most judges. The three by-passed judges left the Court in fight. This prompted a national tumult and the government was blamed for messing with the autonomy of judiciary. Be that as it may, to legitimize this, the government of India summoned the fourteenth Law Commission Report, which underlines "merit" and not "seniority" for designating the CJI. This appointment was challenged in the Delhi High Court through a petition for ***"quo-warranto"*** under Article 226 of the Constitution, on following grounds-

a. it was malafide;

b. it was against the rule of seniority as per Article 124(2) of the Constitution; and

c. The mandatory consultative process as per Article 124(2) of the Constitution and now been resorted to.[10]

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7 INDIAN CONST. art. 216.
8 INDIAN CONST. art. 217, cl. 1.
9 INDIAN CONST. art. 217, cl. 2.

Another incident of superseding the senior most judge took place in 1977, when the government appointed Justice M.H. Beg by-passing Justice H.R. Khanna, the senior most judge. Justice Khanna said, ―Mrs. Gandhi had struck a ‗grievous blow' to the independence of the judiciary."[11] But later, Justice Y.V. Chandrachud. (the senior most judge) was appointed as the CJI, so, the conventional practice was brought to life again.

THE EMERGENCE OF COLLEGIUM SYSTEM: THE THREE JUDGES CASE

―*Collegium system has created an imperium in imperio (empire within an empire) within the Supreme Court."* --Mukul Rohatgi, Former Attorney General of India

The collegium framework has its beginning in a progression of judgment called the ‗Judges Case'. Over the span of three cases, the Court had developed the guideline of judicial independence to imply that solitary of the judiciary will have an advantage in the arrangement of judges and different organs will be rejected from such procedure. Pandit Jawaharlal Nehru while addressing the Constituent Assembly, debates on higher judicial appointments, said that the judges who are selected should be of ‗highest integrity' and be persons ‗who can stand up against the executive government and whoever might come in their way.'[12]

1. Era I – Prior the Emergency Of 1975

In 1971, Indira Gandhi defeated Raj Narain from Rai Barely and subsequently, Raj Narain filed a case against Indira Gandhi, accusing her of electoral malpractices. Later, in 1973, Indira Gandhi proposed to Justice A.N. Ray to accept the highest judicial post of the county by superseding 2 senior judges. This proposal was accepted by Justice A.N. Ray and thus, becoming the first person to acquire the highest post by superseding the other senior judges. The date of appointment was 25 April 1973, the day after the passing of judgement of Kesavananda Bharti v. State of Kerala[13] with a majority of 7:6, which laid the basic structure of the Constitution and thus, limiting the powers of the executive.

Until 1991, the judges were appointed to higher judiciary, on the basis of a panel of advocates, whose names were recommended by the Chief Justice of that particular HC. The names were then directed to the Chief Minister of that State and to the Home Ministry at New Delhi. And, as far as the appointment of Supreme Court judges was concerned, this was usually done amongst the Chief Justices of High Courts. So, the appointment of judges was made by the executive.

The word ‗consultation' mentioned under Articles 124 and 217 of the Constitution was considered neutral and the framers of the Constitution were intending to interpret the term in a sense that both the judiciary and the executive would have equal say in the selection of judges to the higher judiciary and the opinions of both the organs would be considered equally before the appointment of judges. But, this view of the framers was short lived.

The procedure laid down in the Constitution of India, experienced a change after three judges case of the Apex Court, and the word ‗consultation' was interpreted differently in every

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10 *P.L. Lakhanpal v. A.N. Ray*, AIR66, (Del. HC: 1975).

11 1 H.R. KHANNA, JUDICIARY IN INDIA AND JUDICIAL PRACTICE 22, (Tagore Law Lectures, Calcutta, Ajay Law House, S.C. Sarkar and Sons Pvt. Ltd., 1985).

12 AJIT PRAKASH SHAH, *An opaque bench,* THE INDIAN EXPRESS, Jan. 18, 2019, at 14.

13 *Kesavananda Bharti v. State of Kerala*, AIR 1461, (SC: 1973).

judgement, which needs to be considered for a better understanding of the present situation and its effects.

1.1 First Judges Case – *S. P. Gupta V. Union of India*[14]

This case managed various petitions including significant constitutional matter involving the appointment and transfer of judges and judicial independence.

This case is famously known as the *Judges Transfer Case* and is a remarkable result of the Apex Court, managing parts of the law of evidence, constitutional law and executive-judiciary relations, joined in a solid political inclination offering the most exceptional assortment in the Supreme Court's post crisis purgation. Decided by the bench of 7 judges, the issue to be chosen, laid on a few argumentative issues as under -[15]

- ―The circumstances of the appointment, and the conditions of service and confirmation of additional judges, arising in the context of Justices Vohra and Kumar of Allahabad High Court;
- Who has the final voice in the appointment of judges of the Supreme Court and High Courts?
- The locus standi of the petitioners;
- The circumstances of the transfer of judges, arising in the context of Chief Justice KBN Singh, Patna High Court."

This judgment was seen by numerous individuals inside and outside judiciary to loan an excessive amount of capacity to the executive. So, the judgement of this case, gave more significance to the executive arm in the appointment and overpowered the judiciary, as the final word would be of the executive and not the judiciary. This was upheld till the second judges case came into picture.

2. Era II – Post Emergency Second Judges Case

In the year 1993, 547 appointments were made to the higher judiciary and only 7 were not in accordance of CJI.

Supreme Court Advocates-on-Record Association v. Union of India[16]

This case emphasizes on the judicial independence as a part of basic structure of the Constitution and to preserve the ―Rule of Law', which is essential for securing the spirits of democratic system and the separation of power as laid in the Constitution.

The judgment in First Judges Case was overruled by this case (commonly called as Second Judges Case). In 1991, the bench of three judges in *Subhash Sharma v. Union of India*[17]**,** raised a question with regard to the word ―consultation' under Article 124 (2) of the Constitution,

[14] *S.P. Gupta v. Union of India,* AIR 149, (SC: 1982).
[15] *S.P. Gupta v. Union of India,* LETS TALK ABOUT THE LAW (Jan. 29, 2019, 10:04 AM), http://letstalkaboutthelaw.wordpress.com/sp-gupta-v-union-of-india/
[16] *Supreme Court Advocates-on-Record Association v. Union of India*, AIR 268, (SC: 1994).
[17] *Subhash Sharma v. Union of India*, AIR 631, 641, (SC: 1991).

that ―the constitutional phraseology would require to be read and expounded in the context of constitutional philosophy of separation of powers to the extent recognised and adumbrated and the cherished values of judicial independence."[18] This bench also suggested that the correctness of majority judgments should be referred to a larger bench.[19] This case finally led the judiciary to the path of evolving the collegium system.

In the Second Judges Case, the word ―collegium' was evolved by the Supreme Court for the appointment of judges. It was said, that, in the matter of conflict between the President and the CJI with respect to the appointment of the judges, the opinion of CJI have primacy and would be determinative in such matter. Consequently, nine judges bench was constituted to determine the position of CJI, with regards to primacy. The conclusion on the issue of the appointment of judges was laid down by the Court[20] by a majority of 7:2, which led to a system of judges selecting judges, popularly known as the ―collegium system" –

- ―The procedure for the appointment of judges in the Supreme Court and in High Courts integrated as ―participatory consultative process', for the selection of the best and the most suitable persons available for appointment; and all constitutional functionaries must perform such duty altogether with a view to reach an agreed decision, sub serving the constitutional motive;

- If there is any conflict in the opinion of different constitutional functionaries, the opinion of judiciary should, ―symbolized by the view of CJI', have primacy;

- Appointment of any judge to the Supreme Court or any High Court should be made in conformity with the opinion of the CJI;

- In case of Supreme Court, the proposal for the appointment must be initiated by the CJI and in case of High Court, by the Chief Justice of that High Court;

- The senior most judge of the Supreme Court should be appointed to the office of CJI, if considered to be fit to hold the office."

This judgment seeks extreme analysis in as much as it offers capacity to pinnacle court for the last decision of redrafting judges. The intensity of arrangements which was before delighted in, by the executive has come to be caught by the judiciary. For sure, this decision has been made, so as to have judges of higher trustworthiness. But, since, it has been accomplished by method for pushing out the executive, the authenticity of this is regularly addressed. So, instead of achieving the checks and balances in the system, the Court, through this judgement, overpowered the executive and provided judiciary with the upper hand in the appointment, so as to, maintain the integrity of the judicial system and the judiciary.

NEED FOR NEW APPOINTMENT PROCEDURE

After the three judges case, the judiciary got the upper-hand and superior authority in the appointment process and the executive was boycotted from the process of appointment. Even,

[18] *Id.* at 640.
[19] *S.P. Gupta v. Union of India,* AIR 149, (SC: 1982).
[20] *Subhash Sharma v. Union of India*, AIR 631, 449, (SC: 1991).

after the judicial precedent, the roots of the collegium system were very weak and in spite of various efforts, the system remained flawed.

The NDA government tried to overcome the incapable collegium system and for this they made several attempts to replace the collegium system with a different appointing commission, i.e., the NJAC. The BJP government, between 1998-2003, named **Justice M.N. Venkatachaliah Commission,** to audit the collegium framework and opine whether, there is a need to change the collegium framework or not. The commission opined for supplanting the collegium framework with NJAC.

Since, the collegium system was not transparent, mysterious and undemocratic, so, what government needed the most was to establish a more organised and transparent body for the appointment of judges, like the NJAC. But, what we have learnt from the collegium system was that, the government was really happy with that earlier system of appointment. But, if the government continued with the collegium system and would never have shown the sunlight to the NJAC system, then, the democracy would have been hampered and it would have further undermined the trust of public in the credibility of judicial review.

OPINIONS OF SOME EMINENT PERSONALITIES ON THE FORMATION OF NJAC

Many judges were in favour of drafting a new system for the appointment and replacing the lacunas of the previous system with a new and better procedure for the appointment and to expel absence of transparency which existed at the hour of collegium framework. Many of the legal luminaries were of the opinion that, initially the government had supremacy over the judiciary in the appointment process, but, in later case, judiciary had primacy. But both the situations were largely unsuccessful and therefore, the NJAC was carved as a solution, which will have powers to deal with the transfer, appointment, removal of judges and to ensure the judicial accountability. They further, stated that, the corruption is overwhelmingly high in the higher judiciary. ―This has been accentuated by absence of any credible and effective mechanism to secure the accountability of the superior judiciary. The process of impeachment has completely failed and increasingly the power of contempt has been used to gag the media to prevent public discussion of judicial wrongdoing."[21]

But Hans Raj Bhardwaj was of different opinion and he did not support the emergence of new system for appointment of judges. He was of the opinion that, ―this idea of NJAC is not a good one, and the present system of appointment is a good procedure. The present procedure has important components of careful scrutiny and consultation. Presently, appointments are done after the Chief Justice discusses with fellow judges and the government. After due care only, the names are sent to the President. Now, this idea of commission would only lead to deadlock and fights, which I think is not good for judicial image. This idea does not seem workable, and I feel that, this procedure which we have been following since past five decades is a good one, based on consultation and it works."[22]

[21] THE HINDU, http://www.hinduonnet.com/2004/10/16/stories/2004101603471300.html

[22] NAGENDAR SHARMA, *High Cost, Long Delays*, THE OUTLOOK (July 16, 2004), https://www.outlookindia.com/website/story/high-cost-long-delays/224496

EMERGENCE OF NATIONAL JUDICIAL APPOINTMENT COMMISSION

After, the undemocratic outcast of the collegium system, it became necessary to establish a new machinery, to replace the opaque collegium system and the government finally, got success to continue to maintain the trust of citizens in the judiciary, by introducing the amendment bill in 2014, which provided for the establishment of the NJAC, a transparent and democratic arrangement for the appointment and selection of judges.

There have been many proposals for the creation of the National Judicial Appointment Commission and the beginning of the Commission can be traced from the First Judges Case, by Justice Bhagwati, when ~~h~~he suggested the appointment of judicial committee on the lines of Australian Judicial Commission, for recommending names of persons for the appointment of judges."[23] In 1987, the Law Commission went deep into the matter and its recommendations are contained in 121st report.

JAC tried to supplant the 2 decades old collegium framework, on the grounds that, it violated the basic constitutional feature of judicial independence. NJAC was a constitutional body which sought to make the appointment and transfer of judges more transparent and accountable.

The 121st law commission reports proposed the establishment of 11 members National Commission for the appointment of judges as a condition of the time taken up by the Parliament with the 67th Constitutional (Amendment) Act in 1990, albeit in vain as it lapsed. Later, in 1998, an effort was made by a member of Rajya Sabha, yet, again in vain. In, 2003, the 98th Constitutional (Amendment) bill was introduced for the same purpose, but, it was only in 2013, that the 120th Constitutional (Amendment) bill was introduced and Article 124(A) of the Constitution was introduced to oblige the NJA Commission, which also laid down its structure, composition and functioning.

The bill was notified in the Official Gazette on 13th of April 2014 and became the 99th Constitutional Amendment Act. The Act, further, regulates the procedure for appointment as judge to the higher judiciary. Based on these recommendations, the President has to make the appointment.

UNCONSTITUTIONALITY OF THE NJAC

The constitutionality of the commission was challenged and the NJAC was struck down by 4:1 majority, further, giving rise to various questions that would be dealt by judiciary after this decision.

Supreme court Advocates on Record Association and another v. Union of India[24]

A PIL was filed initially before the 3 Judges bench, but, on 7th April 2015 the said bench by an order transferred the case to a bigger bench as the question involved was ~~s~~substantial question of law as to the interpretation of Constitution of India".

[23] *S. P. Gupta v. President of India*, AIR 149, (SC: 1982) (para.30).
[24] *Supreme Court Advocates on Records Association v. Union of India*, AIR 5457, (SC W: 2015).

The Constitutional bench consisting of five judges, while rejecting the NJAC Act, 2014 and the subsequent amendment as unconstitutional, which gave the executives and the political opinions, the ultimate say in the appointment of Judges, declared that the judiciary can't be trapped in the snare of obligation towards the executive. To give such a significant supremacy to the executive in the arrangement procedure, weakens the autonomy of judiciary and can be against the basic structure of the Constitution.

On October 16, 2015, in 4:1 majority verdict, the Supreme Court held that, the NJAC and the 99th Amendment Act was overriding the judicial independence. The majority bench was of the opinion that the independence of the judiciary should be protected from the hands of executive, while Justice Chelameswar gave a dissenting order.

> ―While declaring the verdict, the Supreme Court in its page 1024, said it is to be assumed that the independence and integrity of the judiciary is of the ―highest importance', not only to the judges, but, to the citizens, seeking resort from a court of law against the high-handed and illegal exercise of power by the executive."

While, closing the verdict, the Supreme Court said that the appointment to be made by the collegium system and the CJI will have the ―last word' in it. Further, the majority bench stated that, there is no question of adopting an alternative method of appointment of judges, which primarily does not ensure the independence of Judiciary.

Justice Lokur in its majority decision, while opining, mentioned the problems inherent in NJAC by its birth were that, ―there is no clarity on the role of the President. In any event, the discretion available to the President to consult the judges of the Supreme Court in the matter of appointment of judges is taken away; the decision of the President is subject to the opinion of two eminent persons neither of whom is constitutionally accountable; there is a doubt on the well established principle of Cabinet responsibility; a statute - the NJAC Act, and not the Constitution binds the President, contrary to the constitutional framework; the 99th Constitution Amendment Act makes serious and unconstitutional inroads into Article 124(2) of the Constitution, as originally framed."[25] He further viewed that ―If the establishment of the NJAC by the 99th Constitution Amendment Act, alters the basic structure of the Constitution, the 99th Constitution Amendment Act and the NJAC Act must be declared unconstitutional. Since, the establishment of the NJAC by Article 124A of the Constitution is integral to the 99th Constitution Amendment Act and the NJAC Act and they are not severable and cannot stand alone, they too must be declared unconstitutional."[26]

The major reasons of declaring the NJAC unconstitutional as laid by the four judge's majority opinion were:

- The representation of the judicial personnel was not adequate, i.e., inclusion of the CJI with 2 senior judges of SC. It basically violated the independence of judiciary.
- Then, another major reason is that the union minister of Law and Justice is the in charge of the NJAC, so, thus, overlapping of powers.

[25] *Supreme Court Advocates on Records Association v. Union of India*, AIR 5457, (SC W: 2015) (para 1025).
[26] *Id*. para 1101.

- The NJAC removed the mandatory consultation clause, which was earlier necessary. Now, the CJI has become a mere number in NJAC and does not have any real power.

But, Justice Chelameswar was lone judge in the five-judge bench, who was very much against the order of striking down the NJAC. He was of the view that –

"totally boycotting government from the appointment procedure is not in favour of this country's democratic principles. He showed his strong dissent through his written note in which he stated:

"Firstly, transparency is a vital factor in constitutional governance... Transparency is an aspect of rationality. The need for transparency is more in the case of appointment process. Proceedings of the collegium were absolutely opaque and inaccessible, both to public and history, barring occasional leaks.

Secondly, assumption that, 'primacy of the judiciary' in the appointment of judges is a basic feature of Constitution 'is empirically flawed'.

Thirdly, there were cases where the Apex Court collegium 'retraced its steps' after rejecting recommendations of a particular name suggested by the High Court collegium giving scope for a great deal of 'speculation'. Further, there is no accountability in this regard. The records are absolutely beyond the reach of any person including the judges of this Court who are not lucky enough to become the CJI. Such, a state of affairs does not either enhance the credibility of the institution or good for the people of this country.

Lastly, to hold that it (government) should be totally excluded from the process of appointing judges would be wholly illogical and inconsistent with the foundations of the theory of democracy and a doctrinal heresy, he said, adding Attorney General Mukul Rohatgi was right in his submission that exclusion of the executive branch is destructive of the basic feature of checks and balances - a fundamental principle in Constitutional theory. For all the above-mentioned reasons, I would uphold the amendment. However, in view of the majority decision, I do not see any useful purpose in examining the constitutionality of the Act."[27]

RECENT SCENARIO

While deciding on NJAC, the judicial bench further ordered the continuation of the collegium system and for making a new Memorandum of Procedure in the collegium for the appointment, so as, to improve the existing collegium model by bringing transparency, accountability, non-arbitrariness into the system. But, four years have passed; the judiciary is not yet able to set a draft of MoP. Due to continuous scuffle between the executive and the judiciary, the MoP seems to be a distant dream. The Supreme Court has rejected many MoP drafts made by the Government, saying that, certain clauses need to be amended in the draft. Some government officials were of the view that, the MoP so drafted will not be able to achieve the purpose for which it is being enacted.

[27] Excerpts of the dissenting order of J. Chelameswar J. in the case of *Supreme Court Advocates on Records Association v. Union of India*, AIR 5457, (SC W:2015).

Provisions Contained in MOP

- ―While promoting a High Court Chief Justice or a judge to the Supreme Court, the criteria of seniority, merit and integrity would be followed. Preference should be given to Chief Justices of the High Courts, keeping in view their inter-se seniority.
- In case, a senior Chief Justice being overlooked for elevation to the Supreme Court, the reasons for the same must be recorded in writing.
- The government proposed that, up to three judges may be appointed from the Bar or from distinguished jurists with proven track records.
- To set up an institutional mechanism in the form of a committee to assist the collegium in evaluation of the suitability of prospective candidates. The government has also proposed that, there be a Secretariat that maintains a database of judges, schedules collegium meetings, maintains records and receives recommendations and complaints related to judge's postings.
- The government also insists on adding a criterion of _national security' and _larger public interests' for rejection of recommendation by the Collegium."

A senior government official, requesting anonymity, said that the MoP draft would have to be modified to introduce transparency in the appointment process. ―It is felt that the current draft could not achieve the core purpose of instilling transparency in the selection process of judges", the official said.[28]

While preparing the draft, the government had also put the appointment of top judges out of the purview of the RTI Act and was of the opinion that, the transparency can be achieved even without RTI.

So, the draft was again sent back to the Government for more modifications. This is a proof that there still exists bitterness between the two organs of the government and they are not able to establish balance of power between them. Due to this, judiciary is suffering from setback as the appointment of judges got delayed and more and more vacancies are created.

The last progress that can be seen in the MoP is in February 2018, where the centre said in Lok Sabha that the finalization of MoP will require more time.[29]

POTENTIONAL RECOMENDATIONS – A WAY FORWARD.

1. An Independent Appointment System

India being the second largest county in the world in terms of population, there are large pile of cases going on. India needs to protect its citizens and to maintain the confidence of the citizens in judiciary as the protector of their rights. So, for this, India needs a totally independent body for the appointment and needs to end the tussle between the government and judiciary.

[28] RAGHAV OHRI, *SC returns government Memorandum of Procedure for selection of high court judges,* ECONOMIC TIMES, (2016).

[29] MANU SEBASTIAN, *4 Years of NJAC Judgment: Where Is the MoP for Judges Appointment?* LIVE LAW (16 Oct., 2019), https://www.livelaw.in/columns/4-years-of-njac-judgment-where-is-the-mop-for-judges-appointment -148968.

India needs a system like the one in U.K. which has JAC, a totally independent body with no interference from judiciary and the government.

2. The Procedure for Appointment- Transparent

In U.K., JAC is transparent as it has both the representative and participative character. The election is held in a very transparent way as the vacancies when arrive are advertised, so making it a fair competition. The process further, involves the filing of applications, scrutinizing, panel discussion, statutory consultation etc. This type of process can be very beneficial for India, if adopted, for maintaining the transparency in the appointment process. And, this will ultimately help in curbing the corruption which exists mostly in higher judiciary and will increase the accountability of the judges.

3. Need for a Watchdog Over the Judiciary

The Bar can act as a watchdog in the appointment of judges and the conduct of judges is looked over by the Bar. So, one of the most important duty of the Bar is, to protect the judicial independence and simultaneously, watching over the members of judiciary, not to misuse their powers and distract from their responsibilities. This is one of the most eminent responsibility bestowed over the members of the Bar.

4. Evaluate the Performance

The evaluation of judges and lawyers should be done from time to time, so that, the efficiency would be maintained and there is less possibility of corruption, and this will also make sure that the rule of law is being followed by everyone and the ultimate result will be improvement in judiciary system. Even, the Planning Commission has advised that, the judges should be evaluated periodically by the expert panel, which shall consist of teachers and jurists.[30]

5. Increasing Accountability

If, the accountability of the judges increases, this will be a ‗game changer', as this will help in achieving a corruption free environment in the judicial system. The corrupt judges will become answerable to the people and the goal of bringing transparency in the system can be achieved. A bill for the same was presented in the Lok Sabha, 'the Judicial Standards and Accountability Bill, 2010', which was moved by the lower house, however, pending in the Rajya Sabha. If, this bill is enforced, then this will solve the whole-sole problem of corruption by bringing into its ambit corrupt Judges.

6. Recasting the Mankind

Judiciary is the means to achieve an end in justice and the mankind is the consumer of judiciary for seeking justice. So, the mankind should stand up and raise questions of transparency and accountability of the judiciary. This mankind will help in cleaning the judiciary with higher transparency and accountability.

[30] 12th FIVE-YEAR PLAN (2012-2017).

CONCLUSION

Justice Jerome Frank wrote:

"In a democracy, it can never be unwise to acquaint the public with the truth about the working of any branch of government. It is wholly undemocratic to treat the public as children who are unable to accept the inescapable shortcomings of manmade institutions…The best way to bring about those eliminations of our Judicial system which are capable of being eliminated is to have all our citizens informed as to how that system now functions. It is a mistake, therefore, to try to establish and maintain, through ignorance, public esteem for our courts."[31]

It can be closely examined that the appointment procedure evolved majorly from the Second Judges Case. The Constitution of India does not specifically mention the word "collegium"; this system was a development of judicial interpretation. The collegium performance in certain cases had been hardly creditable, rarely prompt and often surprisingly ignorant. The collegium system primarily works on the basis of seniority which was overlooked in 2 cases.

The lack of written manual, no laid down selection criteria, etc. leads us to the fact that the collegium system is not only opaque, but also worsened.

Even, the introduction of NJAC Act was not able to cure the anonymities which were present in the collegium system as the NJAC gave supremacy to the executive and political opinions over the judiciary, its independence and the basic structure of the Constitution were put in danger.

The Supreme Court, as opposed to accept the spectacular open door to present reformatory changes in the working of judiciary and amending the NJAC Act to introduce a better procedure for the appointment, did nothing and declared the NJAC unconstitutional. It was a failure for each individual, who sought, after a more grounded and progressively independent judiciary. It returned to the old collegium-based arrangement system.

The NJAC system was based on the purpose of bringing transparency as against the collegium system, but this system failed to achieve its objective. There have been various debates on the NJAC in the recent past, and efforts to replace the collegium system have rather faced a setback along with the revival of the collegium system. We cannot overlook the fact that, there is something very better in the collegium system, which helps it going on without any discrepancies. The only step needed by the Government is that, they should overlook the whole system and try to curb the fallouts that exist in the collegium system. It requires self-critique, showcasing what is inherently problematic with the collegium system.

After the declaration of NJAC as unconstitutional, the judiciary, further, laid down the requirement of new MoP so as to curb the problems, that were faced in the collegium earlier and to create a balance between the government and the judiciary in the appointment procedure and to end historic tussle between them. But, even after four years have lapsed, judiciary is not yet able to draft a proper MoP and due to this, the scuffle between the two seems to be never ending.

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[31] Jerome Frank, *Courts on Trial: Myths and reality in American Justice*, PRINCETON UNIVERSITY PRESS, U.S.A., 2-3 (1973).

CONSTITUTIONALISM AND SECULARISM IN THE CONTEXT OF INDIA

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ABSTRACT

Commanders are commanding the commanders as rightly quoted by H.L.A Hart described as the supremacy of law or through which the concept of constitutionalism came into existence. Constitutionalism is a political philosophy based on the idea that government authority is derived from the people and should be limited by a constitution that clearly expresses what the government can and can't do. Constitutionalism at one time could be said to involve the study of the peculiarities of the unique domestic constitutional framework through which government was constituted and power institutionalized. However, this paper analytically discusses the old consensus of conventional constitutionalism and also discusses the current dynamic character of the concept. After taking a step forward, the author also discusses the Deliberative Constitutionalism in the National Security setting. Deliberative democracy is a field of political inquiry that is concerned with improving collective decision-making. It emphasizes the right, opportunity, and capacity of anyone who is subject to a collective decision to participate (or have their representatives participate) inconsequential deliberation about that decision. ―Consequential" means deliberation must have some influence. Furthermore, the scope of this paper falls towards the challenges of National Security in the context of India. National security refers to securing a nation's citizens, territory, resources, assets, ideologies, institutions, and interests against threats which may emanate from changing the geopolitical state of affairs, changing relations between nations, groups, races, sects, advancing technology and changing ideology. The paper gives a sound knowledge to the readers about the kinds of National Security viz. ―internal and external". ―Internal National security is an act of ensuring and keeping peace within the borders of a nation by maintaining the national law and order and defending its people from internal security threats." The Internal challenges of National security include - Emerging cyber-crimes and cyber-security threats, Money laundering, Vote bank politics, Naxalite threat. ―External National security refers to security against aggression by foreign countries." The External challenges of National security include – Cross border threat, Nuclear option, Militants threat, Illegal immigrants to India.

Keywords- Constitutionalism, National Security, Secularism, Constitution, Preamble

―My people are going to learn the principles of democracy the dictates of truth and the teachings of science. Superstition must go. Let them worship as they will, every man can follow his own conscience provided it does not interfere with sane reason or bid him act against the liberty of his fellow men."

— Mustafa Kemal Ataturk

HISTORICAL BACKGROUND OF SECULARISM IN INDIA:

India is a secular country with many diverse religions. India did not become secular before Independence rather it has been a secular country in the post-era itself. As when the various rulers invaded in India like the Aryans, the Mughals, the Turks, the Mauryans, etc. they when invaded India had left many cultures behind them. Like the Aryans, they had left with the religion of Hinduism and the culture of Vedic texts. They worship the fire i.e. they do yagyas and have left us with the culture of doing yagyas. The Mughals had left us with the culture of the Islam, i.e. they had formed the religion of Muslims, they had left us with a different culture and with many famous architectures. The Turks had also come up with the same impact. The Mauryans had left us with the two distinct culture of Buddhism and Jainism. And this is how India became a land of a different cultures, religions, and practices. If there are so many religions in one country, then every religion and every people's religion must be safeguarded and respected. So, the framers of our constitution had secured these religions in one frame under the Constitution of India, which states in the Preamble of the constitution that India shall constitute to secular country. Secular in the context of law means that the state shall not have any religion and also the state cannot discriminate on the basis of religion. For this, they have given us various certain rights under the Constitutional provisions.

MAKING THE CONSTITUTION SECULAR:

After the independence of India on August 15, 1947, the Drafting Committee was appointed by the Constituent Assembly on August 29, 1947. It was charged with the duty of preparing a Constitution in accordance with the decisions of the Constituent Assembly. The Government of India Act of 1935 supplied a large part of the basic framework to work out the new Constitution. However, important principles and constitutional provisions were adopted mostly from the constitutional systems of the Great Britain and the United States. Part III of the Indian Constitution, which deals with fundamental rights, including the provisions dealing with the Indian form of secularism as given under articles 25 to 28 have been adopted mostly from the secular provisions of the United States Constitution.[1]

However, at the time of drafting of the Constitution and at some point of the debates which took site in the Constituent Assembly, the members of the Constituent Assembly refused to add the words –secular" or –secularism" either in the Preamble of the Constitution or in the articles dealing with the secular provisions of the Constitution. At that time these phrases had a compelling experience of atheistic connotation, especially as it used to be in utilization in the Western countries. Therefore, the Constituent Assembly omitted their use in the Constitution.

THE OMISSION OF THE WORD SECULAR IN THE CONSTITUTION:

On December 13, 1946, Mr. Jawaharlal Nehru moved the Objectives Resolution in the Constituent Assembly, which was passed on January 22, 1947. The Objectives Resolution gave expression to the ideals and aspirations of the people of India. Its principles were to guide the Constituent Assembly in its deliberations in making the Constitution. The principles embodied in the Objectives Resolution were incorporated into the Preamble of the Constitution of India. Some of the provisions of the Objectives Resolution read:

[1] Constituent Assembly of India

(1) This Constituent Assembly declares in its firm and solemn resolve to proclaim India as the Independent Sovereign Republic and draw up for her future governance a Constitution…

(2) Wherein all power and authority of the sovereign Independent India, its constituent parts and organs of Government, are derived from the people; and

(3) Wherein shall be guaranteed and secured to all the people of India, justice, social, economic and political; equality of status, of opportunity, and before the law; freedom of thought, expression, belief, faith, worship, vocation, association and action, subject to the law and public morality; and

(4) Wherein adequate safeguards shall be provided for minorities, backward and tribal areas, and depressed and other backward classes; and

(5) Whereby shall be maintained the integrity of the territory of the Republic and its sovereign rights on the land, the sea, and the air according to justice and the law of civilized nations, and

(6) This ancient land attains its rightful and honored place in the world and makes its full and willing contribution to the promotion of world peace and the welfare of the mankind.[2]

The omission of the two words ‗secular' and ‗secularism' are not accidental, however deliberate. The motives for the omission would emerge as clear when we get admission to the debate on secularism, which took vicinity in the Constituent Assembly.

THE CONSTITUENT ASSEMBLY ON SECULARISM:

The concept of secularism as expounded in the constitution. The Constituent Assembly declares its firm and solemn resolve to proclaim India as an independent sovereign Republic wherein shall be guaranteed and secured to all the people of India:

- Justice, socially, economically and politically,
- Equality of status, of opportunity and before the law,
- Freedom of thought, expression, belief, faith, worship, vocation, association and action subject to law and morality,
- Adequate safeguards for minorities, backward classes, and tribal area and depressed and other backward classes…This was before the Constitution of India, and was finalized and the provision in the Constitution relating to Fundamental Rights were given final shape. Though, the secular character of the Constitution was emphasized, yet the Constitution of India, A perusal of the Constituent Assembly debates clearly reveals the general understanding among the members of the Assembly that India was to be a secular State.

  They repeatedly emphasized the secular foundation of the Indian State.[3]

[2] Constituent Assembly Debate vol. I, p. 59
[3] Constituent Assembly Debate Vol. VII, No.20, p.823

GANDHI'S CONCEPT ON RELIGION AND SECULAR STATE:

> *–If I was a dictator, religion and state would be separate. I swear by my religion. I will die for it. But it is my personal affair. The state has nothing to do with it. The state would look after your secular welfare, health, communications, foreign relations, currency and so on, but not your or my religion. That is everybody's personal concern!"*
>
> ***- By Mahatma Gandhi ji***

This quote of Gandhi ji can be well understood and has been used in the famous case law of S.R. Bommai v. Union of India on March 11, 1994.

The notion of the unity of God was at the heart of Gandhi's attitude towards the interreligious relationships, which led him to acknowledge communal harmony as a cornerstone of his political philosophy and programmed. He rightly realized that without Hindu-Muslim unity, Indian civilization could not survive. Gandhi's concept of religion and practice of Hinduism were diametrically opposed to that advocated by Hindu communalist headed by the Rashtriya Swayamsevak Sangh. It is true, Gandhi asserted that religion not be separated from politics. In the last 66 years, the Indian intelligentsia has continued to raise the slogan: –separate religion from politics". The sad part of this story is that, it has failed to tell the ordinary people and the middle classes how it could be done. What is desirable may not necessarily be achievable. Perhaps this demand for separation of religion from politics is being confused with the demand for the separation of church from the state, as it happened in the process of secularism in the West where the state and the church entered into a prolonged struggle for power over everyday life. Gandhi dared to aim at the impossible – Hindu – Muslim amity. Gandhi was aware of the gulf between Hindus and Muslims in India and wanted to bridge it. In 1950, in an article he asked, –It is not a fact that between Mohammedans and Hindus there is a great need for … tolerance[4]

THE INCLUSION OF THE WORD SECULAR IN THE PREAMBLE

The secular nature of the State in India is obvious from the goals and objectives of the Constitution as spelled out in the preamble. However, as we have seen, to keep away from the viable anti-religious effect that the word _secular' would possibly connote, it was omitted from the Preamble and different parts of the Constitution. The check of the authentic Preamble reads "We, the people of India, have solemnly resolved to constitute India into a sovereign democratic republic…"

This phrase was added in the Preamble by the Constitution (Forty-Second Amendment) Act 1976, which came into force on 3rd January 1977. The Indian Constitution enacted in the year 1950 did not, before the 42nd Amendment, comprise the word –secular" or –God" in it. The word –God" is to be found only in the Third Schedule of the constitution.

By the 42nd Amendment, the opening words had been replaced via the following:

[4] *Gandhi versus Hindutva*, (Bindu puri, Tahelka Magazine,18/9/2004); M. K. GANDHI, YOUNG INDIA, 6-10-1921.

–We, the people of India, have solemnly resolved to constitute India into a sovereign socialist secular democratic republic."[5] The word –socialist –as introduced to emphasize the current constitutional dedication to the purpose of socio-economic justice. The intention of the –socialist" was not setup a brilliant throbbing welfare nation.

It was Mrs. Indira Gandhi who introduced the word "secularism" in the preamble of the Constitution in the year 1976.The word "secular "was also added the same Amendment Act.[6] This word high lights that the state has no religion of its very own and all people shall have the rights to profess, exercise and propagate religion of their own. These religion rights are further given under article 25-28 of the Constitution of India.[7]

Various provisions of Indian Constitution contemplate the secular nature of India. Article 25-28, 29-30, to 14, 15, 16, and 17 as well as to art. 44 and 51A.These provisions promote the idea of secularism and by implication prohibit the establishment of a theocratic state. The state is under an obligation to accord equal treatment to all religions and religious sects and denomination.[8]

THE SUPREME COURT AND THE SECULARISM:

As India is a diversified country with different religions leading to secularism is somewhere affecting the national security of the nation. This can be very well understood by the various famous cases and amendments which took place currently in our country.

The US has found a principle of –wall of separation" between church and state. This theory is referred in various US cases - *Reynolds v. United States (1879), Everson v. Board of Education (1947)*[9]

In the famous case-law of S.R Bommai v. Union of India (1994)[10]various judges of the Supreme Court of India individually explained the significance and place of secularism under the Constitution in very meaningful words sampled below:

(i) The Constitution has chosen secularism as its vehicle to establish an egalitarian social order. Secularism is part of the fundamental law and basic structure of the Indian political system.

(ii) Notwithstanding with the fact that the words 'Socialist' and 'Secular' were added in the Preamble of the Constitution, the concept of secularism was very much embedded in our constitutional philosophy from the very beginning. By this amendment what was implicit was made explicit.

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5 Preamble of the Constitution of India.

6 RAKESH BHATNAGAR, *Allahabad High Court Upholds 'Secular' Notion of the Constitution*, THE QUINT, Feb. 12, 2020, https://www.thequint.com/voices/opinion/allahabad-high-court-upholds-secular-notion-of-the-constitution

7 INDIAN CONST. art. 25-28.

8 M.P. JAIN, CONSTITUTION OF INDIA, New Delhi Wadha and company Nagpur, 2013

9 JOHN S. BAKER Jr., *Wall of separation*, THE FIRST AMENDMENT ENCYCLOPEDIA, Feb. 21, 2020, https://www.mtsu.edu/first-amendment/article/886/wall-of-separation (last visited 21/02/2020)

10 *S.R. Bommai and Others V. Union of India and Others*AIR 1994 (SC: 1918)

iii) Constitutional provisions prohibit the establishment of a theocratic state and prevent the state from identifying itself with or otherwise favoring any particular religion.

(iv) Secularism is more than a passive attitude of religious tolerance. It is a positive concept of equal treatment of all religions.

(v) When the State allows citizens to practice and profess their religion, it does not either explicitly or implicitly allow them to introduce religion into nonreligious and secular activities of the State. The freedom and tolerance of religion is only to the extent of permitting pursuit of spiritual life which is different from the secular life. The later falls in the exclusive domain of the affairs of the State.

CONSTITUTIONALISM:

Constitutionalism is the concept in which the government of a state has to work in accordance with the constitution i.e. the government must reflect the constitutionality. Constitutionalism is a commitment to limitations on normal political power, it revolves around a political process, one that overlaps with democracy in looking to balance the state power and individual and collective rights, it draws on unique cultural and historical contexts from which it emanates and it resides in the public consciousness.

TWO TRADITIONS OF CONSTITUTIONALISM

Political Constitutionalism: From Mixed Government to Representative Democracy

The theory of mixed government originated with ancient thought and the classification of political systems on the basis of whether One, a Few or Many ruled. According to this theory, the three basic types of polity - monarchy, aristocracy and democracy - were liable to degenerate into tyranny, oligarchy and anarchy respectively.[11] This corruption stemmed from the concentration of power in the hands of a single person or group, which created a temptation to its abuse through allowing arbitrary rule. The solution was to ensure moderation and proportion by combining or mixing various types. As a result, the virtues of each form of government, namely a strong executive, the involvement of the better elements of society, and popular legitimacy, could be obtained without the corresponding vices.[12] Three elements underlie this classic theory of mixed government. First, arbitrary power was defined as the capacity of one individual or group to dominate another – that is, to possess the ability to rule them without consulting their interests. To be dominated in such an arbitrary way was to be reduced to the condition of a slave who must act as his or her master wills. Overcoming arbitrariness so conceived requires that a condition of political equality exists among all free citizens. Only then will no one person or group be able to think or act as the masters of others. Second, the means to minimize such domination was to ensure none could rule without the support of at least one other individual or body. The aim was to so mix social classes and factions in decision-making, that their interests were given equal consideration, with each being forced to ‗hear the other side'. To quote another republican motto, ‗the price of liberty is eternal vigilance', with each group watching over the others to ensure none dominated them by ignoring their concerns. Third, the balance to be achieved was one that aspired to harmonize different social interests and maintain the stability of

[11] RICHARD BELLAMY, *Constitutionalism*, ENCYCLOPEDIA BRITANNICA, Feb. 24, 2020, https://www.britannica.com/topic/constitutionalism

[12] *Supra* Note 11.

the polity, preventing so far as was possible the inevitable degeneration into one of the corrupt forms of government.[13]

Thus, mixed government provides a model of constitutionalism as consisting in the institutions that structure the way decisions are taken. Although elements of the theory can be found in Aristotle‘s Politics, the locus classicus is Book VI of Polybius's Histories. He underlined its prime purpose as providing mechanisms whereby no individual, body or group could rule alone, thereby curbing the descent into tyranny, oligarchy or anarchy. Polybius regarded the republican constitution of ancient Rome as exemplifying this theory. Thus, the consuls provided the monarchical element; the senate the aristocratic; while the popular element was represented by the Tribunes of the People, the Plebeian Council and the electoral, judicial and legislative powers the people could exercise directly. As he noted, the key feature of Roman republican government was that each of these three groups exercised slightly different powers but required the cooperation of the others to do so. So, consuls might exercise war powers, yet needed the senate to approve generals, award those triumphs and provide the necessary funds, while the people approved treaties and could try high officials and generals for misconduct. Meanwhile, the more executive elements possessing the most discretion were further weakened by their power being shared between multiple office holders, dependent on election, and of short duration. Thus, there were two Consuls each able to veto the other‘s decisions, ten Tribunes with similar countervailing powers and so on, with none able to hold office for more than a year. [14]

The resulting need for different groups to work together was summarized in the slogan Senatus Populusque Romanus (_The Senate and the Roman People‘), frequently abbreviated to SPQR. In reality, though, their relationship was far from harmonious, with the patrician element largely predominating except when factional disputes led a given group among them to seek the support of the plebeians. The conflict between social classes was given greater emphasis by Machiavelli, whose Discorsi offered a radical version of the Polybian argument. He observed how all polities contain two classes, the nobles (grandi) and the people (popolo), whose desires conflict. However, he claimed their discord, far from being destructive, actively promoted 'all the laws made in favour of liberty'. For each was led to promote freedom by virtue of seeking ways of checking the arbitrary power of the other. However, like Polybius, Machiavelli believed all systems ultimately became corrupted and degenerated into either tyranny or anarchy – the balance of power merely served to stave off this inevitable cycle.[15]

The seventeenth and eighteenth centuries brought three main changes to the doctrine. The first, explored below, was the development of the separation of powers as a variation on the doctrine of mixed government. The theory of mixed government involves no clear distinction between the different branches of government. Executive, legislative and especially judicial tasks were shared between the different social classes and exercised by all the government bodies. Indeed, the popular element exercised certain legislative and judicial functions directly through plebiscites and as jurors. The second, was a change in the type of _balance‘ mixed government was supposed to achieve. The classic theory took the idea of the `body‘ politic literally. Just as bodily health was said to rely on a sound physical constitution and a balanced diet and way of life, so the health of the polity depended on a sound constitution that achieved a _natural‘ balance

[13] *Supra* Note 11.
[14] *Id.*
[15] *Supra* Note 11

between the various organs and ‗humors' of the political body. As we saw, in line with this organic imagery the aim was to hold off the inevitable degeneration and corruption of the system. Balance was a static equilibrium, designed to maintain the status quo. However, the seventeenth and eighteenth century saw a new, more dynamic notion of balance, inspired by Newtonian physics and based on mechanics and physical forces. In this conception, balance could involve a harnessing of opposed forces, holding them in a dynamic equilibrium that combined and increased their joint power. The change can be seen in the notion of the ‗balance of trade', which went from being an equal exchange of goods between states to become a competition between trading nations that encouraged their mutual productivity and innovation. In this account, the ‗cycle of life', where growth was followed by decay, became replaced by the idea of progress, in which change and transformation had positive connotations.[16]

The third development drew on these two. This was the idea that political ‗balance' now consisted in the competition between government and a ‗loyal' opposition. As parties evolved from simple factions and patronage networks among rivals for office, and became electoral machines defined as much by ideology and social composition as by the personal ambitions and interests of the political class, they became the organs of this new type of balance. In keeping with the older theory of mixed government, one of the virtues of parties was their ability to mix different social classes and interests and combine them around a common programmed. Indeed, just as economic competition led rival firms to compete over price, innovate and explore untapped markets, so electoral competition led rival parties to compete over policy efficiency and effectiveness, devise novel forms of delivery and focus on areas appealing to different sections of the electorate. This modern form of political constitutionalism proves constitutional in both form and substance. Equal votes, majority rule and competitive party elections offer a mechanism for impartially and equitably weighing and combining the views of millions of citizens about the nature of the public good. And in making politicians popularly accountable, it gives them an incentive to rule in non-arbitrary ways that respond to the concerns of the different minorities that form any working majority, thereby upholding both rights and the public interest rather than their own. [17]

Meanwhile mixed government has developed in new ways through federal and convocational arrangements that likewise seek to ensure different kinds of interest are involved in the policy and law-making process on an equal basis. Yet nobody would deny the systems of most democracies are far from perfect, and it has become increasingly common to look to the other constitutional tradition to rectify these problems. [18]

Legal Constitutionalism: From the Separation of Powers to Rights and Judicial Review

According to Article 16 of the French Declaration of the Rights of Man and of the Citizen of 1789, ‗A society where rights are not secured, or the separation of powers established has no constitution at all.' Though widely accepted today, this view was novel at the time, shaped by the experience of the English, American and French revolutions. The separation of powers developed out of the theory of mixed government during the English civil war of the mid-seventeenth century. In 1642 Charles I belatedly invoked the doctrine of mixed government to

16 *Supra* Note 11.
17 *Supra* Note 11.
18 *Id.*

defend the joint rule of Monarch, Lords and Commons as implied by the notion that Parliament meant all three (the doctrine of ‗King in Parliament' as the sovereign body of the realm). His execution posed the problem of how to control government in a society without distinctions of rank. Dividing the executive, legislative and judicial functions between three distinct agencies appeared to provide a response to this dilemma. However, it took some time to evolve. Although Book XI Ch VI of Montesquieu's The Spirit of the Laws has been credited with offering a definitive statement of the doctrine, his account still bore the hallmarks of its origins in the system of mixed government - not least because of its being based on an analysis of the British parliamentary system and the respective roles of Monarch, Lords and Commons within it. The functional division also remained far from clear cut, with the judicial branch and function still imperfectly differentiated from the other two. Only with the drafting of US constitution and debates surrounding it, most notably the Federalist Papers, did the doctrine emerge in its mature form.[19]

The underlying rationale of this separation is that individuals or groups should not be `judges in their own cause'. The division between the three branches aims to ensure that those who formulate the laws are distinct from those entrusted with their interpretation, application, and enforcement. In this way, lawmakers are subject to the same laws and so have an incentive to avoid self-interested legislation and to frame it in general terms that will be equally applicable to all. These laws then guide the decisions of the executive and judiciary, who, because they are similarly under the law, also have good reason to act in an impartial manner. Separating functions also brings the efficiency gains associated with the division of labor. In particular, the activity of the legislature is made less cumbersome through delegating more short-term decisions to an executive branch capable of acting with greater coherence and dispatch.[20]

The distinctiveness of judicial functions was weak in the doctrine of mixed government and slow to emerge in the theory of the separation of powers. However, making a legal document sovereign—only challengeable by the sovereignty of the people as a whole—inevitably empowered the judiciary, particularly given the comparative length of judicial appointments and their relative isolation from electoral pressures by contrast to the other branches. The judiciary now decided the competences of the various branches of government, including their own, and set limits not only to the processes of government but also to its goals with regard to individual rights. These features have come to define modern constitutionalism and are reflected in all the constitutional arrangements of postwar democracies. Yet they also coexist with forms of political constitutionalism and mixed government.[21]

[19] *Supra* Note 11.
[20] *Supra* Note 11.
[21] *Supra* Note 11.

CONSTITUTIONAL GOVERNED HUMAN RIGHTS AND AN OVERVIEW OF RIGHT OF FREEDOM OF SPEECH AND EXPRESSION AND ITS MISUSE IN INDIA

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ABSTRACT

―To deny people human rights is to challenge their very humanity". Human rights are those rights that are indispensable for humans so as to live with dignity. The rights that are provided to people are enshrined in the Constitution of India, one of such right provided is the right to freedom of speech and expression mentioned in Article19(1)(a) Part III of the Constitution. This right was decided with a view to provide people with an opportunity to be vocal about their opinions and share their ideas and belief but it seems that the use of this right has become excessive and arbitrary in this day and age as many of them are oblivious to the fact that this rights of theirs is not absolute and have certain reasonable restrictions. Presently this right that is supposed to support humanity is acting in intervention to humanity as people under the garb of exercising such rights are incorporated in the acts that are unethical and causing grave injury to mankind, The present scenario of the country can be taken into consideration where people are expressing their outrage upon a subject by taking support of practices such as arson, vandalism, stone pelting , and the most used amongst them is altercation i.e. giving hatred speech in public the cases of which was recently seen in JNU, AMU and other universities. This was done in pursuance to show their superiority and have an upper hand regarding their side of the matter. Therefore, this paper focuses on review of literature that deals with human rights its violation and the steps taken by the government to control it, considering the present situation of the country with a special focus on an overview of freedom of speech and expression and its misuse. On concluding , human rights are utmost necessary for a citizen to live with dignity and the freedom of speech and expression had been in special focus for all time but when it comes to national integrity and safety it is very important to check its misuse, and the present , laws needs a few amendments in order to achieve this.

Keywords- Human rights, freedom of speech and expression, violation of human rights, unethical acts.

AIM AND OBJECTIVE- 1) To study the content of Constitutional governed human rights in India

2) To study about right to freedom of speech and expression and its violation and misuse in India in respect to current scenario of the country.

HUMAN RIGHTS PROVIDED TO THE CITIZENS OF INDIA:

Human rights are every human beings' entitlement by the virtue of his humanity. They are the rights that are indispensable and are cardinal for human beings to live a dignified life. No human shall be deprived of such rights but can have restrictions upon its unhindered use. The

supreme most document of the country i.e. the Constitution of India declares India to be a Sovereign, Socialist, Secular and Democratic Republic. The term 'democratic' denotes that the Government gets its authority from the will of the people. It gives a feeling that they all are equal "irrespective of the race, religion, language, sex and culture." The Preamble to the Constitution pledges justice, social, economic and political, liberty of thought, expression, belief, faith and worship, equality of status and of opportunity and fraternity assuring the dignity of the individual and the unity and integrity of the nation to ail its citizens.

INDIA AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS.

India is a signatory to the Universal Declaration of Human Rights. A number of rights that are guaranteed to an individual are made in consonance to the rights that is specified in The Universal declaration of human rights. Some major rights are (1) Right to equality, (2) Right to freedom, (3) Right against exploitation, (4) Right to freedom of religion, (5) Cultural and Educational Rights, (6) Right to constitutional remedies.

There are many civil political, economic, social and cultural rights that are enshrined in the constitution that are made in reference to the human rights stated in the Universal declaration. The list to those rights is mentioned below:

NO	NAME OF RIGHTS	UNIVERSAL DECLARATION	INDIAN CONSTITUTION
1.	EQUALITY BEFORE LAW	ART.7	ART.14
2.	RIGHT AGAINST DISCRIMINATION	ART.7	ART. 15(1)
3.	EQUALITY IN OPPRTUNITY	ART 21(1)	
4.	FREEDOM OF SPEECH AND EXPRESSION	ART 19	ART 19(1)(a)
5.	PROTECTION OF LIFE AND PERSONAL LIBERTY	ART.3	ART.21
6.	FREEDOM OF CONSCIENCE AND RELIGION	ART.18	ART.25(1)
7.	REMEDY FOR ENFORCEMENT OF RIGHTS	ART.8	ART.32
8.	RIGHT AGAINST ARBITARY ARREST AND DETENTION	ART.9	ART.22
9.	RIGHT TO WORK IN JUST AND FAVORABLE CONDITIONS OF WORK	ART 23(1)	ART.41
10.	RIGHT TO EQUAL PAY FOR EQUAL WORK	ART23(2)	ART 39(d)
11.	RIGHT TO EDUCATION	ART 26(1)	ART 21(a),41,45 and 51A(k)

FREEDOM OF SPEECH AND EXPRESSION:

The Human Right that this paper primarily focuses upon is *The Freedom of speech and expression.* Right of Freedom of speech and expression is mentioned in ART 19(1)(a) of the constitution. This right was given to the people with a view to voice their opinions and provide them with an opportunity to express their outlook towards a subject or a matter. If people are deprived of this right a state of complete autonomy would arrive where the status of the country to be democratic would be hampered and a state would arrive where the will of the people would be dominated and the functioning of the country would fall under the clutches of arbitrariness and excessive use of powers. The right to freedom of speech and expression is not an absolute right and is subjected to certain reasonable restrictions. These reasonable restrictions were added with a view to not to crucify anything just for the sake of someone‘s right to speech and expression.

There are a total of 8 reasonable restrictions that is imposed upon this right:

1. Sovereignty & Integrity of India
2. Security of the State
3. Friendly relations with Foreign States
4. Public Order
5. Decency or Morality
6. Contempt of Court
7. Defamation
8. Incitement to an Offence[1]

These restrictions are divided into two categories restrictions, The first 3 restrictions i.e. sovereignty and Integrity of India, security of the state and friendly relations with foreign state these restrictions fall under National Interest and the rest 5 restrictions i.e. public order, decency or morality, contempt of court , defamation and incitement of an offence fall under the interest of the society.

Restrictions for National Interest

In the case *Romesh Thapper v. State of Madras*[2] it was held that every action of the public like ordinary formation of an unlawful assembly, riots is not a serious or aggravated form of public disorder and does not fall under the purview of security of state until and unless the actions are rebellion, waging war against the state, insurrection etc.

Acts that are malicious with a view to bitter the relations of the country with friendly territories falls under the restriction of Friendly relations with foreign state. As happened in the case of *Jagannath Sathu v. Union of India*[3] where the petitioner was detained under the Preventive Detention Act 1950. He was alleged for sending for publication to a foreign

1 J.N PANDEY, CONSTITUTION OF INDIA (56 ed. 2019)
2 1950 AIR 124, 1950 SCR 594
3 1960 AIR 625 1960 SCR (2) 784

newspaper dispatch of news and views containing false, incomplete, one-sided and misleading information about the State of Jammu and Kashmir.[4]

Restrictions for Interest of The Society

Public order: In the view of the Romesh Thapar case the court held that anything that hampers the public peace or tranquillity disturbs the public order.

Morality and decency: Morality is nothing but probity. It could also be explained as the expected standard of good behaviour that an individual is expected to show. Morality is susceptible to immoral influence, and any such influence that fetter the standards of morality falls under the restriction.

Contempt of court: This is specified under the *Contempt Of Courts Act,1971* that says disobedience of any judgement, order, direction or the process of court and judiciary, therefore the state is empowered to impose restrictions in over to protect the sanctity of court and the judiciary.

Defamation: Defamation is an act of hampering the reputation of a person by words spoken or written or through gestures. Reputation is the most important asset of a person and no one could stand even a speck questionable spot on his character, therefore defamation is a restriction to such a right.

Incitement to an offence: Incitement to an offence is also a restriction. It refers to the act of suggesting, encouraging or inciting a person to do something unlawful or abstain from doing something ignorance of which is unlawful. Indian legal System recognizes all form of incitement be it direct, indirect, written or oral.

FREEDOM OF SPEECH AND EXPRESSION V. SEDITION.

Before contemplating the recent scenario of sedition in the country, first question to know is *What is Sedition?* Sedition is the use of words or actions that are intended to encourage people to be or act against the government. *Kedar Nath v. State of Bihar*[5] lays down the essential ingredients of the modern law of sedition. The apex court while deciding the constitutional validity of Section 124A in light of Article 19(1)(a), said that ―incitement of violence" is an essential ingredient to constitute sedition. The apex court also referred to a pre-legislative history of India and opposition surrounding Article 19 in the Constituent Assembly debates. Sedition was not a valid restriction to freedom. However, out of the six grounds listed in Article 19(2), the court was of the view that ―security of the State' could be one of the grounds to uphold the constitutional validity of Section 124A. The apex court also observed that ―strong words used to express disapprobation of the measures of Government with a view to their improvement or alteration by lawful means" is not sedition.

Keeping in mind and reviewing recent news and articles on sedition and the current scenario in the country, there are certain incidences that took place in recent times, that directly

[4] APURVA RATHEE, *Article 19 (2) : ―Reasonable Restrictions on Article 19 (1) (a)"*, LAWSCHOOLNOTES, https://lawschoolnotes.wordpress.com/2017/04/13/article-19-2- reasonable-restrictions-on-article-19-1-a/

[5] AIR 1962 955

violates and also leads to the misuse of speech and expression in my view. Few of these incidences are.

1. The Stone pelting case of Jammu and Kashmir:

There are some major cases where stone pelting was observed in Jammu and Kashmir. The first major incident was, when some militants were held captive and killed by the Indian Army, the local public of J&K turned out on the streets and expressed their outrage through way of stone pelting that was prima facie immoral and a misuse of freedom of speech and expression. The matter was taken to human rights association contending the violation of their fundamental rights, but later considering it to be a threat to the security of the nation, no action was taken.

The second major and the most recent case of stone pelting was observed when the ART.370 was abrogated that lead to the bifurcation of state into the Union territories. There was a hike in the cases of stone pelting in the year 2019 where 1999 cases were observed as compared to 1193 cases in past years.[6]

2. Kanhaiya Kumar v. State of NCT of Delhi[7]:

In this case students of JNU, protested against the judicial killing of Afzal guru who was the mastermind of the Parliament attack and was hanged in the year 2013, The students of JNU protested by vocalizing Anti -national slogans such as *―Afzal ham sharminda hai tere quatil zinda hai*" and *―Bharat tere tukde honge inshallah inshallah*" A case therefore filed against several students on charges of offence under Sections [124-A, 120-B, and 34]. The University's Students Union president Kanhaiya Kumar was arrested after allegation of ‗anti-national' sloganeering was made against him. Kanhaiya Kumar was released on bail by the Delhi High Court as the police investigation was still at nascent stage, and Kumar's exact role in the protest was not clear. At that time leader of many political parties supported their move and contended that they have the right to speech and expression, but it is very clear that altercation or can say giving hatred speech is nowhere under the ambit of freedom of speech and expression.

3. Shaheen Bagh / Sarjeel Iman case:

Sarjeel Imam , also the ignitor of the Shaheen Bagh protest was arrested in Bihar for the offence of sedition, he was one of the main person highlighted during the CAA protest as he was involved in saying anti- national slogans such as *―Assam aur India katke alag ho jaaye, tabhi ye humari baat sunenge".* He also addressed the north -east part of the country as a chicken head and emphasized upon its detachment from the country.

Considering the few cases stated above on sedition one thing can be concluded is that protesting against something is not wrong but incorporating atrocious way to express the outrage is not right. People are diverse therefore it evident to have difference of opinions but using nefarious ways such as arson, vandalism, giving hatred speech not only disturbs the tranquility or can say equilibrium of the country but also leads to the violation of other laws and rights under the garb of exercising their own rights.

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6 *1,999 stone-pelting incidents in 2019 in J-K, 1,193 post abrogation of Article 370, Jan 07 2020,*https://economictimes.indiatimes.com/news/politics-and-nation/1999-stone-pelting-incidents-in-2019-in-j-k-1193-post-abrogation-of-article-370/articleshow/73129411.cms?from=mdr

7 Criminal Writ Petition No. 558 of 2016(H, C. Delhi) (Pending).

FREEDOM OF SPEECH AND EXPRESSION V. PRESS :

The backbone of every country is a responsible and a professional media. A press is a watchdog of the democracy. People rely on the information that is given by the press. But nowadays media is not as transparent, reliable and authentic that it used to be earlier times. Their aim, today, is not the to provide the most relevant and honest news but to provide news that is sublime, and a bit fabricated that is delightful for the people to listen to.

In the earliest case of *Romesh Thaper v. State of Madras*[8], the freedom of press was declared to be a part of freedom of speech and expression by the Hon'ble Supreme Court.

Before discussing on the major issues related to the freedom of press one must be very clear about the meaning of the word press. The meaning is divided in two broad categories **(1)** the core or strict interpretation, **(2)** the wider horizon of the term press. The core meaning or the common meaning of the word press means the printing press. It includes all the physical aspects of the printing press. It is clear from this meaning that is very narrow meaning or a very strict interpretation of term press. The word press in its wider perspective includes all printed material printed in the printing press, like newspapers, journals, magazines, periodicals, pamphlets, leaflets, books, handbills, documents or any other printed material[9] .

Freedom of press is not specifically specified in the Indian constitution but it is covered under the ambit of ART19(1)(a) i.e. freedom of speech and expression, it was said by Dr. B.R Ambedkar, chairman of the drafting committee that ―no special mention of freedom of press is necessary at all as the press and an individual are the same as far as the right to speech and expression is concerned".

This right that was made available to the press is a perquisite, but it is accompanied by its violation by the representatives and by the white-collars, and there are many cases related to the violation of this right in the sphere of the media in the past years.

In the case of brutal murder of a 14 year old in Noida ,the apex court clarified that ―transparency is something but secrecy in investigation is another", CBI and a section of the Media were trying to tarnish the reputation of the family by reckless reporting , therefore they had an impact on the investigation . Sensationalized journalism also have an indirect impact on the judiciary.[10] As said earlier media is no longer a source of 100% true or can say authentic information, and this trivial untruth or can say a white lie often leads to defamation that is a reasonable restriction of Art 19(1)(a). In the *Divya Sapandana case*, Divya Sapandana, member of parliament and a former actress won a defamation case against Asianet, Suvarna news 24X7, Kannada news channel who alleged her to be involved in the IPL match fixing in the year 2013, and exhibit her to be the brand ambassador of Bengaluru IPL cricket team while she was an ambassador but in the year 2008. In the judgment the court contended that ―this court is of the opinion that the act of the defendants is in complete violation of journalistic ethics and deliberately destroy the image and the popularity of the plaintiff" therefore, a compensation of

8 AIR 1950, 124, SCR 1950, 594.

9 FREEDOM OF PRESS: THE CONSTITUTIONAL PERSPECTIVE.,https://shodhganga.inflibnet.ac.in/bitstream/10603/173762/9/09_chapter%202.pdf

10 *Role of Media and Right to privacy in India*, https://shodhganga.inflibnet.ac.in/bitstream/10603/40105/17/17_summary.pdf.

Rs. 50 Lakh INR was given to the plaintiff apart from an injunction against telecast of any such program on AIR[11].

Recently, The Editor- in- Chief of *REPUBLIC TV. Mr. Arnab Goswami* one of the fearless and candid journalist was attacked by the goons sent by a political party on his way back to his home as on the debate session earlier that day he questioned the President of INC on her silence on the matter of mob lynching in the Palghar District , as she is usually vocal about her thoughts on similar matters , and lately an FIR was lodged against three journalists Mr**.** Arnab Goswami, Mr. Sudhir Chaudhary and Mr. Amish Devgn by the Mumbai and Kerala Government for spreading communal hatred.

Media is the fourth pillar and the watchdog of democracy, and the sole purpose of media is to bring forth all the occurrences and eventuality from every nook and corner , therefore the attacks and cases against the journalist in my opinion is a question on Freedom of speech and expression pertaining to the press as the notions and rational of different news channel and journalist differ regarding a matter, and they present different sides of the same scenario. It depends upon the interpretation and intellect of the viewers how they infer that.

CENSORSHIP AND THE FREEDOM OF PRESS:

Censorship is the suppression of speech, public communication, or other information, on the basis that such material is considered objectionable, harmful, sensitive, or "inconvenient." Censorship can be conducted by governments, private institutions, and corporations. Motion pictures (movies) are always subjected to or can say is verified by the censorship board to have a check on them whether or not they touch the area that is inappropriate or obscene for the viewer. Every motion picture is accredited with a label i.e. _A‘- which means content appropriate only for adults and _UA‘- which means content that is appropriate for viewers for all the age groups. There are many cases where there was a clash between the censorship board and the people regarding the content and the validity of the content portrayed. But there is a question whether the censorship infringes or can say violates the freedom of press? There are certain grounds of censorship i.e. i) Sexuality, ii) Politics, iii) Religion, iv) Communal conflict, v) incorrect portrayal of someone or something vi) extreme violence.

K.A. Abbas v. Union of India[12]. The Supreme Court upheld the constitutionality within the ambit of Article 19(2) of the Constitution and added that films have to be treated separately from other forms of art and expression because a motion picture is "able to stir up emotions more deeply than any other product of art"[13].

At the same time it cautioned that it should be "in the interests of society”. If the regulations venture into something which goes beyond this legitimate opening to restrictions, they can be questioned on the ground that a legitimate power is being abused.

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11 *Divya Spandana wins defamation case against media house*, MAY 08, 2019 https://www.thehindu.com/news/national/karnataka/ramya-wins-defamation-case-against-media-house/article27073216.ece

12 AIR 1987 481, SCR 1971 (2) 446.

13 SUMIT MATHEW. *Censorship of Films*, http://www.legalserviceindia.com/legal/article-351-censorship-of-films.html#:~:text=A.,any%20other%20product%20of%20art.

In the latest *Padmawat case*, the movie was censored on the grounds of incorrect portrayal of Rani Padmavati, Karni Sena protested a lot to put a ban on the film as the incorrect portrayal of Rani Padmavati hurt the sentiments of people, finally the ban on movie was lifted and it was released after modifications in the film, so that no wrong information about a historic figure is portrayed . Interesting aspect of this phenomenon is that irrespective of the effect of the movies, there is often a call for a total ban without exploring any other possibilities. The Supreme Court in *State of Gujarat v Mirzapur Moti Kureshi Kassab Jamat*[14] stated that a total prohibition under Article 19(2) to (6) must also satisfy the test that a lesser alternative would be inadequate.[15]

On concluding, freedom of press is essential for the outflow of information to the people but, this right cannot be exercised arbitrarily, certain points shall be kept in mind while exercising this right so that it does not hamper people at individual level or at large, motion pictures are the most influential as it leaves a mark in the brains and hearts of the people therefore, censorship board is required so that nothing is released that is violative of or hurt any corner of life. Censorship board should be used in the correct way and sense so that nothing violates the reasonable restrictions of freedom of speech and expression. If any materiel is censored, that was violative of the restrictions, therefore it would not amount to the infringement of the freedom of press.

CONCLUSION:

Human Rights are indispensable, and no individual should be parted with such a right in order for him to live with dignity. The constitution of India ensures some rights for the citizens pertaining to all the aspects of life. One of the most essential right is the right of freedom of speech and expression, it is a right that provides human with a liberty to communicate and express their opinion either verbally, written or through gestures. When rights are available to people its violation by them is also certain. These violations are often as a result of obliviousness of the people towards the restrictions that these rights have as the rights are exercised under a misapprehension that they are absolute. This paper focused on violation of this right in the way of sedition and by the press. Sedition could be explained as an activity that is anti-national and can put the reputation of the country at stake and also hamper the relations between the territories of power at peace with the country. Sedition is a complete violation of the right to freedom of speech and expression and India has recently witnessed a lot of cases regarding the same, though certain provisions of law are there to punish the people for the offence od sedition but the law must become more strict towards providing punishment to the people who attempt sedition, so that no one dares to repeat the offence again, next violation of this right by the press was discussed, where it was evident that there were many cases in past that was adjudged upon by the Hon'ble court that have contended the violation of this right by the press by stepping out of the ambit of this right, censorship was a major question on the violation of the freedom of press but was concluded on the point that if the censorship board congruously or can say duly imposes censor on motion picture therefore that would not amount to the violation of freedom of press. Therefore, human rights are an integral part of the constitution as well as the life of a person, therefore it must be aimed to be used on the most accurate manner in order to avoid its violation.

[14] SSC, 2005(08) 534.
[15] http://www.legalserviceindia.com/articles/fban.htm

A STUDY ON PARLIAMENTARY FORM OF GOVERNMENT

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ABSTRACT

The parliamentary type of government that exists in Bharat is borrowed from British parliamentary system. The Indian parliamentary type of government runs around the conception of cooperation and coordination between the legislative and therefore the govt branches of the govt. The _Westminster model of government‘ is that the sentence given to our parliamentary government and isn't solely applied to the centre however additionally to the states. Article seventy-four and seventy-five deals with the parliamentary type of government at the centre and Article 163 and 164 deals with the parliamentary type of government at the state and it's rife in countries like Britain, Japan, Canada, India, etc. The Parliamentary system contains a presence of twin govt wherever the president is that the American state jure govt that's the nominal govt and therefore the head of the state whereas the prime minister is that the actual govt that's the $64000 govt and therefore the head of the govt. The Parliamentary system has majority party rule, bicameral lawmakers and has conception of collective responsibility. The ministers have double membership of both the legislature and the executive branches of the government. The Parliamentary system has many merits like wide representation, prevents despotism and authoritarianism, has responsible government and there is harmony between legislature and executive organs of the government. Thus, the Parliamentary system is a democratic form of government in which the party with the greatest representation in the parliament, forms the government. Briefly, it suffers from certain drawbacks like multiplicity of political parties, evil of defection, lack of cohesiveness and leadership national parties, illiteracy of voters, growth of regional parties and criminalization of politics. Parliamentary form of government should try to rectify their lapses so that the citizens of our country or nation become protocol and autonomic.

Keywords: Parliamentary, government, Centre, state, authoritarianism, Westminster model, criminalization, despotism, autonomic.

INTRODUCTION

India's Constitution provides for a parliamentary system of government at the Centre, as well as at the states. Articles 74 and 75 of the Indian Constitution deals with the parliamentary form of government at the Centre, and Articles 163 and 164 of the Indian Constitution address parliamentary form of government at the states. The Indian Parliament is bicameral in nature and includes the President, the Council of States, i.e., the Rajya Sabha, and the People's House, i.e., the Lok Sabha. With a bicameral legislature a Federal state is a significant element. Hence, the cabinet is the actual executive in parliamentary form of government; it is also known as a branch of government cabinet. Under legislative structure, the government is responsible for their actions and policies and is accountable to the legislature. This form of government is also also known as a responsible government or Westminster government model, and is prevalent in

Britain, Japan, Canada, India, etc. The Parliamentary system is characterized by parties that are highly structured and tend towards unified action, block voting and distinct party platforms. This party discipline is required in parliamentary systems primarily because deviation from the party line could result in bringing down the government.

FEATURES OF PARLIAMENTARY GOVERNMENT

The certain features of Parliamentary form of government are as follows:

- ***de jure* and *de facto* executive**: Under this form of government, the President is the formal Head of State (de jure executive or titular executive) while the Prime Minister is the actual Head of Government (de facto executive). As specified in Article 74 of the Indian Constitution, a ministerial council headed by the Prime Minister to assist and advise the President in the exercise of his duties and the advice provided by the Prime Minister is binding on the Chair. A notable example of this form of government is in the United Kingdom, where the King or Queen is the de jure (Head of State) executive, while the Prime Minister is the de facto (Head of Government).

- **Collective Responsibility**: It is the primary aspect of the legislative system of government and, according to Article 75, once a Cabinet decision is made, it is the collective duty of each minister to uphold it, inside and outside the Parliament.

- **Majority Party Rule**: The government is formed by a party with a majority in the Lok Sabha. The President nominates the leader of the majority party as the prime minister and appoints the council of ministers after consultation with the prime minister. A coalition government is established when no party can achieve majority in the Lok Sabha.

- **Individual Responsibility**: Each house minister is personally responsible for running his own department to Parliament. Parliament arians will put questions to the ministers who are responsible for any acts of omission and contract relating to their own department. For example, when China invaded India in October 1962, Mr V.K Krishna Menon, the then Minister of Defence, resigned as an example of individual responsibility.

- **Political homogeneity**: Political homogeneity essentially means that the leaders of the ministerial council have or hold the same political views as those of the same political party. In coalition government, the ministers are bound by consensus.

- **Double Membership**: Our Indian Constitution proclaims that a minister who for six consecutive months is not a Member of Parliament ceases to be a Minister. The ministers are both the legislature representatives and the executive which means that an person cannot be a minister without becoming a parliament member.

- **Prime Minister 's leadership**: As the de facto president, the Prime Minister is the head of the Council of Ministers, the head of the governing party and the leader of the parliament. The Prime Minister may invite new ministers into his cabinet and can reshuffle his cabinet members' portfolios whenever he wishes. Thus, it can be concluded that the Prime minister has an overall control over the cabinet and on the recommendation of the Prime Minister, the other ministers are appointed.

- **Dissolution of the lower house**: Article 85 of the Indian Constitution grants the President the right to dissolve the lok Sabha. The President may dissolve the Parliament's lower house before the expiry of his term on the recommendation of the Prime Minister and may hold fresh elections

- **Secrecy**: another requirement for democratic government. The ministers do not report whatever is addressed in the cabinet to the media or anywhere else. A member can lose his seat if he considers the confidentiality of the cabinet proceedings exposed.

MERITS OF PARLIAMENTARY FORM OF GOVERNMENT

- **Smooth Functioning**[1] – The harmonious relationship between the executive and the legislature helps to keep the country running smoothly by preventing confrontation between the government's two bodies. This form of government also ensures that all government institutions function alongside each other in a complementary way. Cooperation and cooperation between the legislature and the executive is characteristic of the democratic system of government. Accordingly, the cabinet will get the legislature to pass its legislation promptly. The principle of partial separation of powers, which accounts for independence accompanied by duty and transparency, is being pursued in India. Therefore, the two organs can function without any interference if they work as per the interest of the people.

- **Quick Decision Making -** If the ruling party enjoys majority in the legislature, then the executive can take decisions quickly and implement them without any hindrance and fear of being let down on the floor of the House. This can be very helpful in case of constructive decision making and overcoming the problems of procedural delays.

- **Responsible Government :** Responsible governance refers to a governance that keeps people responsible. This takes the form of a Cabinet that is based on an elected assembly 's support, rather than a king or their representative. Across India, the Parliament exercises power over the ministers by various means, such as question hour, debates, motion for adjournment, no motion of confidence, etc.

- **Flexible System**[2]- In nature this form of government is highly adaptive to the changing situations. An example of a flexible system benefit can be seen in serious emergencies where leadership can be changed without harassment and objections.

- **Open Administration**- The executive remains vigilant and always tries to administer properly and effectively in order to secure its electoral prospects and confidence of the Parliament. The Parliament controls the executive, particularly the Cabinet in two ways:

    i. **Need of Confidence by The Government-** Since motion of ―No Confidence" against the government, would make the Prime Minister resign from his office, leading to the dissolution of the Council of Ministers as a whole.

[1] M. LAXMIKANTH, Indian Polity, Parliamentary System, 12.5, (6th ed., Mc Graw Hill 2020)
[2] *Id.*

ii. **Financial Powers of The Parliament**- The Government has to seek for financial grants by the Parliament to implement its policies and for the purpose of administration. The Parliament has the power to grant or refuse the requested funds, thereby controlling the executive. The House also has to control the expenditure made out of granted funds.

- **Alternative government-** It reflects an alternative government. In the event that the majority party in the legislature loses its majority, the opposition party can form the government without making fresh elections. But, in the legislature, it must prove its majority. Therefore, Dr. Jennings says, "the opposition leader is the alternative prime minister." Nevertheless, there are several cases where no single faction in the legislature secures the majority. In this case, the only alternative is to form a coalition government, which consists of more than one political party. Such Governments are called National Government in England.

- **Prevents Despotism –** In this form of government, the council of ministers vests the power of executive authority. Ministers are responsible to the legislature; they are answerable to the legislature for their actions and omissions. They can be removed by a ‗No Confidence Motion'. Therefore, this form of government cannot become autocratic.

- **Wide Representation**: Proper representation can be formed to all the regions and sections in the current form of government as the group of ministers jointly form the executive in a Parliamentary form of government.

DEMERITS OF PARLIAMENTARY FORM OF GOVERNMENT

1. **Unstable Government -** No guarantee is provided that a government will survive its tenure. The ministers rely on a majority legislator's mercy. A motion of no confidence or a political defection or a multi-party coalition will make the government unstable. Examples of corrupt government in the past include I K Gujral, Deva Gowda, Chandra Shekhar, V P Singh, Charan Singh and Morarji Desai.

2. **No Continuity of Policies**[3] - Tenure volatility isn't conducive to long-term policy formulation and execution. When the ruling party shifts, it impacts profoundly on the government's policies. The Janata Party under Morarji Desai, for instance in the year 1977, overturned a number of various Congressional policies that were of the previous Government. This type of thing was repeated again in 1980, when Congress regained power.

3. **Dictatorship of the Cabinet -** When the governing party starts gaining absolute dominance in both Parliament houses, the cabinet is likely to become autocratic and begin to wield unlimited powers. While, it offers the executive a window of opportunity to become tyrannical. Under the leadership of Rajiv Gandhi and Indira Gandhi the cabinet dictatorship was witnessed in Congress.

[3] HRSHT, No Continuity of Policies, DEMERITS OF PARLIAMENTARY FORM OF GOVERNMENT, (Feb.18.2020, 3:13PM), https://www.padmad.org/2017/03/demerits-of-parliamentary-form-of.html

4. **Against Separation of Powers** – In this system, the principle of separation of powers is violated. As the ministers, the members of the ruling party or coalition, dominate policymaking though, in principle, policymaking is the domain of the legislature. In the parliamentary system, the legislature and the executive are together and inseparable. In Parliamentary form of government there is a fusion of powers. Thus, it goes against the theory of separation of powers.

5. **Government by Amateurs**[4] –The Parliamentary government lacks competence and effectiveness, because the ministers are mostly amateurs. As the ministers have to be appointed from among the members of the legislature, the scope for appointing talented and competent people as ministers is limited. Many times, important considerations in appointing ministers are not skills, competence and talent but caste, religion, community faction and influence in the party.

   - The program is not administrative effective because ministers are not specialists in their fields.
   - In the selection of ministers, the PM is limited to the Members of Parliament alone and cannot rely on outside talent.
   - Ministers frequently commit much of their time to legislative duties, meetings with the cabinet and party events.

6. **Failure to Take Prompt Decision**[5]**:** As the Council of Ministers does not enjoy a fixed tenure; it is unable to adopt any bold, long-term policy. The problem is compounded in a coalition government which is often unstable. The coalition partners tend to fight among themselves. As a result, they fail to adopt any bold policy. According to Dicey, government fails to take prompt, bold and effective steps during crisis or war. The Prime Minister takes time to persuade his members in the Cabinet to take decisions. Similarly, it is not easy for the government to persuade the legislature to take a prompt decision to manage crisis. This stands on the way of taking quick decision even in emergency.

The happenings during the last two decades clearly demonstrate that the parliamentary form of government has almost failed. Efforts to remove its drawbacks have not been successful. Briefly, it suffers from following drawbacks: -

1. **Multiplicity of political parties:** The existence of too many political parties has resulted in unstable governments and even created problems in the formation of governments. A number of state Governments have fallen due to the multiplicity of political parties. Till 1979, this was confined to states only, but since 1979 this affected Central Government and also four national governments have been fallen. In 1989, the Janata Party came to power at the Centre. It was a combination of a number of political parties. Due to internal dissections, there was a split in the party and Mr. Charan Singh defected from it

[4] Government by Amateurs, WHAT ARE MERITS AND DEMERITS OF PARLIAMENTARY SYSTEM? (Feb.18.2020, 3:34PM), https://www.careerride.com/mchoice/what-are-merits-and-demerits-of-parliamentary-system-27765.aspx

[5] Demerits of government, What ARE MERITS AND DEMERITS OF PARLIAMENTARY SYSTEM? (Feb.18.2020, 3:34PM), https://www.careerride.com/mchoice/what-are-merits-and-demerits-of-parliamentary-system-27765.aspx

and as a result of this, the Janata Government headed by Mr. Morarji Desai fell. Because of this it is not possible to have a strong opposition in the legislatures which influences the decision of the government in various forms and exercises control over it.

2. **Evil of Defection**[6]: The evil of defection has been threatening the very basis of our parliamentary system resulting in unstable governments. To cure this evil, Parliament enacted the 52nd amendment in 1977 and added the Tenth Schedule to the Constitution which provides that if a member of the legislative party voluntarily leaves his party or votes against the whip of the party or nominated member joins other party within six months of election he will lose his membership of the legislation. But one of the exceptions to the above rule is that if 1/3 of the members go out of the party it will call a split and not defection and the separated group will be a new entity. Unfortunately, this provision of the Tenth Schedule has proved to be a boon for dishonest politicians who aspire for immediate political gain. A number of State Governments were toppled by the power-hungry politicians. In 1979, this evil affected the Centre Government and the Janata Dal Government led by Mr.V.P.Singh fell when Mr. Chandra Shekhar defected from it along with 57 supporters and formed a separate party. He formed the Government with the outside support of the Congress, but after four months the Congress withdrew its support on a flimsy ground and subsequently he secured majority with the help of some some M.P.'s who defected from other political parties and joined the Congress Party. (Mr. Arjit Singh's group defected from the Janata Dal formed a separate group and later on jointed the Congress Party).

3. **Lack of cohesiveness and leadership in National Parties**[7]**:** Lack of unity and cohesion in national parties, particularly the Congress Party, and behaviour of the members of the different groups within the party have weakened the authority of the leader of the party who becomes the Prime Minister. It has been seen that the Prime Minister has to devote much of his time in solving party disputes and little time is left to him to look after nation's work. The Prime Minister has to satisfy different sections and groups among his party by giving them ministerial posts. Till 1967, the Congress Party was unified under the strong leadership of Pt. Jawaharlal Nehru. Afterwards the era of coalition government came, and their fate is well known. In Congress Party also there is no leader of Pt. Nehru's stature and therefore there is lot of dissension in the party. After 1991 elections, The Prime Minister i.e. P.V. Narshima Rao had to change three Chief Ministers in Karnataka and two in Andhra Pradesh. In 1993 Assembly elections, the party faced difficulty in choosing its leader in Himachal Pradesh and Madhya Pradesh. In 1996 parliamentary elections of the Lok Sabha, the position was worse than that of 1979, 1989 and 1991 parliamentary elections. No party obtained the requisite majority in the House. In a 545-member house elections were held for 537 seats, the party position was as follows: BJP 160, Shivsens 15, Samta Party 8, HVP 3, Congress 136, Janta Dal 44, Independents and others 17, etc. In such a situation formation of a strong and stable government is not possible.

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6 DR. J.N PANDEY, Constitutional Law of India, Central Law Agency chapter 3: Salient Features of the Indian Constitution, 26 (51st ed., 2014)

7 *Id.*

4. **Illiteracy of voters:** National issues versus Local issues- A vast majority of our electorates is illiterate and politically immature, and their right of exercising franchise is swayed away on the basis of caste, religion, and money, etc. National issues are not at all considered by the electorates. In 1993 and 1996 Assembly elections in U.P., M.P. and Rajasthan, elections caste factor has played a major role.

5. **Growth of regional parties**[8]: The growth of local and regional parties arousing parochial and provincial feelings also weakened the functioning of the parliamentary system. These regional parties were demanding more autonomy for the States and thus threaten the unity and integrity of the nation. In this respect the 1996 Parliamentary elections was even worse than two earlier elections in Lok Sabha. In 1966 parliamentary elections, there had been a marked success of several regional parties, notably DMK-TMC combine in Tamil Nadu, Assam Gana Parishad, the Haryana Vikas Party (HVP) and the TDP (Naidu Group) in Andhra Pradesh. These regional parties have been demanding reconsideration for present division of powers between The Centre and The States and claiming more autonomy for the states. This is likely to weaken the unity of the country.

6. **Criminalization of Politics: -** Criminalization in politics has also affected free and fair election. Almost all political parties have connections with known criminals. Some political parties have given tickets to known criminals. These criminal leaders spread violence in elections on a large scale. They resort to booth capturing, bogus voting, etc. During the 1996 parliamentary elections numerous murders were committed in the State of Bihar and Andhra Pradesh. Many persons with criminal records were elected to the Eleventh Lok Sabha.

CASES INVOLVED:

Special mention may be made of the constitutional status of the President of India provided for in Articles 53, 74 and 75. Article 53 The Constitution confers upon the President the executive power of the union, but he is obliged to exercise his duties in compliance with the Constitution. Article 74 states that the Council of Ministers shall be formed to assist and advise the President in the exercise of his role and shall act accordingly. Article 75(3) stipulates the general responsibility of the Council of Ministers to the House of the People. The Constitution includes no clause under which legislature.

In *Ram Jawaya Kapur v. State of Punjab*[9],it was observed by the court that the executive power is vested in the President, but the President is only a formal or constitutional head of the executive. The President acts in the exercise of his function by the aid and advice of the council of ministers. The executive has the primary responsibility to formulate governmental policy and to transmit it into the law. But it is responsible for all its action to the legislature and, therefore, it must retain the confidence of the legislature. Article 75(3) deals with the basis of that responsibility. The President acts on the aid and advice of the Council of Ministers in executive action, and the President is not required by the Constitution to act personally without or against the consultation of the Council of Ministers.

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8 DR. J.N PANDEY, Constitutional Law of India, Central Law Agency chapter 3: Salient Features of the Indian Constitution, 27 , 51st edition 2014,

9 *Ram Jawaya Kapur v. State of Punjab*, AIR, 549 (SC 1955)

At present, power of Modern legislation is declining day by day and the Executive is becoming more and more powerful.

In *U.N.R. Rao v. India Gandhi*[10]it was observed that the harmonious reading of the mandatory character of Article 74(1), together with Article 75(2) and 75(3), means that the President cannot exercise executive powers without consulting the Council of Ministers, even though the President has dissolved the legislature. The core of democratic democracy is the responsibility of the Council of Ministers for the House of the People. The Constitution of India specifically provides for responsible government, according to Article 75(3).

In the UK, the concept is that of individual and collective ministerial responsibility. India's Constitution provides only for collective accountability, meaning no vote of no-confidence against a single minister can be held. The Council of Ministers is collectively responsible for all policy activities before the House of the People. And it rises and falls together.

Judicial approach to collective responsibility

In *U.N.R. Rao v. Smt. Indira Gandhi*[11], The Supreme Court held that the ministers making up the Cabinet were working under the principle of collective responsibility. Although India's constitution is federal in nature, it is based on the British parliamentary system where the executive body is responsible for formulating government policies and thereby transmitting them to the law requiring the confidence of the state's legislative branch in exercising that responsibility.

In *Sanjeevi Naidu v. State of Maharashtra*[12]**,** Justice N.S. Hegde observed that, while observing the essence of joint responsibility, the Cabinet will be held accountable for every action taken by any of the Ministers. The purpose of collective responsibility is to make the whole body of minister jointly or vicariously accountable for the conduct of other ministers if an particular minister is not yet personally responsible for it, he shall be considered to share the responsibility with others who may have made any mistake.

In Common Cause, a *Registered Society v. Union of India***,**[13]the Apex court defined what "collective responsibility" means. The first sense that can reasonably be applied to it is that all members of a government are united in favor of their policies, and will show that unanimity on public occasions, though they may have expressed a different opinion at the Cabinet meeting when formulating the policies. The other interpretation is that ministers, who have had the ability to speak out for or against Cabinet policies, are also individually and morally responsible for their success and failure. The Cabinet stands or collapses. In practice, collective responsibility today means that every member of the Government must be prepared to support all Cabinet decisions both inside and outside the House.

Juristic Approach to Parliament's Power to Amend the Constitution And Independence Of Judiciary

Parliament 's power to amend the Constitution and the process is provided for in Article 368 of the Indian Constitution. The Parliament has the legislative power to change any clause of

10 *U.N.R. Rao v. India Gandhi*, AIR 1971 SC, 1002
11 *Supra* Note 10.
12 *Sanjeevi Naidu v. State of Maharashtra*, AIR 1002,1006, (SCR 1970)
13 *Registered Society v. Union of India*, (1999) 6, SCC 667

the Constitution by way of extension, alteration or replacement (Article 368(1)). The amendment can only be introduced by the introduction of a Bill for that purpose in either House of Parliament and, when the Bill is passed in each House by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and vote, the Bill shall be submitted to the President of India, who shall give his assent to the Bill, and the Constitution shall stand amended in accordance with the terms of the Bill (Article 368 (2) of the Constitution)[14].

In *M.S.M. Sharma v. Sinha*[15]and *Keshav Singh v. Speaker of Legislative Assembly*,[16]the Supreme Court noted that Article 105(1) grants its Members the freedom of speech in Parliament. This freedom is "subject to the provisions of the Constitution." These words were interpreted to mean provisions of the Constitution which govern the parliamentary procedure, i.e. Articles 188 and 121 hereof.

In *P.V. Narsimha Rao v. State,*[17]a broader interpretation has been given by the Five-Judge Bench, stating that Article 105(2) protects a Member of Parliament from court proceedings relating to or concerning him or her in Parliament, or having a connection or nexus to anything he or she has said or voted on. The majority judges insisted that in order to allow MPs (Member of Parliament) to engage fearlessly in parliamentary debates, members need broader immunity protection from all civil and criminal proceedings that have a link or reference to their speech or vote.

In *Advocate M.L. George v. High Court of Kerala*,[18]it was observed that the Legislature, being covered by the right provided for in Article 194, is not liable to the Court for voting in Parliament in any specific way. No one may assert any legal right to enforce a rule or the rule-making authority has no duty to do the same.

CONCLUSION

Looking at the drawbacks of the Parliamentary form of government since last two decades, it can be concluded that the current parliamentary system is not functioning successfully, and that the operation of this parliamentary system is not so smooth or hurdle-free. Debate, dialogue and debate are the means and substance of the democratic process , ensuring full citizen participation and representation in all parts of society, raising the qualification level of elected members, improving women's representation in Parliament and gaining more influence in local constituencies by ensuring the right to recall an elected representative. Above all, it is essential to address the observed problems and negative tendencies which preclude in achieving the goals of parliamentary democracy in India and therefore strong initiative should be taken to rectify their lapses so that the citizens of our country or nation can become protocol and autonomic.

14 https://indiankanoon.org/doc/1389240/ (Feb.20-2020, 20:10 PM)
15 *M.S.M. Sharma v. Sinha*, AIR (1959) SC 395, 408, 409
16 *Keshav Singh v. Speaker of Legislative Assembly*, AIR (All 1965) 349
17 *P.V. Narsimha Rao v. State*, AIR (1998) SC 2120, 2182
18 *Advocate M.L. George v. High Court of Kerala* AIR (2010) Ker. 134

CONSTITUTIONAL GOVERNANCE OF HUMAN RIGHT IN INDIA

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ABSTRACT

The constitution of India is based on the principles of liberty, equality, fraternity and justice. The preamble of the constitution states that India is a Sovereign, Socialist, Secular and Democratic Republic and the term ‗democratic' denotes the Government gets its authority from the will of the people. It says ‗irrespective of the race, religion, language, sex and culture' everyone is equal, assures the dignity of the, the unity and integrity of the nation to all its citizens. Human rights are "commonly understood as inalienable fundamental rights to which a person is inherently entitled simply because she or he is a human being." Human Rights are those minimal rights which every individual must have against the state or other public authority by the virtue of his being human. Human rights are not the gift of any legislation but are rights given to humans. Human dignity is the exemplar of human rights. The purpose of law dealing with these rights is merely to recognize them, to regulate their exercise and to enforce them. The constitution makes it mandatory for the Government to protect and promote freedoms, and to assure every citizen a decent standard of living. In other words, the Indian Constitution guarantees the basic human rights to every citizen of India. The Universal Declaration of Human Rights was adopted by the UN General Assembly on 10 December 1948, India was a signatory to the Universal Declaration of Human Rights. The preamble of the Universal Declaration of Human Rights States :- "*It is essential if man is not to be compelled to have recourse, as a last resort to rebellion against tyranny and oppression, that human rights should be protected by the rule of law.*"[1] A number of fundamental rights are guaranteed to the individual in Part Ill of the lndian Constitution are similar to the provisions of the Universal Declaration of Human Rights. The right to freedom, the right against exploitation, the right to freedom of religion, cultural and educational rights, right to constitutional remedies and special provisions relating to certain classes are some of the constitutional provisions ensuring human rights.

Keywords: Constitution of India, Human Rights, Fundamental Rights, Universal Declaration of Human Rights.

[1] Universal declaration of human rights , UNITED NATIONS , https://www.un.org/en/universal-declaration-human-rights/

INTRODUCTION

The concept of the human right began the start of the civilization of the country. The human being to live happily needs the rights to smooth their life. From the beginning of human history, the man struggled for their existence against nature and these struggles were for achieving basic freedom and liberty. These struggles made the way to the concept of human rights. Human rights are commonly understood as "inviolable fundamental rights to which a person is inherently entitled simply because she or he is a human being". Human rights are concerned with the dignity of the individual, the level of self-esteem that secures personal identity & promote human community. According to Scott Davidson, ―The concept of human rights is closely connected with the protection of individuals from the exercise of State, Government or authority in a certain area of their lives, it is also directed towards the creation of societal condition by the state in which individual is to develop their fullest potential". From the above definitions, it can be seen that human rights are an essential part of every human rights to live their life to the fullest. Human rights are difficult to define but impossible to ignore. The concern of human towards human rights and fundamental freedom is since the Vedic age, though the human right is of the European countries concept it is as old as Indian culture.

Human rights like fundamental rights are of paramount importance and eternal and ought to be treated as absolute for preserving the dignity of the people. Society and the state can alone guarantee the human rights to the individual but also demand observance of social norms from the citizens. The state maintains the framework of social order by the implementation of various laws without which well-ordered social life would not be possible. According to Aristotle, State came into existence out of base necessities of life and continues for the sake of good life.[2] Similarly, Locke was of the view that the end of the state is to remove the obstacles that hinder the development of an individual.[3]

Protection of human rights is a necessity for the development and growth of an individual personality, which ultimately contributes to the development of the nation as a whole. Human rights have gone through various stages of development and have taken a long time to become the concept of the present day. It includes civil rights, liberties, social and economic rights. These rights are essential for all individual as these are accordant with freedom and dignity and ultimately contribute to social welfare. They may also be described as 'common rights' for they are rights which all men and women in the world would share.

In the present-day world, human rights and fundamental rights rank among the highest priorities in the relation among nations. Human Rights are given so much importance in so many ways that it means everything for everybody. Everyone tries to define it in his or her ways to suit the desired goals. Human rights are widely considered to be those fundamental moral rights of the person that are necessary for a life with human dignity. Since human rights are not created by any legislation, they resemble very much the natural rights. Anybody like the United Nation must recognize them. They should not be even be subjected to the process of amendment. The legal duty to protect human rights includes the legal duty to protect them. These rights are essential for the adequate development of human personality and human happiness. A universal system of human Rights aims to revise and restore human dignity in all societies, where political

[2] J.S. BADYAL, ABC OF POLITICAL SCIENCE 73 (Raj publishers (Regd.), Jalandhar, 2005).
[3] J.S. BADYAL, ABC OF POLITICAL SCIENCE 40 (Raj publishers (Regd.), Jalandhar, 2005).

and economic oppression exists and to relieve human misery; to enrich and refine human life in all parts of the world. All human rights are universal, interdependent, interrelated and indivisible.

The first documentary use of the expression "Human Rights" was found in the charter of United Nations which was adopted at San Francisco after the second world war on 25th June 1945 and ratified by a majority of its signatories.[4] The charter of the United Nations is the multilateral treaty and creates a legally binding obligation for all the members of the United Nations. Apart on the UN Charter, there are four International instruments created under the United Nations as International Bill of Human Rights which includes Universal Declaration of Human Rights 1948, the International Covenant on Civil and Political Rights 1966, and the International Covenant on Economic, Social, and Cultural Rights 1966, the Optional Protocol to the International Covenant on Civil and Political Rights, 1966.[5] The first major international human rights documents were the Universal Declaration of Human Rights (1948). This document laid out all of the basic rights and freedoms. This is, however, a non-binding declaration. It means though it explains the foundation and principle of human rights, the articles in Universal Declaration of Human Rights are not legally enforceable rather is has acquired universal acceptability... At the international level, various efforts have been made for the protection of human rights. This is a basic declaration of the commitment of the International community to the Human Rights and Fundamental Freedoms as a common standard of achievement for all people and all the nations. Many countries have cited the declaration or included its provision in their basic laws or constitutions. Many human right instruments since 1948 have been built on its principles. The Universal Declaration of Human Rights has influenced the various national constitutions, regulations and policies that protect and promote the Human Rights and Fundamental Freedoms.

HUMAN RIGHTS IN INDIA

India is the biggest democratic country in the world. India became independent in 1947 and we gave ourselves a constitution which guaranteed to all its citizen liberty, equality and justice irrespective of their caste, colour, creed or sex. Being democratic the main objective was the protection of the basic rights of the people and the government of India has given the due consideration to recognize and protect human rights. The philosophy of human rights and the fundamental rights were incorporated in the constitution of India in the preamble and the chapters of Fundamental Rights, Directive Principle of State Policy and Fundamental Duties. The chapter on fundamental right unambiguously recognized the basic rights of all individuals including human rights.

Indian constitution guarantees most of the human rights contained in the Universal Declaration of Human Rights such as civil, cultural, economic and many others. Part III of the Indian Constitution guarantees the civil and political rights, whereas economic, social and cultural rights enshrined in the Universal Declaration of Human Rights and also in the Covenant on Economic, Social and Culture Rights had been included in Part IV of the Constitution which is known as Directive Principles of the State Policy. The constitution directs the State to provide proper means of livelihood, equitable distribution of material resources, equal pay for work,

[4] https://shodhganga.inflibnet.ac.in/bitstream/10603/8112/10/10_chapter%201.pdf

[5] S. K. KAPOOR, INTERNATIONAL LAW AND HUMAN RIGHT 817(Central Law Agency, Allahabad, 15th edition 2009)

living wages for all workers and compulsory education for the workers. All the provision or the regulation or the statutes have to be in concurrence of the constitution otherwise it will be the violation of the constitution. Amongst the three organs of the Government, the judiciary is the settler of the Human Rights in India. This function is mainly performed by innovative interpretation and applications of the Human Rights provision of the constitution. Moreover, the Constitution of India has been amended time to time for the better promotion and protection of Human Rights and the Fundamental Freedoms.

The rights guaranteed and provided in the Constitutions are required to be as per the Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights in the view of the fact that India has become a party to these covenant by ratifying them and as these Covenants are a direct consequence and follow up of the Universal Declaration of Human Rights, this aspect of the Declaration is the guiding of Human Rights incorporation in the Constitution of India. The declaration of the Fundamental Rights in the Constitution serves as the reminder to the Government in power that the liberties and freedoms essential for all people are too assured and respected by the law of land. The Fundamental Rights and the Directive Principles of State Policy initiates the heart and soul of the Indian Constitution.

CATEGORIES OF HUMAN RIGHT

Human Rights can mainly be classified into two categories. One is Civil and Political Rights, and another is Economic and Social Rights. Civil and Political Rights are preponderantly negative as certain rights negatively charge the human rights and Economic and Social Rights are mostly positive. Indian Constitution in tuning with International Laws provides some basic principles to govern the criminal justice system. The articles in the Constitution from 12 to 51 which we call as the Human Rights section of the Indian Constitution are corresponding to what is laid in the Universal Declaration.

Civil and Political Right

The Covenant on Civil and Political Rights are developed for the protection and promotion of the certain rights which are called as the Civil and Political Rights. The rights said in the Covenant on Civil and Political Rights have been protected under Part III of the Indian Constitution as the Fundamental Rights. As above said, they are negative as a state should no restrict or curtail or encroach the freedom of equality[6], freedom of speech and expression[7], right against exploitation[8] freedom of religion[9], cultural and educational right[10] and constitutional remedies[11]. The Supreme Court enlarged the meaning and the scope of the fundamental rights. One of them is Article 21 of the Constitution of India as guarantees the 'Right to Life and Personal Liberty' but it has been interpreted to include the right to go abroad, right to privacy, right to shelter, right to free legal aid, etc.

0. The Prevention of Ex-Post Facto Operation of Criminal Law, as a principle enshrined as _no person shall be accused and convicted of an offence for an act which was not an

6 Article 14-18 of the Indian Constitution.
7 Article 19 of the Indian Constitution.
8 Article 23-24 of the Indian Constitution.
9 Article 25-28 of the Indian Constitution.
10 Article 29-30 of the Indian Constitution.
11 Article 32-35 of the Indian Constitution.

offence under the law in force on the date when the offence was committed' in Article 20(1) of the Constitution of India as a Fundamental Right along with the Article 11(2) of the Universal Declaration of Human Rights.

1. "Everyone has the right to freedom of opinions without interference and to seek, receive and impart information and ideas through any media regardless of frontiers". The freedom of opinion and expression is protected internationally under Article 19 of the Universal Declaration of Human Rights (1948) and under Article 19 of the Constitution of India.

2. –Everyone has the right to education. directed to the full development of the human personality and the strengthening of respect for human rights and fundamental freedoms"[12]. It is about this provision that the president gave assent to the Constitution (83rd Amendment) Bill, the Right to Education was incorporated in the Constitution of India as a Fundamental Rights. This bill seeks to make the right to free and compulsory education for the children of 6 to 14 years of age as a fundamental right under Article 21A of the Constitution of India.

3. Freedom of religion is guaranteed under Article 18 of the Universal Declaration of Human Rights and Article 25 to 28 of the Constitution of India.

In the *Maneka Gandhi v. Union of India*[13]case, the expression _personal liberty' in the Article 21 of the Constitution of India drive the court to interpret the reach and ambit of it to its widest amplitude rather than attenuate their meaning and content. In the case *Unni Krishnan J.P v. State of Andhra Pradesh*[14], Supreme Court held that _personal liberty takes all the right of man', and it includes both the substantive right to personal liberty and procedural safeguard for its loss. Hence it has widest ambit, scope and co-extensive of Article 21. Then again in *S.R. Bommai v. Union of India*[15]case, Supreme Court held the preamble to be an integral part of the Constitution of India so the 'personal liberty' under the Article 21 must be interpreted as personal liberty and dignity as promised in the preamble. The Conventions and the Constitution of India stand equal footing for the protection of basic human rights or fundamental rights.

The landmark case of *Keshavananda Bharati v. State of Kerala*[16]judgment had an important aspect of the human rights involved. While the fundamental right and the directive principles were being approved by the Constituent Assembly on December 10, 1948, the General Assembly of the United Nations adopted the Universal Declaration of Human Rights and though that declaration was not legally binding but showed the direction to India for understanding the nature of Human Rights. The question arose that whether the rights remain inalienable or if they can be amended? The courts considered the arguments of Mr Palkhivala also, who argued that apart from the Article 13(2) of the Constitution of India, the fundamental rights were based on the provision of the Universal Declaration of Human rights and were the basic and natural rights and are inalienable therefore outside the scope of the amendment. On this basis and comparison of the Fundamental Rights and Constitution of India, the theory of Fundamental Rights came

12 Article 26 of Universal Declaration of Human Right (1948)
13 AIR 1978 SC 597.
14 AIR 1993 SCC 645.
15 AIR 1994.
16 AIR 1973 SC 1461.

under the umbrella of the theory of basic structure and being as such thus were inviolable and could not be curtailed or amended.

While considering the case of the *Indian Express Newspapers (Bombay) P. Ltd v. Union of India*[17], the court read out the Article 19 of Universal Declaration of Human Rights along with the Article 19 of the Constitution of India declaring that ‗Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers' and thus relooked at the position of the freedom of the press.

In the case *Charan Lal Sahu v. Union of India*[18], while debating over the issue of the production or carrying on the trade-in dangerous chemicals by multinational industries on the soil called for the strict enforcement of the constitutional guarantee for enjoyment of human rights in India. The Supreme Court drew its attention towards the Charter of Universal Declaration of Human Rights and courts considered Article 1,3,6,7 and 8 of Declaration which held for a human being equal in dignity and freedom and rights of life and personal liberty.

Human Rights	**Indian Constitution**	**International Covenant on Civil and Political Rights**
No Forced Labour	Article 23	Article 8
Right to Equality	Article 14	Article 14
Equal Protection	Article 15	Article 26
Right to Equal Opportunity	Article 16(1)	Article 25(c)
Freedom of Speech and Expression	Article 19(1)(a)	Article 19(1) and (2)
Right to Peaceful Assembly	Article 19(1)(b)	Article 21
Freedom of Association	Article 19(1)(c)	Article 22(1)
Right to Reside and Settle	Article 19(1)(d) and (e)	Article 12(1)
Punishment only for violation law	Article 20(1)	Article 15(1)
Protection again Double Jeopardy	Article 20(2)	Article 14(7)
No Compulsion to be a witness himself/confesses guilt	Article 20(3)	Article 14(3)(g)
Due process of law to deprive one's life and liberty	Article 22	Article 9(2)(3) and (4)
Religious Rights	Article 18(1)	Article 25
Right to life and personal liberty	Article 21	Article 16(1) and Article 9(1)

[17] AIR 1986 SC 515.
[18] AIR 1990 SC 1480.

Economic and Social Rights

In India, Civil and Political Rights are given much more importance than the Economic and Social Rights. However, the civil and political rights is impossible without the fulfillment of economic and social rights. P.N. Bagawati J. rightly said that the civil and political rights become a practical reality for the people of the State only on the achievement social and economic rights. The Economic and Social Rights are the medium to achieve the civil and political rights or otherwise, the civil and political rights will remain merely a letting illusion and promise. The rights contended under the International Covenant on Economic and Social Rights are incorporated in the Directive Principles of State Policy under the Part IV of the Constitution of India. The Part IV of the Indian Constitution contains the directive principle of the state which guarantee certain basic economic and social right to the citizens by the state, though they are not enforceable by law. In the simple terms, they are the guiding principles for the state to make the policies regarding the distributive justice, right to work, right to education, social security, just and humane conditions for work, promotion of interest of weaker section etc. so that each individual can enjoy their right to their fullest.

In *Randhi Singh v. Union of India*[19] the Supreme Court held that the principle of ‗equal pay fro equal work' though not a fundamental right is certainly a constitutional goal and therefore capable of enforcement through constitutional remedies under Article 32 of the constitution. In *Unnikrishnan v. State of Andhra Pradesh,* Supreme Court held that the ―right to purview of Article 21 of the constitution. Now through the 86th Amendment to the Indian Constitution, in the year of 2002 right to education has become one of the fundamental right directly under the Article 21A. Article 52 of the Indian Constitution which says that the state shall endeavour to foster respect for international law and treaty obligation in the dealings of organized people with one other, the provision of Article 253 and entry 14 of the Union List in Seventh Schedule of Indian Constitution which speaks about entering into treaties and agreements and conventions. The learned judges further stated that if any international convention is not consistent with the fundamental rights, its spirit must be real into these provisions to enlarge the meaning and content thereof, to promote the object of the constitution. Further the doctrine of sovereign immunity states that special reservation can be enjoyed by the state party to the international community. In *Nilbatibehra v. State of Orissa*[20] that the claim for compensation for the violation of fundamental right is acknowledged remedy for enforcement and protection of such rights.

Human Rights	**Indian Constitution**	**International Covenant on Economic, Social and Cultural Right**
Equal pay for equal work	Article 39 (d)	Article 7(a)(i)
Safe and healthy working conditions	Article 42	Article7(d)
Maternity benefits	Article 42	Article10(2)

[19] AIR 1982 SC 879.
[20] AIR 193 SC 160.

Safeguards the people with respect to their all capacity i.e, education, health, work, employment etc.	Article 41	Article 6(1)
Special provision for the protection of children and youth	Article 39(f)	Article 10(3)
Compulsort and free Education	Article 25 (now fundamental right under Article 21A)	Article 13(2)(a)
Secure workers living along with their family	Article 43	Article 9(a)(ii)
Reasonable restrictions on working hours /periods holidays	Article 43	Article 7(d)
Right to Health	Article 47	Article 11

CONCLUSION

Article 4 of the International Covenant on Political and Civil Rights says that in the time of public emergency which endangers the life of the nation and the existence of which is official proclaimed, the state parties may take measures derogating from their obligations under the Covenant. It is available only against certain rights not for all. In the sense certain rights cannot be suspended such as right to life, right to equality, freedom of speech and expression, conscience and religion etc.

Nevertheless, suspension of fundamental right must be in proposition to the situation, or should not be inconsistent with other obligation under international law, or those measures should not involve discrimination on the ground of race color, sex language etc. The state party should inform such derogations with reasons when it is activated and when it is terminated. The constitution 44th amendment made in 1978 states that fundamental rights may be suspended only in case of proclamation of emergency on the ground of war or external aggression, but not in case of armed rebellion‘

Human Rights are categories as justifiable and non-justifiable in nature. The rights which are justifiable are fundamental human rights and the rights which are not justifiable are human rights but not fundamental in nature i.e. Economic, social and cultural rights are also important equivalent fundamental rights in the constitution and to enforce them they have to appear as providing the content of a fundamental. The term has been replaced in the place of internal aggression right but not just by themselves. However, the Indian Constitution provide scope for wider interpretation to the judiciary on the implementation of the non-justifiable human rights. The Court widened the definition of Article 21 to include to healthy environment. It suggests that certain rights are directly available for the rest struggle must be there. At International level no such difference is being observed.

SUGGESTIONS

- Section 21(1) and Section 30 of the Protection of Human Rights Act, 1993 should be amended so to make it mandatory for the State Governments to constitute Human Rights Commissions at the state level as well to constitute Human Rights Courts at district level and further the jurisdiction of these courts as well as the procedural requirements should also be specified for the smooth and effective functioning.

- Section 36(1) should be amended and to empower National Commission to take up or investigate any matter pending before any state human rights commission or human rights courts to provide speedy justice.

- There should be a provision in the Act which specifically provide the time period with in which the decisions of the commission should be implemented by the concerned government.

- Provision can be made for the conduct of seminars in every district each month for educating people about their human rights and the protections granted by Constitution as well as under the Act of 1993.

- The provision can be made for conducting of periodical survey. The periodical survey should be conducted for checking the progress in the field of the implementation of the provisions as well as in achieving the objectives of the Act.

- The special cell can be established in every human rights court at district level where free legal aid should be provided to victims of human rights violation who due to their poverty and vulnerable conditions enable to approach court for the redressal of their grievances.

PUBLIC INTEREST LITIGATION: A BOON FOR WOMEN IN INDIA

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ABSTRACT

The constitution of our country had been ingeniously drafted to secure the social, political and economic justice to all its citizens and bring unity in the social fabric of our country. However, women have always been a vulnerable and exploited section of our society, therefore, the framers of our constitution have granted Fundamental Rights as a justiciable remedy to them against any barbaric treatments. Also, many other contrivances are constructed for this purpose such as PIL. The paper explores the role of PIL as a pivotal tool in our constitutional country to safeguard the rights and provide justice to women who cannot forcefully articulate their grievances. It is also an efficient tool for Judicial Review and Judicial Activism. It has many feathers in its cap in regard to its utility, however, there are certain shortcomings which are mentioned in this paper and are yet needed to be covered up to pace ourselves into the heaven of freedom, equality and justice.

Keywords: vulnerable, judicial review, judicial activism, fundamental rights, equality, justice, freedom.

INTRODUCTION

The word Public Interest Litigation itself highlights the concept dwelled in it that a litigation is filed for the interest of the public at large and not for obtaining any personal advantage or goal .It is one of the most effective tools to foster constitutionalism in a country as it verily embodies the principle of social and economic justice as enshrined in our preamble. PIL stands for a legal action taken by a public-spirited person in order to protect and safeguard the interest of the general public. It was enacted specifically for the underprivileged or economically disadvantaged people who due to any social, economic or otherwise reasons are distant enough to approach the court, on infringement of their fundamental rights, for redressal.

PIL, as a concept, originated from the United States for precipitating social change, later its modified concept was adopted by India and it became an important part of our constitutional litigation. PIL denotes a very crucial aspect of judicial creativity and dynamism. No standardized definition about "Public Interest Litigation" has been made in any statute or in any act present in India. However, any member of the public acting in good faith can move to the High Court and Supreme Court for relief against the State under Article 226 and Article 32 of the Indian Constitution respectively and can directly file a writ petition.

Public Interest Litigation is an efficient weapon given to the public by Courts through judicial activism. However, as held by the Supreme Court in the cases of *Ramjas Foundation v. Union of India*[1] and *K.R. Shinivas v. R.M. Premchand*[2]:

A writ petitioner, stated that "whoever comes to the Court for relief in public interest must come not only with clean hands like any other writ petitioner, but should also come with a clean mind, clean heart and the clean objective".[3]

ORIGIN OF PIL IN INDIA

The germination of this conducive concept named PIL was made within the territory of India in 1976 with the case named *Majdur Kamgar Sabha v Abdul bhai Faizullabhai*[4] initiated by Krishna IYER J. and it was further initiated in *Hari Sangh Raihvaiy v. Union of India*[5] where the workers of the association which was not registered were allowed to file a writ petition under Article 32 of the Constitution for the redressal of common grievances of the workers. Krishna IYER J. specified the explanations for alleviation of the rule of locus standi in *Fertilizer Corporation Kamgar v. Union of India*[6], the thought of 'Public Interest Litigation' was further incorporated in *S.P. Gupta and Others v. Union of India*.[7]

In the case of *Janata Dal v. H.S. Chowdhary*[8] the scope of PIL was further assessed. The Court laid down the following:

"The expression 'litigation' means a legal action involving all the proceedings which are initiated in a Court of law for the enforcement of right or seeking a remedy. Therefore, linguistically the expression "Public Interest Litigation' means the legal action initiated in a Court of law for the enforcement of their legal rights and liabilities in which the general public or a class of the community have pecuniary interest or are affected".

Public Interest Litigation acts as a potentiality given to the public through judicial activism. The Court has the right to take cognizance of the matter and proceed *suomotu* or can initiate proceedings on its own on a petition filed by any public-spirited individual. In this way it acts as the voice of the suppressed and underprivileged.

EFFECTIVENESS OF PIL

Public Interest Litigation was one of the ideas which was brought up by the Apex Court and it gradually transformed itself into an extremely powerful device in the hands of general people. The Supreme Court, through PILs has achieved radical and laudable changes in the equity, conveyance and socio-legal arrangement of the nation, for example, certain Fundamental Rights are interpreted in a broader way which to a great extent influenced the lives of the common people in a positive way. In *Pranatosh Roy v. State of Assam,* a decision by the Guwahati High Court which was subsequently confirmed by the Supreme Court 'To keep a

1 AIR 1993 SC 852
2 SCC 1994 A.P 620
3 *Ashok Kumar Pandey v. The State of West Bengal* AIR 2003 SC
4 AIR 1976 SC 1455
5 1981 AIR 298, 1981 SCR(2)185
6 AIR 1980, 344
7 AIR 1982 SC 149
8 AIR 1993 SC 892

check on frisky letters/petitions, the following guidelines were laid down which further initiates help in the studying that whether the petitions or letters fall into the category of PIL or not.'

In this regard Justice Bhagwati in People's Union for Democratic Rights v. Union of India said

"We suggest that Public Interest Litigation is brought before the Court not only for the purpose of enforcing the right of one another but also for the protection of the right as happens within the case of normal or ordinary litigation, but however it is intended to promote and protect the demand in public interests that violations of constitutional or legal rights of large number of people who are impoverished, ignorant or in a very socially or economically backward and underprivileged position must not go unnoticed and unredressed."

Hence from here, the chain for the advancement of Justifiability of essential privileges of the general population, who couldn't speak for themselves in a court of law and whose rights were unnoticed, began.[9]

JUDICIAL ACTIVISM AND PIL

JUDICIAL ACTIVISM is a pivotal role played by the judiciary in achieving Social Justice and building up the robust Indian tradition of voluntary social action. According to Justice P.N.Bhagwati, Judicial Activism is another form in the constitution which is concerned with substantivisation of social justice.[10] It tries to free the judiciary from constraints of traditional and old methods of judicial processes and enjoins an additional dynamic interpretation of the social values which are enshrined in the Constitution, beyond what the framers of Constitution had contemplated.

PIL and judicial activism goes hand in hand. The Supreme Court entertains and encourages the "PIL" in its expanded form of judicial activism, in this way it has come up with new remedies for transgression of fundamental rights, attainment of the goals of the Constitution.

In Kesavananda Bharati case, the Supreme Court of India held that the basic features of the Constitution of India like democracy, rule of law, federal system, secularism and independence of Judiciary can't be amended. If it's amended, then the Supreme Court will declare such law as unconstitutional. Such articulation of doctrine of basic structure, which is not contained within the constitution, is nothing but Judicial Activism which also incorporates and imbibes the ingenious idea of PIL.

JUDICIAL REVIEW AND PIL

The doctrine of judicial review is one of the most precious contributions of the U.S.A. One can find a basis for judicial review within the writings of Alexander Hamilton, one of the framers of the American Constitution in 1789. He wrote, "*The interpretation of the law is one of the proper and peculiar provinces of the courts. A constitution should be regarded by the judges as a fundamental law. It thus belongs to them to ascertain its meaning and meaning of an act passed by the legislature*." He further said that if there was any conflict between the Constitution

[9] https://www.scribd.com

[10] ASHUTOSH PANDEY, *Development issue in contemporary India*, JUDICIAL ACTIVISM AND PROTECT OF HUMAN RIGHTS IN INDIA, https://books.google.com

and the law, the judges should prefer the Constitution as it is supreme. This becomes the basis of judicial review. The power of the judicial review originated in the United States in the famous case *Marbury v. Madison*[11]. In this case Justice Marshall made it very clear that the judiciary has the right to interpret the law and it must not enforce any law which it considers to be a violation of the constitution. In this way the judiciary keeps a check on the arbitrary actions of the executive and legislature.

In *L. Chandra Kumar v. Union of India*[12], the power of judicial review was vested with the Supreme Court of India. It also granted a Judicial Tribunal with this right. Judiciary acts as a sentinel of constitutional statutory rights of the citizens. It can review legislation and administrative decisions under Article 147 and Article 13 of the Indian Constitution which makes it an equal access to judiciary for the underprivileged masses who are struck down by poverty and ignorance. Therefore, the SC of India, actively imbibed the concept of PIL in the judicial framework of the Constitution to ensure social justice in its true sense. In India, a binding decision of the SC /HC can be reviewed in a review petition and it is an exception to the principle of stare decisis work

FUNDAMENTAL RIGHTS AND PIL

Fundamental rights are the soul of the democratic machinery because democracy is said to be as of the people, by the people and for the people. Hence the framers of our constitution has adopted the concept of fundamental rights from the U.S constitution and has applied it here in India, it is the basic structure of our constitution and it can‘t be amended by the legislation, through this judiciary tries to safeguard our fundamental rights against the arbitrary policies of the government.

Since there are no statutory rules and regulations in respect of Public Interest Litigation, the jurisdiction of the Court under which a case could be filed, depends upon the nature of the case. It can be said that if the question involved is with regard to an action of the State authority affecting a small group of people, the PIL can be filed in the High Court.

In the case of *Anil Yadav v. State of Bihar*[13] involving the policemen as accused, the Supreme Court ordered speedy prosecution of the guilty policemen. It also provides for the free legal aid as a fundamental right of every accused. It showed the signal for the growth of social activism and investigative litigation.

PIL: A BOON FOR WOMEN

History often showcases that women generally had no access to avail the justice system when their rights were being violated. With the introduction of an instrumental tool named PIL women got access to the established judicial system of India and they came forward to voice up against various forms of violence committed against them and thus demanded for the redressal.

With the change in time some women approached the judiciary, various cases of rape, especially of the women of the 'weaker sections' were filed. Thereby alarming the judiciary to

[11] U.S., 137, (1803)
[12] AIR 1997 SC 1125
[13] 1982 AIR 1008, 1982 SCR (3) 533

take firm steps. Many cases including the following have ushered in a new era for languishing women: -

- ***Hussainara Khatoon & ors. V. Home Secretary State of Bihar***[14]

In January 1979, a report in The Indian Express, authored by KF Rustamji, then member of the National Police Commission, highlighted the inhuman conditions in which 18 prisoners, including six women, were suffering in Patna and Muzaffarpur jails, as they awaited trial for periods longer than they would have been sentenced to, had they been convicted.

Kapila and her husband Nirmal Hingorani wanted to represent the under-trial prisoners but being bound by the rule of locus standi, the couple was hit upon by the novel idea of filing a habeas corpus petition on the prisoners' behalf. Kapila argued the case for two weeks in court, thereafter the Supreme Court issued a notice to the Bihar government, which led to the release of all the victims, and eventually about 40,000 under trials across the country. The landmark case came to be known as the Hussainara Khatoon case — Hussainara was one of the six women prisoners — and became the first public interest litigation (PIL) in India, earning Kapila the title of the "Mother of PILs".

Thus, this case directly brought to the forefront in a nutshell the concept of PIL as the voice of the dumb and enlarged the ears of the judiciary by making it more active and sensitive towards the adverse happenings in our social sphere of life.

Lodging of First PIL gave impetus to women to take stand for their infringed and subjugated rights and therefore various such cases were noticed, some of the prominent being, are as follows:

- ***Joseph Shine vs. Union of India***

Joseph Shine, the petitioner in the case, from Italy who had approached the court in the welfare of the public interest and asked the Court to strike down Section 497 of the Indian Penal Code (IPC). Though he was not personally affected by the law but he did for the welfare of the people, his petition was accepted in view of the relaxed rules of locus standi in Public Interest Litigation cases. [15]

The petitioners' case was based on the argument that the law criminalizing adultery is unconstitutional as it discriminates against women. They argued that the law snatches women from their fundamental right to sexual autonomy. The Central Government on the other hand argued that Section 497 of IPC is essential for maintaining the sanctity of marriage. The government recognized that the law was discriminatory against women and proposed to make the offence of adultery gender neutral.

Thus, it can be highlighted that a wife is not an asset of her husband, she too has her own personal life and right to privacy which cannot be denied in the name of marriage. It can be regarded as a bold step in the path of attaining equality.

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[14] AIR 1979 SC, SCR (3) 532

[15] DISHA CHAUDHRY, DECRIMINALIZATION OF ADULTERY, https://www.scobserver.in

- **ARTICULATING AGAINST TRIPLE TALAQ: A CURSE FOR MUSLIM WOMEN**

ShayaraBano V. Union of India &Ors.

ShayaraBano, 35 years old, a native of Uttarakhand, with a master‘s degree in sociology, emerged as the defining persona in the legal battle against the patriarchal custom. She filed a public interest litigation (PIL) in the apex court in 2016, seeking a ban on the practice of instantaneous divorce after her 14-year-marriage ended abruptly in October 2015.

She contended that *Talaq-e-biddat*is a unilateral, abrupt and irrevocable form of divorce and should be declared as unconstitutional, arguing that the practice of Triple Talaq is violating the fundamental rights of Muslim women, under Article 14, 15 and 21 of the Constitution of India.

As a consequence of sincere fight of Shayara for the rights aggrieved Muslim Women, The Muslim Women (Protection of Rights on Marriage) Act, 2019 made instant triple talaq a cognizable offence, which attract up to three years of imprisonment and a fine.[16] Under the act, an accused can be arrested without a warrant. This came up as beacon light for women in today‘s patriarchal society.

- **Vishaka & Ors. Vs. State of Rajasthan:**

The case deals with the sexual harassment of a woman at her workplace. The petitioner alleged that the working women are being subjected to sexual harassment in workplaces. She fought rigorously for the cause, thereafter, the Supreme Court held that such violation attracts the remedy under Article 32 for the enforcement of the Fundamental Rights of ―gender equality" and "right to life and liberty" and also of the violation of the Fundamental Rights under Article 19(1) (g) of the Constitution. The Supreme Court held that, women have fundamental right of freedom from sexual harassment at workplace. The Supreme Court also brought to the forefront important guidelines for the employees which are supposed to be followed to avoid such harassment of women. The main objective of the Supreme Court was to ensure equality among people specially regarding gender equality and also to ensure that the workplace is free from any biasness towards women.

After this case, the Supreme Court made the term ―Sexual Harassment" crystal clear, according to this any physical touch or conduct or actions, showing of pornography, any unpleasant taunt or misbehavior, or any sexual desire towards women, sexual favors or making colored remarks will come under the ambit of sexual harassment.

- **SABARIMALA TEMPLE: A fight for Equal access in Revered Shrine**

Indian Young Lawyers Assos. V. State of Kerala (2018)

In 1990- A petition was filed in the Kerala High Court banning entry of women inside the Sabarimala temple. In 1991- The Kerala High Court upheld the restriction of women of certain age entry inside the holy shrine of Lord Ayyappa. In 2006 Indian Young Lawyers Association filed petition in Supreme Court seeking entry of women between 10 to 50 years. Further in 2016- The United Democratic Front government of Kerala informed the SC that it is bound to protect

[16] *Triple Talaq*, LIVE MINT, https://www.livemint.com

the right of Sabarimala devotees to practice the religion as accepted by the community. Further, The Kerala Government had told the Supreme Court that the decision was in favor of women allowing them inside the sanctum sanctorum of the temple[17].In 2018- A judgment was passed by the Supreme Court allowing the entry of women of all ages in the revered shrine but however the women were not allowed to enter even if the entry was permitted to them. As women were allowed in other Ayyappa temples, the state government said the deities were different in different temples. In this case the proceedings are still on the way and the public especially anxiously waiting for the final judgment which would be probably a stepping stone towards the struggle for absolute equality. To contradict the statement there are some temples in which the entry of men is prohibited, therefore such issues should also be brought to the limelight to ensure in true sense equality.

- **PIL against HALALA: -** ***Sameena Begum V. Union Of India (2018)***

The PIL challenging the constitutional validity of practice of polygamy and Nikah-Halala under Muslim Personal Law, was moved in the apex court by lawyer and BJP leader Ashwini Kumar Upadhyay in the year 2018. He claims that the provisions of Muslim Personal Law (Shariat) Application Act, 1937 in so far as it recognizes and validates the ~~"~~sinful form" of Nikah-Halala and polygamy, grossly injures the fundamental rights of married Muslim women and offends Article 14 (Right to Equality), Article 15 (Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth) and Article 21 (Right to Life) of the Constitution of India for being against public order, morality and health.[18]

While polygamy allows a Muslim man to have more than one wife, 'Nikah Halala' is a practice in which a woman, after being divorced by Triple Talaq, marries another man and gets divorced again in order to be able to remarry her former husband.

Sameena Begum is one of the Muslim women, who has become the face of the fight against Nikah Halala.Sameena Begum was first married in 1999 and has two sons. After several instances of abuse and a police complaint, she was given triple talaq by her husband. She was forced to marry again by her family, this time to an already married man. After she was pregnant for the third time, she was again given triple talaq over the phone following a trivial argument.[19]

She said she has filed the PIL not only for herself, but also for others who have suffered the same plight. She requested the court that Section 2 of Muslim Personal Law (Shariat) Application Act, 1937 be declared arbitrary and violation of Articles 14, 15, 21 and 25 of the Constitution.

This can be said as a great move taken by a common and suppressed woman against the atrocities committed on not only her but the whole Muslim community. It has been alleged that she is facing various threats from the Muslim men.[20]However, the indomitable courage shown by her acted as a great blow on the face of evil customs, and it is hoped that the new era of Gender Equality in its true sense will soon prevail.

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17 *Sabarimala verdict*, POLITICS AND NATION, https://economictimes.indiatimes.com
18 ADITI LAHIRI, *PIL in SC*, AMIE LEGAL, https://amielegal.com
19 DEBAYAN ROY, *Muslim woman faces death threats*, NEWS18 INDIA, https://www.news18.com
20 *Sameena Begum facing death threats*, THE NEW INDIAN EXPRESS, https://www.newindianexpress.com

- ***Laxmi V. Union of India* (2014)[21]**

In this case, a PIL was filed in Supreme Court of India by Laxmi (acid victim), praying for control over the sale of acid, for compensation to survivors, and survivors guarantee to access the medical health. The PIL has resulted in several important orders regarding regulation of sale of acid and for setting minimum compensation for survivors of 3 lakhs.[22]

ABUSE AND MISUSE OF PIL: A BANE TO THE JUSTICE SYSTEM

Former Chief Justice A.S. Anand cautioned the overuse of PIL and emphasized *―Care has to be taken to see that PIL essentially remains public interest litigation and is not allowed to degenerate into becoming political interest litigation or private inquisitiveness litigation".*[23]

Words of Krishna Iyer J reveal the change of public interest litigation after following its history for over two decades:

―Abuse of PIL and the misuse of this versatile process by enemies of the poor and even trivialization of public interest litigation bringing it into contempt are now on the cards, gambling with the court's mood and using this factotum facility as an intimidating tool.

These trends justify a critical study of PIL as a panacea or placebo, as a magic drug or a free formal curial ploy."[24]

Huge numbers of the PIL activists found that the PIL is a helpful instrument of provocation, as paltry cases could be documented without bothering of overwhelming court expenses as required in private common case. It is the duty of the courts to limit the free stream of cases in the fake PILs, customary suits will endure a considerable measure, and that would be a danger to Indian democracy and to the whole legal system. An appropriate help is required from the Media and legal counselors to check any misuse of PIL's.

Lawyers should discourage the tendency to abuse the process of the court by dishonest litigants by not defending their cause.

PILS IN INDIA AND THE UNITED STATES: A COMPARATIVE ANALYSIS

Public interest litigations originated in the United States in the 1960s, due to the drastic reasons of social changes such as the Civil Rights Movement and the Vietnam War, many public interest groups were formed and called for new and fairer social systems. The litigations submitted for these objectives were called public interest litigations.

The model of public interest litigation evolved in the United States and has certain distinct characteristics which cannot be adopted by developing countries like India. Thus, PIL in India seen as an improvement on the American doctrine of standing which has muddled together two distinct issues: -

i. Whether the petitioner is capable enough to present a good case to the court and

[21] 2014 SCC 4 427
[22] https://www.lawnn.com
[23] P.S SHINSY, *Abuse of PIL*, CONSTITUTION OF LAWYERS, https://legalserviceindia.com/
[24] https://www.scribd.com

ii. Whether there is such injury that requires judicial redress from the court.

American law assumes that only a person with a personal stake can meet the first requirement of motivation. The Indian Supreme Court allows any member of the public to seek judicial redress for a legal wrong caused to ~~a~~ person or to those class of persons who are unable to approach the Court directly". This modification of the traditional locus standi rule could be termed as representative standing'.[25]

In America, there is a system where Private attorney general brings a lawsuit in the public interest. He is entitled to recover attorney's fees. The logic behind this principle is to provide extra incentive to private citizens to pursue those suits which are beneficial to the society at large. The U.S. Congress codified the private attorney general principle into law, but this is not prevalent in India.

One of the main strategies behind adoption of PIL in India is to give the indigent and oppressed meaningful class access to justice, which is not, in the United States. In US, the strategy is to provide funds so that they may participate in the traditional system on an equal footing.

Thus, the PIL model in India cannot be based on the U.S. model because of large-scale poverty and ignorance and the lack of adequate resources. Moreover, the issues taken up by PIL in the United States are very different from the issues in India. The United States model is concerned more with civic participation in governmental decision-making, and it seeks to represent ~~in~~terests without groups," such as consumerism or environmentalism. The public interest litigation model which has evolved in India is directed and work towards the political economy for the disadvantaged and other vulnerable groups. It is concerned with the immediate as well as long term problems of the disadvantaged. It also seeks to ensure that the activities of the State fulfill the obligations of the law under which they exist and function. The substance and purpose of public interest litigation in India is thus much wider than that of public interest litigation in the United States.[26]

PIL A PANORAMIC APPROACH

Right to Privacy as Fundamental Right

A public interest litigation was filed by a retired judge of Karnataka's High Court *(Justice K.S. Puttaswamyv. Union of India and Others)* in 2012, challenging the Aadhaar scheme on multiple grounds to SC.

Aadhaar is a unique 12-digit identity number issued to all Indian residents and is the world's largest biometric ID system used for governmental benefits, collecting taxes, etc. The Constitution Bench of nine justices was assembled to hear the case about the right to privacy and who unanimously voted yes.

[25] VASUNDHARA MAJITHIA, *PIL*, CONSTITUTIONAL AND ADMINISTRATIVE LAW, https://www.lawctopus.com

[26] SCC Online

A bench of Chief Justice S ABobde and B R Gavai sent notices to the finance ministry and the UIDAI on a PIL filed by Mysore based and social activist Wilson Bezwada, who was one of the pioneers in launching a movement against manual scavenging.[27]

It was thus held that, Aadhaar (Pricing of Aadhaar Authentication Services) Regulations 2019, on the ground that these violated the right to privacy, declared part of right to life by a nine-judge SC bench.

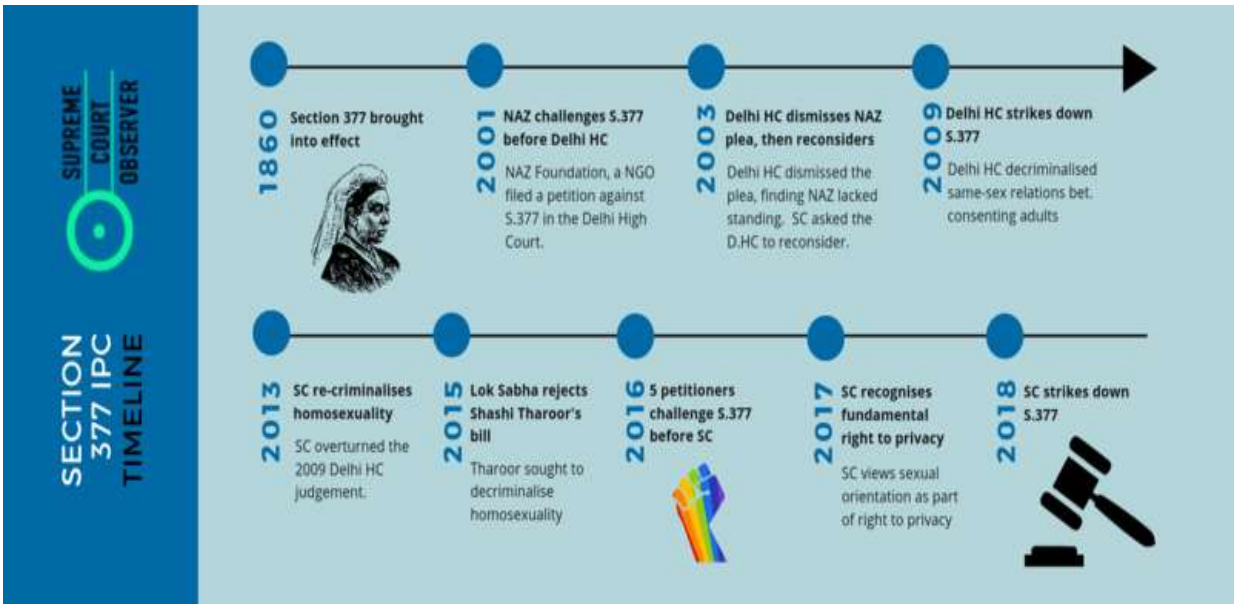
- ***M.C. Mehta v. Union of India (1987)***

Ganga is a trans-boundary river of Asia flowing through India and Bangladesh. It is one of the most sacred rivers to the Hindus and a lifeline to a billion Indians who live along its course. One of the most populated cities along its course is Kanpur. This city has a population of approx. 29.2 lakhs (2.9 million). At this juncture of its course Ganga receives large amounts of toxic waste from the city´s domestic and industrial sectors, particularly the leather tanneries of Kanpur.

In 1985, **M.C. Mehta** filed a writ petition in the nature of mandamus to prevent these leather tanneries from disposing off domestic and industrial waste and effluents in the Ganga River.

- ***Navtej Singh Johar vs. Union of India***

The Whole concept of this case could be briefly summed up through the following timeline-:



[27] DHANANJAY MAHAPATRA, *Aadhar breaches privacy*, THE TIMES OF INDIA, https://timesofindia.indiatimes.com

Thus, it is clear from the above timeline that the rights of the LGBT section of our society has been secured and a new wave of freedom has brought in the society through the pragmatic judgment in this landmark case.

CONCLUSION

The concept of PIL is a glimmering topic in today's topsy- turvy world where man is busy in his rat race to earn his daily bread, in such a condition, the PIL can also be seen as a uniting string, a string which unites the problems of a diversified public and gives a formidable and legal voice to them who are at stake due to such oppressions. In Spite of its enlarged use it is facing certain bottlenecks as mentioned before, which need to be rectified as soon as possible. Moreover, it is the need of the hour to be well aware of the rights and be educated citizens who are familiar with their rights as well as duties, if rights and duties would be taken hand in hand no handcuffs would be needed in future and the society would become a paradise. Also, this bonanza for marginalized people called PIL needs to be handled with bona fide intention, it should be used for the purpose it is made and not otherwise. Although the PIL has contributed a lot in ameliorating the society yet it still needs to cover many more miles in this respect. It has come up as a boon for women in India as it has been quite successful in granting a dignified status to women in the patriarchal society of today. Earlier women were either considered as beauty ornament or as a person made only to serve men and look after the household chores, they had no voice of their own, they were placed next to the toes of the men when it comes to giving a dignified position to them, they were completely dependent on the mercy of men and because of lack of finance they remained secluded from the exorbitant legal proceedings and processes. Having flashbacked the deplorable condition of women we can have a glance at the present scenario, which is much reformed and better than earlier, now women are more educated about their rights and they are not as much dependent on men as they were earlier. Moreover, the PILs have added a lot in upgrading the lives of a large section of women, abolition of triple talaq is the most lucid and proficient example. Last but not the least it can be said that yes –PIL has been a boon to women".

SECULARISM: CONCEPT AND PRACTICE IN INDIA

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ABSTRACT

Secularism is one of the fundamental rights in the Indian constitution, still, the announcement of India as a secular state accompanied the achievement of the 42nd amendment to the constitution. The word _Socialist‘ and _Secular‘ were enumerated to the constitution by the 42nd amendment. In the present situation, secularism is the separation of religion from the state. The complete Indian constitution is outlined in the preamble. It is the mirror of the soul of the constitution. The positioning of the words in the preamble is also very remarkable. India depicts itself as a unification of varied religions, castes, and culture. So, in all way, these are the vital consideration which needs to be managed attentively otherwise they may create a risk to the integrity and harmony of the country. The demolition of Babri Masjid in Ayodhya in December 1992 is a hit to Indian secularism. There was a far-reaching sense of premonition; yet the Indian state turned into an abettor, through demonstrations of negligence and commission by the crossing of both conventional social pluralism and current secularism. Secular tradition is entrenched in Indian history. The adoption of religion is an entirely private affair of the individual where the state has no role. Secularism is mirrored in article 25-26, 29-30 as a fundamental principle of the Indian constitution. In Indian constitution neutrality and impartiality for the state is necessary as Article 25, 15(3) and 29 reflect state neutrality in the matter of religion. This research paper sheds light on the concept of secularism and the practice in India concerning politics and various other aspects. The research is to find out reasons for the continued relevance of religion in the present scenario and will compare the practice of secularism during two periods i.e. pre-independence and post-independence.

Keywords: Secularism, Indian constitution, religion, independence, political

INTRODUCTION

India has always been the place where there is harmony and amicability, so individuals from varied religious groups from the world wish to live in India. India showed the world the significance of secularism which pulled in the individuals everywhere throughout the world. India is a common country with no state religion and in this manner, each resident dwelling inside the domain of India has the privilege to follow the religion he trusts in. Religion is close to one‘s heart and a personal affair where everybody has the option to follow religion one possesses. As the first Prime Minister of India, Jawahar Lal Nehru addressed in his autobiography "no word perhaps in any language is more likely to be interpreted in different ways by the people like the word 'religion'. That being the case, 'secularism' which is a concept evolved concerning religion can also not have the same connotation for all". Secularism connotes the idea of respecting all religions equally as in the Indian context. The concept of 'secular state' indicates one where there exists equal protection of every religion and no promotion of any

specific religion by the State. ―English Dictionary on historical principles" defines secularism as ―The doctrine that morality should be based solely on regard to the well-being of mankind in the present life, to the exclusion of all considerations drawn from belief in God or a future state"[1]. Secularism is elaborated in the "Oxford Dictionary" as "denoting a system which seeks to interpret and order life on principles taken solely from this world without recourse to belief in God and future life"[2]. Secularism as an advanced political and protected standard includes two essential recommendations. The first is that individuals having a place with various religions and orders are equivalent under the watchful eye of the law, the laws and rules under the constitution, and the policies of the executive. The second recommends that there could not be stirring up of issues relating to religion and legislation. It follows that no one should be victimized based on their religion or belief and everyone should be equal in the eyes of law. India is a country of diverse religions and to survive the society, it becomes a mandate to follow the basic principle of Secularism so that no group of people or individuals is discriminated against based on religion.

HISTORY

Secularism as an idea is profoundly established throughout the entire existence of India. It has existed since ancient occasions. The people of India have been practicing a varied form of customs and the monarch all around swore off impressive particular religion on the people. Following by Mughal and pioneer time, Ashok about 2200years back and Harsh Vardhan about 1400 years prior acknowledged and patronized various religions[3]. Ashoka's 12th Rock Edict acknowledges, "His sacred Majesty the king does reverence to men of all sects, whether as ascetics or householders"[4]. There was also a convention of hostility between different religions because of different rules by the kings since the past, from Gupta rulers to Ashok and Akbar. Numerous religious groups and practices fended off rigid and intolerable practices. Yet the practice of conversion into Islam during the period of Aurangzeb and other leaders and the inflicting of tax for the sake of religion named Jizyais also acknowledged[5]. It has likewise to be borne as a main priority that secularism isn't an outlandish idea planted in India from the west. It became out of its previous history of a wide and general development in considerations and emotions, which rises step by step from the intermixing of various gatherings and networks in the outcome of the impulse given to it by changes in social financial and political life. It has made Indian culture a "composite" one, which implies mixing of isolated components into a solitary entirety. There is a lot to be perused and comprehended in a secretive comment of Guru Nanak; "There is no Hindu and no Mussalman" as he saw no differentiation among man and man.

There exist two ideologies of secularism, one is the Gandhian form and the other being Nehruvian form. According to Mahatma Gandhi, he trusted Hinduism and the rest of the religion as tolerant and common couldn't make the state free from being secular. Subsequently, no necessity for partition among state and religion existed. He accepted that state even providing rational treatment to every religion can be; in any case, keep up equivalent good ways from all religions just as strict networks. Nehru believed that anyway the attributes of the different religions might have been, it didn't make a difference because economic advancement and

1 8, A.H. JAMES MURRAY, NEW ENGLISH DICTIONARY ON HISTORICAL PRINCIPLES 366 (1914).
2 OXFORD DICTIONARY OF THE CHRISTIAN CHURCH 1236 (1958).
3 DR. SUPRITA DAS, *Origin and Evaluation of Secularism in India,* IOSR-JHSS 5,5(2017).
4 MANJU SHUBASH, *Rights of religious minorities in India*141 (1988).
5 *Id*.

culture would give an adequate premise to secular resistance. Nehru was a skeptic and his belief was as a lack of bias regarding state religion as the state would not interfere with the religion of people. Nehru further elaborated on the principle that religion is one's very private matter and it should not act as a guiding role in the lives of the public. Post-independence, Nehru, later on, puts forward Gandhi's ideology and thus India approved that state shall approve the people of practice any religion; state shall not link with one distinct religion; state shall have to respect all religions equally-this being the innovation of Indian Secularism. The idea of secularism was not explicitly fused in the constitution at the phase of its making. Anyway, its essence existed in the fundamental rights and order provisions. The idea of secularism, however not explicitly expressed in the constitution, was, in any case profoundly inserted in the protected way of thinking. The ideas of secularism are not static; it is versatile in meaning. Right now, it is generally attractive as there can't be any fixed perspectives right now idea forever to come. The courts choose occasionally the forms of the ideas of secularism and uphold it by the way of providing judgments.

IS INDIA A SECULAR STATE?

All things considered, if we experience the essential component of secularism as comprehended in the west, it very well may be seen that state has nothing to do with religion and there will be no segregation between residents based on their religion or their pattern of worship and that everyone will be equivalent under the watchful eye of law.

Presently, India cannot be said to have literal secularism as no one law governs everyone as there exists personal law relating to various religions. In the same context as there exists a separate personal law for Muslims, there also exist Article 44 which requires the state to lay out a ‗Uniform civil code'. Also, the relief provided to few groups dependent on religion undermines the speculation of secularism and makes possible, the explanation behind a quick addition of bigger part communalism. On the off chance that we examine the various establishments which are popular in our country, we would find that some of them are not in conformity with the possibility of secularism. Taking an instance, under section 494 of the Indian Penal Code, ―Polygamy is a crime and a person, who is involved in second marriage while the principle marriage is existing, is reprehensible the law." Nevertheless, this applies to those people who are allowed to keep more than one spouse as per the personal laws.

The actual reality by the way of movement of a restorative arrangement isn't undefined amongst the people and so it is liable to one's strict confidence proportionate to building a joke of the general thought of secularism. In this manner, the foundation of the ―Muslim Women (Protection of Rights on Divorce) Act, 1986" to dodge the Apex Court's ruling in the Shah Bano case[6] and to act towards the Muslim women who are separated extraordinarily as opposed to their accomplices in other exacting religions cannot be named as secularism. By refusing the justice to Muslim women that are provided to the women of various other religions is an encroachment to the very foundation of the Indian constitution as the state cannot discriminate any person based on their religion. Article 15 provides for non-discrimination based on religion, still the determination of rights and liabilities based on the respective religion. This tosses a shadow on our instance on India's existence as a secular state.

[6] *Mohd. Ahmed Khan v. Shah Bano Begum*, SCC 1985, 556.

CONSITUTIONAL OR PARTY-POLITICALSECULARISM?

In India secularism has always been political. During independence, it was the most debatable topic. Religion politics has been seen in every state although the state is secular or not. Secularism is not only about separating the religion from the state moreover it is about respecting each other‘s religion. Religion has a great impact on politics, every politician is gaining vote by using a religious person as a weapon. So, political parties are deliberately connecting politics and religion for vote bank.

Post-independence, various leaders have directly or indirectly talked about secularism in one-way or the other. Jawaharlal Nehru was always in support of secularism in India. After independence, Nehru and Indian national congress initiated the movement for secularism in the society to unite the country and hold nation beneath a single umbrella. Nehru was of the view that India being a multi-religious and multicultural country holds a strong position and this composition is the biggest strength of the country. The basic idea behind this concept is to respect people of every religion, castes, customs, creeds, colors, languages, cultures, and traditions. Unfortunately, politicians are doing religious and caste-based politics.

Gandhi’s ideology on secularism:

Mahatma Gandhi was the inspiring leader of India. In his politics, many people believed that religion had a great role. In the year 1927, he wrote, ―believing as I do in the influence of heredity, being born in a Hindu family, I have remained a Hindu. I should reject it if I found it inconsistent with my moral sense or my spiritual growth”[7]. Gandhi describes secularism as Nehruvian. Nehru and Gandhi have a difference of opinion on this topic. Gandhiji regarded religion as ethics and as a commitment to the brotherhood. He was totally against the idea of a state's religion or state support for any religion, as he has said society or group 'which depends partly or wholly on state aid for the existence of its religion, does not deserve or, better still, does not have any religion worth the name.'[8] He believed that every citizen of the country has an individual right to follow or not to follow any religion. The state should not interfere with the religious practices of the public or individual vis-à-vis people should not take the support of the state in matters of religion.

Jawaharlal Nehru’s outlook:

According to Jawaharlal Nehru, Gandhi was using religion for political purposes. Nehru‘s outlook towards secularism was modern and international. He laid down the basis of secularism in the country. He expressed his view in the following, "We call our state a secular state one, the word secular, perhaps is not a very happy one. And yet, for want of a better word, we have used it, what exactly does it mean? It does not mean a state where religion as such is discouraged. It means freedom of religion and conscience, including freedom for those who may have no religion. The word 'secular', however, conveys something not be its dictionary meaning. It conveys the idea of social and political equality. Thus, a caste-ridden society is not properly secular”[9] . Nehru was of the view that region is the private affair and could not the taken as

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7 Madan, 228 (2011).
8 Madan, 237 (2001).
9 RANVIR SINGH AND KARAMVIR SINGH, *Secularism in India: Challenges and its future,* 72 IJPS, 501, 403 (2011).

political agenda. He strongly believed in the separation of religion from politics. As per Prime Minister, Jawaharlal Nehru's the following are the features of secularism:

i. To provide equal status to all the religions in the country. Secularism according to him, –equal respect for all faiths and equal opportunities for those profess any faith."

ii. The state should not interfere with religion and should be impartial in the matter of religion.

iii. All religions are not supposed to encroach other religions or with each other.

iv. The secularism of all areas of social life. In other words, his ideal of secularism envisaged a political structure in which the individual was not subject to any social inequalities imposed by religious sanctions[10].

Chester bowls observation about Nehru, according to him, the greatest achievement of Nehru is "creation of a secular state in which the 45 million which chose not to go to Pakistan may live peacefully and worship as they please."[11]

SECULARISM UNDER CONSTITUTIONAL FRAMEWORK OF INDIA

The word –Secular" was added to the preamble of the constitution of India by the Constitution (Forty-second Amendment) Act, 1976.Article 25, 26, 27, 28, 29, 30 14, 15, 16, and 325 of Indian constitution deals with secularism. A distinct right to religion is given in article 25-28. Although this right is not absolute as the state can interfere in some circumstances.

As per Ahmadi and Bharucha, JJ, Secularism is a part of the basic features of the constitution[12]. Secularism is one facet of the right to equality. Article 25(1) protects the rights of individuals. Exercise of the right of the individual to profess, practice, and propagate religion is subject to public order. Secularism is absolute; the state may not treat religious differently on the ground that public order requires it. The principle of secularism illumines the provisions of articles 15 and 16[13].

Article 25(1) guarantees to every person, and not only to the citizens of India, the freedom of conscience and the right freely to profess, practice, and propagate religion. But this right is subject to public order, health, morality, and other provisions related to fundamental rights.

Article 26 gives special protection to religious denominations. It states as follows:

i. To establish and maintain institutions for religious and charitable purposes

ii. To manage its affairs in matters of religion

iii. To own and acquire movable and immovable property iv. To administer such property by the law.

[10] 48 IJPS, 217-219 (1987).
[11] 48 IJPS, 222 (1987).
[12] *S.R Bommai* v. *Union of India*, SCC 1994, 1.
[13] *M. Ismail Faruqui (Dr)* v. *Union of India*, SCC 1994, 360

Article 27 provides freedom as to the payment of taxes for the promotion of any particular religion. Article 27 provides the freedom to attendance at religious instruction or religious worship in certain educational institutions. Subsection (3) and (3-A) of section 123 of the representative of the people act, 1951 together states that appealing to any religion or seeking votes in the name of any religion is prohibited. The freedom and tolerance of religion are only limited to spiritual life which is different from secular life.

Article 28: No religious education shall be provided in any educational institution, which is funded by the state except the institutions funded conducted by a trust.

Article 29: No citizen shall be denied admission into any educational institutes maintained by the state based on religion, race, caste, and language.

Article 30 provides all minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice.

Article 14, 15, 16deals with equality and states that there shall be no discrimination on the ground of religion whatever may be the case.

Article 325 states that there shall be one general electoral roll for the territorial constituency for election to either house of the parliament or either house of the legislature of a state, and no person shall be ineligible for inclusion in any such role or claim to be included in any special electoral roll for any such constituency on the ground of religion, race, caste, sex or any of them. [14]

On Nehru's urging, the Constituent Assembly adopted Article 44 under the Directive Principles of State Policy which states: The State shall endeavor to secure for the citizens a Uniform Civil Code throughout the territory of India: "Nehru's was the architect of India's concept of secularism. He sought to separate law from religion and sought to separate social reforms from religion, with the help of the state he sought to bring about religious reforms. He separated education from religion and insisted on secular and scientific education.[15]

CHALLENGES: CHANGING PHASE OF SECULARISM

Nehru legalized secularism through the constitution of India. Nehru not only preached but practiced the secularism in his day to day life. He made it sure that he does not associate himself with the celebration of any religious ceremony so that people of any particular sector or religious group, may not blame him for adopting a partisan attitude[16]. At the time of Prime Minister Nehru, secularism was functioned well. After Nehru‘s death, secularism went into danger as communalism was taking place in India. Therefore, different religious associations successfully established hospitals and institutes on the benefit of State subsidizing for the reason. This has given space to the State to disparage religion. Also, significant exercises, for example, training and wellbeing went under the control of public associations. This led to communalism in the mind of children by biased education. Religious riots were taking place at the end of the seventies. People were criticizing Muslims for the partition from India. In the early nineties, the

[14] DR. B.L FADIA, *Indian government and politics*196-197 (2003).
[15] JAWAHARLAL NEHRU, *The discovery of India*389 (1946).
[16] SINGH, *Supra* Note 9 et 506

nation was on the fire when Babri masjid was demolished laid to Bombay riots. During the eighties and nineties, the various movements have taken place such as the Khalistan movement, Ram Janambhoomi, and Shah Bano movement. Firstly, the challenges before Secularism in India are related to religion and case-based politics, politics is dividing the country between Hindu and Muslim. For vote banks, political parties are using religion. Elections are fought in the name of Hindu and Muslim. Communalism is the major challenge and consequence of this leads to individualism. Here, people keep private interest over public interest. They do not hesitate to take an opportunity where it comes to their interest by using community interest. Other challenges are unemployment, illiteracy, poverty, ethnicity, and region-based organization. Secularism should not be regarded as a problem; it is a solution to the problem in India.

CONCLUSION: SPECULATIVE VIEW OF THE FUTURE

It is a hard matter of fact that the exploitative strategies are undertaken by the politicians and they maltreat the people‘s opinion regarding their respective caste and religion. The crooked political arrangement is rapidly moving towards religion and steadfastness toward their own beliefs, which is a form that leads to the division of the country. In such a circumstance, it appears that secularism is preposterous in India. In any case, it is genuine that Indian Democracy, which is setting down deep roots, is in itself an assurance for the eventual fate of secularism. A pluralist country as India needs secularism as life-blood. India has been pluralist not since post-innovation, yet for hundreds of years. If secularism is not undertaken, the result will be the division or partition of various states of India as the public will claim for the autonomous state concerning the caste, culture, religious group, race, etc. The state needs to check the circumstances which would result in indifference relating to religion should attempt to make stability in differences of religion which survives both in reality and practice in India. Financial upliftment, making of strict congruity, teaching religious peace among the residents by awareness in regards to secular esteems can be a few instruments to advance secularism in the Indian setting. Secularism cannot be attained in India in the absence of the reforms regarding the collective group i.e. society and the religion. Everyone in society should accept the change and should look forward to India being a united country in the world. Also, these exercises shall be extricated against the circle of the religious officials and should be dependent on the state being secular. The ancient practices which are followed since time immemorial and the legislations that are not reasonable must be modified accordingly. The basic concept of every religion or group is based on the philosophy that every man is the offspring of God and God is for all. In India, we require to carry home to all the people in this society this fundamental note of religion.

CONSTITUTIONAL TORTS: EMERGING JURISPRUDENCE

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ABSTRACT

Constitutional tort law is usually an approach of vicarious liability of the state. But the omission that emerges here is of sovereign powers, if the act was wrought in view to governmental functions. It all outsets with the Latin Maxim- *Res Non Potest Pecare means* "the king can do no wrong". The ample objectives of vicarious liability of State for torts committed by its servant are:

1) Respondent Superior

2) Qui facit per alium facit perse

3) Socialization of compensation.

Article 300 of the Constitution which concerned with the scope of liability of the Union of India & government of the State, instead of formulation the liability in specific terms, indicate back to section 175 of the Government of India Act 1935, which refers in turn to see Article 32 of the Government of India Act, which in its turn, refers to section 65 of the Act of 1858. Article 300 of the Indian Constitution is not sufficient to safeguard the rights liberties of the individual, when the rights are infringed by the servants of the State. The first part of Article 300 serves only with nomenclature of the parties to the suit for proceedings, but the second part construes, the extent of liability by the use of words in the lie cases & refers back for the determination of such cases' to the legal position before the depiction of the Constitution. To determine state liability with the resultant confusion & complexity the Law Commission in its 1st report, 1956 recommended, government introduced Bills, "The Government Liability in Tort" in Lok Sabha in 1965 which did not emerge as act. Tortuous liability developed from *Penninsular v. Oriented Steam Navigation Company* case in 1861 to recent *Nambi Narayanan v. State of Kerala*, 2018. In this paper an attempt is made to evaluate Constitutional Tort.

Keywords: Vicarious Liability, State Liability, Governmental Liability, Tortuous Liability, Constitutional Tort

INTRODUCTION

It all began in England, before 1947, the Crown enjoyed immunity from the tortuous liability with the Latin maxim *Res Non Potesr Peccare* which translates to "The king can do no wrong". The maxim evolves an idea of sovereign and governmental immunity. But slowly as the concept arose, it was later on engaged into account that the state could be held liable for the

wrongful acts it does, be it is servant doing the act impartial like private individuals. The concept is not well versed in India and thus raised many debates in the judicial area. Constitutional Tort Law is a general concept of Vicarious Liability of the state. Here it all depends on whether the state is liable for the wrongful acts of its employees during the course of employment. But the exception that arises here is of sovereign powers, if the act was done in regard to the governmental functions.

With the recent Judgment by the S.C in *Nambi Narayan v. State of Kerala*[1]delivered on 14th September 2018 the concept of Vicarious Liability of State for the tortuous actions of its servant was established. In this case, the court awarded former Indian Space Research Organization Scientist S. Nambi Narayanan a compensation of Rs 50 lakhs for wrongful arrest in 1994 on espionage charges and illegal detention for 54 days. After 24 year long legal battle, a bench of The Supreme Court granted compensation to the rocket scientist for loss of reputation and mental agony. Narayanan afterward stirred the NHRC looking for a compensation of Rs 1 crore for his trials and tribunals. The NHRC had ordered for an interim compensation of Rs 10 lakhs which was upheld by the Kerala High Court in 2012. Further the Supreme Court appointed a committee including Justice DKJain, to investigate the role of the Kerala police officers who were involved in falsely implicating the torture. With this judgment, once again, the vicarious liability of the state for tortuous liability actions of its servants was established.

Article300 states that the government of India may sue or be sued by the name of Union of India and Government of The State may sue or be sued by the name of the state or the legislation of The State. Thus, the Constitution constructs the Union and the States as juriso persons competent for admitting or obtaining property, making contracts, bearing on trade or business, bringing and defending legal activity, just as private individuals. The legal generally of the Union of India, or State of Indian union is thus located yonder doubt by the express language of Article 300. Article300(1) provides the government of India may be sued in relation to its affairs in the case as the Domain of India, subject to any law which may be made by the Act of Parliament. The Parliament has not made any law and therefore the question has to be determined as to whether the suit would be against the Domain of India before the Constitution came into force. Thus, as long as the Parliament of the State Legislature do not enact a law on the point the legal position in this respect is the same as existed before the commencement of Constitution.

REASON FOR THE DEVELOPMENT OF CONSTITUTIONAL TORT

The constitution aims to strike a balance between the State‘s actions and the interest of general public. With the innovative growth of functions, powers and duties in a welfare State, for pivotal question of State liability the concept of sovereignty is not an acceptable test. The NC to Review Working of the Constitution in its consultation paper on ―Liability of State in Tort" expressed the stated:[2] ―From the present State of the law relating to liability of the state in tort in India, it is evident that the law is neither related to this matter nor satisfactory in its form. It doesn‘t give relief to citizens wounded by the wrongful act of the state, on the basis of the exercise of sovereign function. A concept which itself carries a flavor of autocracy and high

1 https://indiankanoon.org/doc/49204394/

2 *National Commission to Review the working of the Constitution*, A Consultation Paper on Liability of The State in Tort, 6 (Vigyan Bhavan, Delhi 2001)

handedness then one would have thought that if the state exists for the people, this ought not to be the position in law."

The committee also observed: "There are numerous other important imperfections in the present position. The base of the current law is ARTICLE 300 of the Constitution, it's language importantly holds one through sequential steps of (what may be called) tracing back of the genealogy of the law, to an import of time residing in the 19th Century that too, to import when the country was governed or dominated by alien rulers. The law is in outcome constructed upon archaic provisions. In this sense ARTICLE 300 has turned out to be a weak foundation on which to build up an edifice of the law on this subject."

As an outcome of disaffection with the application of dichotomy rule, a new judicial trend has manifested itself in the area of State liability under the guidance of the S.C of India. By the "dynamic Constitutional jurisprudence'[3], the S.C is evolving "compensatory jurisprudence' by which the court is diluting Article 300 of the Constitution and innovating the constitutional tort under Article 21 of the Constitution.

Now the Apex Court is prepared with the new tools and devices, new remedies for the purpose of protecting the most precious Fundamental Right to life and personal liberty. Thus, the Court can award compensation to any person, who may have unduly suffered detention or bodily harm or ill-treatment or mental stress or sexual harassment at the hands of the employees of the state. The victim can interchange a writ petition for these purposes, relatively than to take alternative of an ordinary civil suit. Thus, the liability of state for tortuous liability acts of its servants under Article 300 is extended by smearing Article 21 of the Constitution. *Rudal Shah v. State of Bihar*[4] noticeable a milestone and thru a shift in Indian tort law. Traditional tort law is about questions of liability loss and compensation and is in an area of private law. With Rudal Shah, Constitutional tort was recognized by the court. The proof of identity and punishing of compensation as Constitutional remedy strengthens the rights of exaggerated individuals which is available through writ jurisdiction of the S.C and H.C under Article 32and 226 of the Constitution. Article 32(1) affords that the SC shall has the power to grant directions or orders or writs as well as writs in the nature of *Habeas Corpus, Mandamus, Prohibition, Quo Warranto and Certiorai* whichever may be appropriate for the enforcement of any of the rights deliberated by this part. Article 226(1) reads that "Notwithstanding anything contained in Article 32 every HC shall have power, throughout the territories in relation to which it exercises jurisdiction to issue any person or authority, including in appropriate case any Government within those territories directions, orders or writs including writs in the nature of writs or any of them for the enforcement of any of the rights conferred by Part III and for any other purpose".

CONSTITUTIONAL TORTS

I. **Custody death**: The occurrence of custodial violence and custody death carried on with unabated. The incident of courts with cases of custodial violence become visible to have proceeded them to regard complaints with decreased suspicion and intensified credulity. In the 18 cases, that were tracked down within this arena of custodial violence compensation was not refused in any case. The link between custodial violence and

[3] M.P.JAIN, INDIAN CONSTITUTIONAL LAW 1114 (Wadhwa and Company, Nagpur, 5th Edn, 2006)
[4] https://indiankanoon.org/doc/810491/

compensation is direct *Nilbati Behera*[5]*, D.K. Basu* [6]*and Rudal Shah* [7]have evidently set at rest any questions there might have been on the payment of compensation for violation of Article 21. There is an increasing regularity in referring cases of custody death, since it is not seen as realistic to expect that the police will carry out an unbiased investigation in a matter where the police are themselves in the harbor. The prosecution of errant officers is not unknown in the law. Courts too may suggest prosecution where it is not already underway or to leave it open for the state authorities to proceed against the erring officers both departmentally and criminally.[8]

The medicine of compensation as a ―palliative" or it is supplementary normally being characterized as an ―interim" ration is now firmly entrenched in the law. Any doubts that might have persevered about the state's responsibility for the security of persons in its custody has now been laid down at rest by the decision of the SC in *State of A.P v. Challa Ramkrishna Reddy*[9]this affirms the decision of APHC an early decision that went beyond situations of custodial violence perpetrated by instrumentalities of the state to the responsibility of the state when persons are taken into its custody. The inconsistent usage of force level in the instigating of death seen in conjunction with the abuse of power that custodial violence epitomizes indisputably ideas to a deep malady harming the system of criminal justice.

II. **Police Atrocity**: Excessive or unwarranted use of force by the police constitutes a ground for seeking relief both compensatory and asking for investigation and prosecution from the court. Where it had been established that a constable had assaulted a person in the time period of his duty, and that constructed in amputation of a limb, the state was held vicarious liability and the doctrine of *sovereign immunity* was expressly denied.[10] Interestingly the court was called upon to address a turnaround of the contention that where an alternative remedy exists in civil law, public law remedy, in writ should not be allowed a position that has been negative many times over. The court administered initiation of ―criminal proceedings against the police constable concerned for his rude behavior in his pushing to the ground which subsequently concluding the death apart from accelerating the departmental enquiry unsettled against him". The state was ordered to pay Rs 2 lakhs to the family with the ―right to be insured by and take such action as may be accessible to them against the wrongdoer.[11]

III. **Encounter Killing**: The labeling of a person as a member of an extremist organization has provided a shield to the police and armed forces in cases of encounter killings or in fake encounter. The obstacle to enable investigation in cases of alleged encounters was set out in an earlier survey. A response to extremist violence, where a sensitive tolerance of state violence is seen, was found in the decision of a Division Bench of the Guwahati

5 *Supra* Note.1.
6 D.K.Basu v. State of West Bengal (1997) 1 SCC 416
7 (1983) 4 SCC 141
8 Gopal Ch. Sarmah v. State of Assam (2000) 1 Gau LT 643 at 657. See also Kamla Devi v. Govt. of NCT of Delhi 2000 Cri. LJ 4867: (2000) 84 DLT 348
9 (2000) 5 SCC 712
10 State of Gujarat v. Govindbhai Jakhubhai 2000 ACJ 1305
11 Mariyappan v. State of Tamil Nadu 2000 Cri LJ 4459, the incident was of November 1990

High Court in *Siba Nath Gogoi v. Union of India.*[12] Dealing with a question to the specification of a person who was killed reportedly in an encounter Sarma J. in his different but coinciding judgment added in a postscript. The court did make an exception when it said: "Fake encounter or cold-blooded killings apart for the death of a terrorist no compensation can be\should be granted by the court. The judicial maxim adds a peremptory to the registering and investigation of so-called encounter deaths to check the veracity or otherwise of charges that the encounter was real or fake.

IV. **Illegal detention:** The casual treatment meted out in matters of liberty has led courts to direct the compensation to be paid to these detained beyond the prescription of the law. Because **Article 22** of the Constitution "**Protection against arrest and detention in certain cases**" and **Section 57** of the CrPc: "**Person arrested not to be detained more than twenty four hours**" come after in time petitions alleging detention of the arrested person in the police lock-up beyond 24 hours, in some cases for days and months together in police lock-up.

In *Hussain v. State of Kerala*[13] a person was accused of an offence under the NDPS Act 1985 and due to the ineptitude of his counsel he was wrongfully convicted and sentenced to 10 years imprisonment and fine of Rs.1 lakh. By the time SC heard his appeal aided by **amicus curiae** he had served five years in jail. Acquitting the appellant, the court however said: "In this case we are not considering the question of awarding compensation to the appellant, but he is free to resort his remedies under law for that purpose." Constitutional tort is however essentially viewed as a matter of state liability for infringement of fundamental rights and is not an unvarying direction to pass the liability on to the delinquent even where such officer has been identified.

V. **Disappearances:** Cases of vanishings continue to crop up in the courtroom coming from the trouble torn years in the Punjab and the north eastern states. The fading of persons arrested by the armed forces has lifted presumptions of the disappeared being dead, unless the armed forces fabricate the person. It has also led to presumptions of the armed forces having disappeared person. Yet in constitutional tort the remedy is limited to directing the payment of compensation as an interim measure. The SC in *State of Punjab v. Vinod Kumar*[14] merely paused to explain that, no trial court would take a cue about liability of delinquent officers from the interim compensation award passed. Thus, emphasizing the distance between liability of delinquent officers from the interim compensation award passed thus emphasizing the distance between liability in the realm of civil remedy of compensation and criminal trial and the impact the former may have on the latter.

VI. **Negligence:** Electrocution and medical negligence establish a sizeable segment of the cases on negligence. The defense of 'act of god' & 'accident' as different from negligence has found audience with the court and duty of care has been applied in cases especially where the victims have been children. The principle that is derived from law and economics of "reasonable expectation of pecuniary benefit" was iterated by the court.

[12] (2001) 2 Gau LJ 280
[13] (2000) 8 SCC 139.
[14] (2000) 9 SCC 742 at 744

But *Justice Chandrachud* had not been provided with information that could have assisted him in determining the ―pecuniary advantage" of each child to the parent. He had, therefore, categorized the children into groups between 5 and 10 years and 10-15 years. In regard to the first group of 14 children he had awarded Rs 50,000 with a conventional sum of Rs. 25,000. The court ―having painstaking to the environment from which these children were steered their parents being reasonably well-placed officials at *TISCO.* The injured person in the case of negligence had suffered a range of harm, including severe burns. Compensation ranging from Rs.5 lakhs to Rs.38 lakhs was awarded nu *Justice Chandracud* including within it-

- the percentage of burns
- daily expenses
- cost of medical treatment
- expenses for psychotherapy
- effect on marriage prospects
- non-pecuniary losses, and
- punitive damage

The contrast that this rendition poses with the experience of the Bhopal victim calls to be studied in this context in terms of mitigation of damage, proof of harm and causation, punitive damages, the valuing of life and survival capacity, the many losses that could go unaccounted and the significance of the process of determination of compensation. In understanding the meaning of multinational tort and liability, it would also be relevant to investigate the difference tort committed by an Indian, and a multinational, enterprise.

VII. **Nuisance and pre-emptive action in tort:** In case averring nuisance, the setting of a 129hatti was sought to be in juncted by recognizing a preventable tort. The SC set out the distinction between a ―nuisance actually in existence" from ―possibility of injury will not provide at plaintiff with a cause of action unless the threat be so certain or imminent that an injury actionable in law will arise unless prevented by an injunction." The court may not require ―proof of absolute certainty or proof beyond reasonable doubt", but ―a strong case of probability that the comprehended mischief will in fact stand up" must stand indicated. The remedies for private nuisance, the court enumerated abetment, damages and are such as by reason of its gravity. The development of this branch of law of pre-emptive action in tort could, if imaginatively applied find wider application in attempts to prevent damages.

VIII. **Fine and Compensation in Criminal Law:** The imposition of fine, and the payment of compensation out of the amount recovered, continues to be one of the ways in which the victimological aspects are balanced against the logic of punishment when inordinate delay occurs.[15] Delay, and the variations that might have interfered in the lives of the two

[15] State of Karnataka v. Peter Prank 2000 All LJ 3516, delay of 7 years; Balraj v. State of Haryana 2000 Cri LJ 2496, 12 years; Salim v. State of U.P. 2000 All LJ 2919, 22 years; Ganga Singh v. State of U.P. 2000 Cri LJ

accused and of the victim is not uniformly been measured, relevant while defining sentence. Court continues to find the device of fine and compensation useful when altering the sentence of imprisonment in response to the facts of the case before them. It is not an invariable rule that compensation in ordered out of the fine imposed. It has also been observed that when for instance the law employs the phrase ―and shall also be liable to fine", as it does in *Section 302 of Indian Penal Code,* it is not to be understood as a legislative mandate that the court must invariably award a sentence of fine also in addition to imprisonment to life. While this, so victimological approach has taken root. Where the ―lamented family are persons of modest income and it would be in the interests of justice to power a fine that is in consonance with the status and financial capacity of the charged with the fine and compensation out of the fine, have been administered.

IX. **Vicarious liability:** The doctrine of vicarious liability as applied in motor vehicles accident law holds the owner as vicariously liable for the negligence of his servant-driver. However, the law has evolved to hold that the driver has not necessarily to be made a party to proceedings for determining compensation. In *Patel Roadways v. M.Chhoalal Thakkar,* for instance, a Division Bench of the Karnataka High Court explained that neither the Motor Vehicles Act nor the rules made under the act require driver to be impleaded as a party in a claim petition. The owner and the driver may, under the law of torts be jointly and severally found liable but, whether a driver is impleaded or not or owner can be made vicarious liable only where negligence on the part of the driver is established. A driver challenging the recovery of loss occasioned to the state by damages to the bus, was supported by the court holding that he ―could not have been burdened with this liability by the State of Haryana when he was in the performance of his duty and during the course of performance of his duty some damages happened to be caused to the bus." In non- accident related cases courts have variously asserted the place of vicarious liability in tort and compensation law. In the celebrated case of *Chairman railway Board v. Chandirma Das*[16] while affirming compensation of Rs. 10 lakhs to be paid to a foreign national who had been subjected to rape by railway employees or railway premises, the court said: ―The employees of the Union of India who are designated to dart the railways and to cope the establishment including the railway stations and the Yatri Niwas are essential components of the government machinery which conveyed on the commercial activity. If any of such employees perpetrates an act of tort the Union Government of which they are the employees can subject matter to other legal requirements being pleased to be held vicariously liable in damages." This development in the law may be seen as appearing from within the arena of constitutional tort, which has its basis in state liability.

X. **Culpable Inaction:** The disturbances and destruction of properties following the assassination of Rajiv Gandhi on May 20, 1991 has brought culpable inaction into focus

1695:2000 All LJ 651, 21 years; State of Karnataka v. B.Venkatareddy (2001) 6 Kar LJ 46, 11 years; Rashid v. State 2000 Cri LJ 3751, 18 years, and age of accused 83 years; Balram Singh v. State of M.P. (2000) 2 Jab LJ 291, 15 years; Kuldip Sharma v. State (2000) 84 DLT 358, 30 years in a case of cheating.

[16] (2000) 2 SCC 465. Vicarious liability is, however, not to be extended to criminal liability, where mens rea must exist: Saroj J.Kamble v. Smt Latha Mohan (2001) 2 Mah LJ 874

in *J.K Traders of Ramakrishna 70 MM Theatre v. State of A.P.*[17] This case has many of the ‗classical' feature of culpable inaction: the petitioners had apprehended attack and asked for police protection; the police did not react immediately, and, when they did turn up at the scene of destruction they allegedly watched while the vandals wreaked havoc. Further an enquiry by an Additional Commissioner of Police found police officers guilty of dereliction of duty but no action was taken on the report. It was urged that "*there must be established positive inaction on the part of the government resulting in direct violation of the right to life*" and that the evidence did not lead to this conclusion. The single judge measured the catena of decisions dealing with state liability for compensation and set out the principles deduced, which included:

- Constitutional ratification enjoins upon the state to save the person and property of every citizen and if it fails to release its duty, the state is liable to pay the damages to the victims.
- The failures or inactions on the part of the state which led to the violation of the fundamental right more especially under Articles 14, 19 and 21 should have direct nexus to the damage caused/suffered.
- The defense of sovereign immunity stands severely restricted in its discharge of sovereign functions, and while undertaking commercial activity.
- Both public law and private law remedies are accessible while demanding damages for violation of fundamental rights.
- Quantum may vary from case to case "dependent upon nature of loss grieved by victim."

The relationship between "positive inaction" foreseeability and culpability of the state has been categorically stated in *J.K Traders.* The complicity of state agencies has also been recognized as an aspect that may constitute the context of culpable inaction. Article 21 of the Constitution of India mandates an obligation upon the state to enforce law and order to maintain public order and public peace so that all sections of the society, irrespective of their religion, caste, creed, color and language can live peacefully within the state. The state cannot escape its liability to pay adequate compensation to the family of the person killing during 1948 riots. Culpable inaction, it appears, continues to develop around instances where foreseeability complicity and positive inaction are discernible.

CONCLUSION

The Constitutional Tort emerged out of the concept of Rule of Law. When the instrumentalities of State violate the law or go beyond the law, due to which fundamental rights of people are affected, the State is barred from claiming sovereign immunity as a defense. This influenced the development of the principles in extension of liability of the State under Article 21 of the Constitution. *Rudal Shah's* case constitutes a landmark in the Constitutional jurisprudence of State liability in tort when a wrongful act of a servant of the State violates Article 21 of the Constitution, the Constitutional court come forward to pay compensation. Thus,

[17] (2000) 5 Andh LT 726.

the liability of state for tortuous acts of its servant under Article 300 is expanded by applying Article 21 of the Constitution. The introduction of compensation as a Constitutional remedy strengthens the rights of affected individuals under Article 21. The constitutional remedy is available through Writ Jurisdiction of the SC & HC Article 32 and 226 of the Constitution respectively. Constitutional tort under Article 21 awards compensation to victims whose rights are infringed by the medical practitioner due to medical negligence. This claim against the breach of public duty by the State is recognized as a right in public law and then the defense of sovereign immunity is not applicable in such cases.

RECOMMENDATIONS

- Tortuous liability should be committed by the State, its officials in purported exercise of their administrative powers and functions, be treated on par with a tortuous act by a private person or individual.
- State should be liable for any tortuous act a committed by its official in purported exercise of their sovereign functions and that such a plea should be an exception to the rule.
- Possible to specify exhaustively which are the sovereign functions of the State?
- Fundamental Rights of a citizen are violated by the States, it should be open to the State to plead the defense of sovereign functions or to plead the protection clauses.
- Amendment of Article 300 of the Constitution in such a manner as to specifically lay down in respect of which tortuous acts, the State should be liable or to specify the tortuous acts for which it should be liable.

INTERACTION BETWEEN FAMILY LAW AND THE CONSTITUTION

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ABSTRACT

Family has been recognized as a basic unit of society and is a link between individual and community. Consistently, there have been a number of changes in the patterns of marriage such as age at marriage, inter-caste marriage, etc. A relative increase is noticed in divorce cases in urban areas. Current trends indicate that there is definite change in the basic system of family, especially the role of elders and disharmony in husband-wife relationships. The purpose of this research paper is to attempt and explore some of the current thinking around the Constitution, their importance and its link to personal laws and what changes have been made in the legislature which aims at broadening the rights of the members forming the family nucleus. The various religions followed in India are Hinduism, Islam, Christianity, Jainism, Buddhism, etc. but the ceremony of marriage is different in every religion.

All the laws which pertain to every religion are derived from their religious texts. Various amendments have been given to these laws as time passed. This paper has considered all types of personal law but basically the principal legislation of family law the most, i.e. The Hindu Marriage Act, 1955 and The Special Marriage Act, 1956. Various aspects of prevailing personal laws deprivileged women. In order to address this inequality, The Apex Court has suggested a range of amendments to existing family laws and also codification of some aspects of personal laws so as to limit the ambiguity in interpretation and application of these personal laws.

Keywords: family, religions, laws, amendments, trend, change, women.

CONNECTING FUNDAMENTAL RIGHTS WITH PERSONAL LAWS

The Constitution protects the sanctity of the family precisely because the institution of family is deeply rooted in the nation‘s history and tradition.

The interaction between Family law and Constitution governs all the legal matters relating to families or other personal relationship, as well as the trend of same sex marriage these days. It includes the legal issues that arise in a family such as inheritance, adoption, marriage, divorce, partition, LGBT rights etc. India is a secular country and a wide number of religions are freely practiced. Hinduism, Islam, and Christianity are the major religions that are practiced. People solemnize marriages in accordance with religious rituals and ceremonies, which are mostly codified by statutory personal laws.

So basically, all the matrimonial laws in India are governed by personal laws of the parties relying on their own religion such as: -

- For Hindus, The Hindu Marriage Act, 1955
- For Christians, The Indian Christian Act, 1872 and Divorce Act, 1869
- For Muslims, part of Muslim Act
- For Parsi, Parsi marriage and Divorce Act, 1869

There is also a Special Marriage Act, 1954 which is for every religion.

Before enlightening the interaction between family and Constitution. Let us first understand the basic term –Constitution" can be defined as: -

- The basic principles and laws of a Nation, which determines the powers and duties of government and guarantees certain rights to people in it.
- Set of political principles by which a place or an organization is governed.

Role of constitution in regulation of families: The need of the Constitution is most essential in terms of regulating the bond of marriage in issues regarding marital adjustment, marital problems, family violence, when the next generation starts coming to existence and a new paradigm needs to be developed.

In spite of urbanization and industrialization in the contemporary Indian Society, the family Institution continues to play a central role in the lives of the people. States have the right to determine the working of the family, Moreover, to ensure that women aren't deprived of their rights or aren't dominated by male society[1]. As enshrined in Article 14 and Article 15 of The Constitution, this aims to provide equality irrespective of the gender.[2]

Are personal laws unconstitutional: The issue of personal laws has always depended on the state of Hindu–Muslim relations in the country, while personal laws have been based on religious texts; the way in which they are implemented has always been mediated by the Constitution. No religious texts have been retained verbatim as law.

In personal laws there are some elements that are not based on the shariat, and rather applied as a matter of "justice, equity and good conscience"

How are personal laws appropriated: In the current scenario still, the women form a part of a vulnerable group. Their rights continue to be subordinated to the imperatives of

[1] LINDA C. MCCLAIN, *Family Constitution and the (NEW) Constitution of the family*, RESEARCH GATE (Feb. 12, 2020, 09:49 pm), https://www.researchgate.net/publication/228167040_Family_Constitutions_and_the_New_Constitution_of_the_Family.

[2] V.N. SHUKLA, CONSTITUTION OF INDIA 210-215 (13 ed. EBC Publishing (P) Ltd 2017).

majoritarianism, it is necessary to make a conceptual shift in the way in which family laws have so far been envisaged.

Nature of Family law in context to The Indian Constitution: The Family Law is based on the survival, permanence and the continuity of family, seeking the way to perpetuate the species and protect it and at same time, to give necessary protection to family members that make up the family nucleus. Family disputes and their resolution are as old as the history of the Institution of Family. Therefore, to keep the institution of family intact as a unit of society, our Indian legal system has always provided for family dispute resolution. According to the system of law and procedure, the family courts were established to provide a view to provide and promote conciliation in, so that the matters connected with marriage and family affairs can secure speedy and secure settlement of disputes.

During the post-independence years, this period was characterized by number of legislations concerning the Indian family. The most important piece of legislation was the one passed in 1956, dealing with succession, namely The Hindu Succession Act, 1956.

This act enabled the women to enjoy full ownership in the property inherited or acquired by her. Women inherit property equally with men now.[3]

CHANGING EQUATIONS

India is a land of diversities with several religions. The Indian legal system comprises the Personal laws, which are very old and govern the Hindus and the Muslims. The Hindu personal law has undergone many changes by a continuous process of codification.

The Supreme Court has held different sorts of views in cases wherever the question of supremacy between personal law and fundamental rights was concerned. In some of the cases, the apex court held that fundamental rights could not be the touchstone to test personal laws while in some other cases it was declared that these rights are basically as supreme.

The apex court has pronounced several judgements in these cases but surprisingly did not give a consistent interpretation of the laws and provisions of the Constitution. The major conflict arises when personal laws are perceived to be in violation of the fundamental rights. Article 13 of the Constitution of India states that the Parliament shall not make any law which takes away or abridges the fundamental rights and any law made in contravention of the same is, to the extent of contravention, void.[4]

Same sex marriage: Article 21 of the Constitution of India entitles every citizen of with the right to life and personal liberty. This right also includes the right to privacy and dignity. Choosing your life partner is a private matter, every adult is entitled to make this choice.[5] India does not have any legislation that legalizes same sex marriages. Delhi High Court‘s landmark judgment in *Naz Foundation v. Government of NCT of Delhi*, this case came to be a major step towards changing the perception of same sex unions in India.

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3 REETA SONAWAT, *Understanding Families in India: A Reflection of Societal Changes*, SCIELO (Mar. 6,2020,10:06 pm), http://www.scielo.br/scielo.php?script=sci_arttext&pid=S0102-37722001000200010 .

4 Shukla,*Supra* Note 2 at 38.

5 P.M. BAKSHI, THE CONSTITUTION OF INDIA 70-71 (14 ed. Universal Law Publishing 2017).

Section 377 of the Indian Penal Code, 1860 was introduced in India during the British rule, criminalized sexual activity "against the order of nature". This section criminalized consensual homosexual activities also. [6]

The High Court in the case of *Naz Foundation v. Government of NCT of Delhi* passed a landmark judgment, decriminalizing homosexual intercourse between consenting adults. [7]

Section 377 of the Indian Penal Code was adjudicated to violate the fundamental right to life and liberty and therefore right to equality as guaranteed by the Constitution of India. Naz Foundation, a non-governmental organization, in the year 2001, filed a lawsuit in the Delhi High Court, asking for a legislation of homosexual intercourse between consenting adults.

The Court also held that Section 377 was against Article 14 and 15 of the Constitution, as it discriminated homosexuals and created a class, discriminating them on the basis of sex. It was held that the word 'sex' in Article 15 not only includes biological sex, but also the sexual orientation of a person.

The Court also observed that the right to life under Article 21 includes the right to health and concluded that Section 377 is an impediment to public health because it hinders HIV-prevention efforts.

The Delhi High Court's judgment has opened new gates, and it will hopefully prove to open many more gates in the future. This judgment is the light in the dark tunnel that will hopefully see a new marriage law in the country that caters to the need of everyone.

AMENDMENTS WHICH GAVE IMPORTANCE TO THE RIGHTS OF WOMEN

Adultery: The PIL moved under Article 32 by Joseph Shine[8], challenges the Constitutional validity of Section 497 of The Indian Penal Code, 1860 as it is discriminatory against men, and is violation of Article 14, 15 and 21.

The petition claims that the whole criminal law is supposed to be neutral; Section 497 is prejudice against men. CJI Dipak Equality is the governing principle of a system.[9] Husband shall not be considered the master of the wife.

Women must be treated with equality. Any discrimination shall attract the provision of Constitution. Section 497 IPC which deals with Adultery is absolutely arbitrary." It was Justice DY Chandrachud, who observed that women could not be treated as commodities by it is not at the discretion of their husbands to give consent in matters of adultery". The question of fidelity wasn't put up here but whether the state possesses enough ability to monitor the relationship between the two adults. The Supreme Court said in August that Section 497 is an anti-women law and it shall be dismissed as it discriminates against men. The law was criticized on the basis of treating women as possession of men.

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6 The Indian Penal Code, 1860,Section 377.
7 *Naz Foundation v. Government of NCT of Delhi,* DLT 2009 HC 277.
8 *Joseph Shine v. Union of India*, SCC 2018 SC 1676.
9 The Indian Penal Code, 1860, Section 497.

Joseph Shine, who hails from Kerala, filed a Public Interest Litigation (PIL) that challenged IPC Section 497. He contended that the law is discriminatory against the male society and criminal law shall be neutral in nature.

Triple talaq: triple talaq was proclaimed unconstitutional by The Supreme Court in the year 2017. Supporters say its new measure to protect Muslim women, but the punishment is harsh and open to misuse. Men found in breach of the new law can be jailed for up to three years.

The Supreme Court's 1985 landmark judgement on the Shah Bano case said that the religion of the spouse has no bearing on whether providing alimony and maintenance for the spouse and children after the divorce and his husband was entitled to pay alimony and maintenance for her and their five children. The law prior had left Muslim women without the protection that other women had under the law. The Muslim Women (Protection of Rights on Marriage) Bill, 2019 does more than criminalize triple talaq; it offers Muslim women recourse and access to protection of the law from the practice of arbitrary instant divorce.[10]

Triple Talaq has a strong influence and could be seen being dominant over women. It is totally against the rights of Equality and still promotes the patriarch of male society and deprives women's empowerment among Muslim.

This method of Divorce completely violates the fundamental principles of Gender Equality and secularism. The question arises as on the dignity of woman, justice and basic human rights privilege of Muslim women in the country. In August 2017, Supreme Court of India termed Triple Talaq as unconstitutional and many social, religious and legal observations have been produced against the practice of Triple Talaq.

Based on the atrocities faced by Indian women and judgment given by Supreme Court, Triple Talaq Bill has been introduced in the Indian Parliament to void the practices of triple talaq by Indian Muslim men and a bill was passed in parliament in December 2018 and finally passed by both the Houses on 30th July 2019.[11]

Adoption by Muslim women: The Supreme Court passed a landmark judgment in *Shabnam Hashmi vs Union of India*, regarding adoption of child by a Muslim woman.[12] Previously, their personal law deprives the rights of women of the community to adopt children.

The bench of the Supreme Court headed stated that Muslim women have the right to legally adopt children like any other Indian citizen under their personal laws. The right to adopt children cannot be denied by Muslim personal law.

Right of an unwed mother: Under the Hindu Minority and Guardianship Act of 1956 father is considered as the natural guardian of a Hindu child. If a child is born out of legal wedlock, only then the mother can be the natural guardian.[13]

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[10] DEVIKA, *Triple talaqvoid & illegal | Parliament Passes The Muslim Women (Protection of Rights on Marriage) Bill,2019*, SCC ONLINE (Jan. 31, 2020,12:32 am), https://www.scconline.com/blog/post/2019/07/31/parliament-passes-the-muslim-women-protection-of-rights-on-marriage-bill-2019-triple-talaq-void-illegal/.

[11] PRABHASH K DUTTA, *Beyond Triple Talaq*, INDIA TODAY (Mar. 11,2020,11:28 pm), https://www.indiatoday.in/india/story/triple-talaq-supreme-court-976439-2017-05-11

[12] *Shabnam Hashmi v. Union of India*, SCC 1 (470) SC 2014.

But, in 2015, the Supreme Court held that an unwed mother can also legally become the sole guardian of her child and also that the consent of the biological father was not necessary for the mother to become legal guardian of her child. The Supreme Court observed that the father could not have 'a preferential right over the mother in the matter of guardianship.

Compulsory registration of marriages: The 270th report of the Law Commission of India on Compulsory Registration of Marriages (2017) and From the Supreme Court s reference in *Seema v. Ashwini Kumar*, [14]to repeated attempts by National Commission for Women (NCW) to Convention on Elimination of All Forms of Discrimination Against (CEDAW) women have repeatedly argued that registration of marriages would go a long way in addressing discrimination towards women and children.

The problem of different ages of consent provided under various personal laws and repeated violation of the Prevention of Child Marriages Bill has created a situation that needs immediate attention.

MARRIAGE AND DIVORCE

Right to marry: The right to marry is a part of the right to life under Article 21 of the Indian Constitution. The right to marriage is also stated under Human Rights Charter this is a universal right that shall be available to irrespective of their gender or religion.[15]

An alternative legislation to the Hindu Marriage Act 1955 is The Special Marriage Act, 1954. The Muslims marrying a Muslim have a choice between their personal law and the Special Marriage Act. The Indian Christian Marriage Act 1872, states that all Christian marriages should be solemnized under its own provisions. The Special Marriage Act states that any two persons irrespective of their religion can marry in accordance with its provisions. [16]

National Crime Record Bureau Statistics reported that honour killing in India has grown more than ever from 2014 to 2015. If a person chooses to marry outside their religion, he or she can either convert to that religion or can marry under Special Marriage Act, 1954.

The Parliament enacted the Special Marriage Act with a perspective to address the issues of inter-caste marriages. This legislation lays down a special form of marriage for people who have married outside the religion they follow. This legislation covers the marriages amongst the Hindus, Muslims, Christians, Sikhs, Jains and Buddhists.

Inter-religious marriages: there is a special law to support such marriages. For the majority of people, marriage shall be conducted within one‘s religious group, and the family also, additionally, the Directive Principles of StatePolicy which lays down certain goals for the government to achieve so as to maximize social welfare for the people.[17] But it has been observed that people marrying outside their religion attracts strong sentiments and honour killing as well even there has not been any barrier to marry outside the religion legally. In recent

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13 DR. PARAS DIWAN, MODERN HINDU LAW 266 (23 ed. Allahabad Law Agency 2016).
14 *Seema v. Ashwini Kumar*, AIR 2006 SSC 578.
15 TOM HEAD, *Civil Liberties: Is Marriage a Right?* , THOUGHTCO (Feb. 11,2020,11:47 pm), https://www.thoughtco.com/is-marriage-a-civil-right-721256 .
16 ROSEDAR S R A, FAMILY LAW-I 212 (2 ed. LexisNexis 2016).
17 Bakshi, supra121.

decision rendered by the Indian Supreme Court in *Lata Singh vs. State of UP*,[18] reported at Judgments Today, it was held that the caste system serves as an evil eye on the nation and shall be demolished for good. Acts of violence and threats against such inter caste couples are wholly and those who are committing these sorts of offences shall be punished critically. The government must enforce the law to secure the citizen's fundamental rights.

In case of Hadiya, [19]The Delhi High court stated that choosing your spouse is a fundamental right. Everyone has the explicit right to enter into marriage and freely choose a partner of their choice. The case of Hadiya has started a fresh commotion over the right of women to choose their spouse beyond their religion. Hadiya's parents filed a suit in the Kerala High Court, challenging her right to marry. She was a Hindu previously but converted into Islam to marry a Muslim. The state High Court upheld her father's right over her choice and entitled her to solely choose who she wants to marry. Her father had filed a "HABEAS CORPUS" petition in Kerala High Court under Article 226 of the Constitution after she got married, stating that she was brainwashed to get married. The Kerala High Court annulled her marriage in May 2017 and also stated that she was weak and vulnerable. Her husband challenged the decision in the Supreme Court.

The Supreme Court took Hadiya's testimony and freed her from her father's custody. The Supreme Court allowed Hadiya to continue living with her husband.[20]

Divorce: The principal legislation of divorce in India is by The Hindu Marriage Act, 1955 and The Special Marriage Act, 1956.

Irretrievable breakdown of marriage: The Supreme Court has solicited its powers under Article 142 of the Constitution to dissolve marriages that cannot be repaired any further, even if there aren't grounds for obtaining divorce. These powers enable the Apex Court to grant divorce on the ground of irretrievable breakdown of marriage, even if the wife doesn't consent to it. Article 142 of the Indian Constitution has given the power to the Supreme Court to pass an order in those cases where it is necessary to provide complete justice and observed that efforts to continue the marriage had failed and reunion is not possible.

The court ruled that the case was suitable for the invocation of Article 142 of the Constitution by providing permanent alimony for the woman.

Women breaking the disgrace of separation: it has been observed that women in urban areas do not continue their marriage if there is any question on the violation of their fundamental rights or where gender inequalities exist, the number of divorce has doubled in the past decade, because of the broad rights now enlisted by legislation.

Rights of women even after divorce: women have now Right over their streedhan, right to residence, right to get alimony, right to ask for maintenance of child, Right to ask for payment of attorney. Also, the concept over the custody of a child has now shifted to the best interest of

[18] *Lata Singh v. State of UP,* 2006 AIR 2 SC 2522.
[19] *Shafin Jahan v. K.M. Ashokan & ORS,* AIR 2018 SC 357.
[20] PRIYANKA MITTAL, *Right toprivacy is fundamental: SUPREME COURT*, LIVEMINT (Feb. 25,2020, 01:26 am), https://www.livemint.com/Politics/7MJYb4WJXezaRdf8Sr1ubI/Privacy-is-a-fundamental-right-says-Supreme-Court-in-histor.html.

the child. It will be at the discretion of the child only if he or she is above the age of nine. A mother who neglects the child or ill-treats shall not be awarded with the custody.[21]

SUCCESSION

The Hindu Succession Act, 1956, governs the succession and inheritance laws for Hindus, along with Buddhists, Jains and Sikhs. Changes were made in the Hindu Succession Act, 1956, through the Hindu Succession (Amendment) Act, 2005, in order to eliminate discrimination against women.

Section 6 of the Act was amended which stated that a daughter has an equal right to ancestral property as that of a son, and her share shall arise by birth itself.

Gender bias in succession law: As per the Hindu Succession Act, 1956, when a female die, her self-acquired property goes to husband‘s heirs, not her own parents.

When a man dies, the property is inherited by his relatives, not the woman‘s heirs. This is a clear bias, wherein her property goes to her husband's descendants.

Customary laws of tribal are ―patriarchal", devastating the inheritance rights of women. The Himachal Pradesh High Court ruling in 2015 and the Bombay High Court ruling in 2019 had granted rights to women in accordance with the Hindu Succession Act, 1956, but in states like Jharkhand the tribal women are still suffering.[22]

Under, Muslim Law, the male heirs or let‘s say the sons get double the shares of what a daughter receives.[23] This is completely contravening and violating the provisions of fundamental right to equality of women as envisaged under Article 14, 19 as well as 21 of the Constitution.

UNIFORM CIVIL CODE- AN ASPIRATION OR ILLUSION

Article 44 of the Constitution of India requires the state to secure for the citizens of India Uniform Civil Code throughout the territory of India. As has been noticed above, India is a unique blend and merger of codified personal laws of Hindus, Christians, and Parsis and to some extent of Laws of Muslims.

Indian case law: directions to enact a code: The Supreme Court of India for the first time directed the Indian Parliament to frame uniform Civil Code in 1985 in the case of *Mohammad Ahmed Khan vs. Shah Bano Begum*,[24] a penurious Muslim woman claimed maintenance from her husband under Section 125 of the Code of Criminal Procedure after her husband pronounced triple Talaq (divorce by announcing the word ―Talaq" thrice).[25] It was further held that a Muslim woman is entitled to get Maintenance under Section 125 of The

[21] SHARIKA NAIR, *Custody Rights of Indian Moms (And Dads) After Divorce*, YOUR STORY (Jan. 29,2020,12:06 AM), https://yourstory.com/2016/05/custody-rights-divorce.

[22] RIJU MEHTA, *Inheritance rights of women*, THE ECONOMIC TIMES (Jan. 29,2020,12:09 am), https://m.economictimes.com/wealth/plan/inheritance-rights-of-women-how-to-protect-them-and-how-succession-laws-vary/amp_articleshow/70407336.cms.

[23] AQIL AHMAD, MOHAMMEDAN LAW 392 (26 ed. Central Law Agency 2016).

[24] *Mohammad Ahmed Khan v. Shah Bano Begum*, 1985 AIR 945 SCR (3) 844.

[25] DR. S.C. TRIPATHI & VIBHA ARORA, LAW RELATING TO WOMEN & CHILDREN 172 (6 ed. Central Law Publications 2017)

Criminal Procedure Code and also observed that Article 44 of the Constitution had remained a dead-end. To, unbind this decision later, The Muslim Women (Right to Protection on Divorce) Act, 1986 was enacted.[26]

Uniform Civil Code in recent time consistently has been the on-going point of debate. In reference to The Indian Constitution's directive to replace the personal laws that has been based on scriptures & customs of their community, with prescribing a common set of rules governing every citizen.[27]

Secularism in India & fundamental right to practice religion is mentioned in Article 25 which always has been an important issue. Though, later became one of the most controversial topics in contemporary politics throughout the case of Shah Bano in 1985.

In spite of the fact that Article 44 of Indian Constitution ensures Uniform Civil Code to all citizens of the Country without curtailing the fundamental right as well as right to practice the religious functions. The debate shifted to Muslim Personal Laws, permitting unilateral divorce polygamy and placing it among the legally bearing the Sharia Law. Personal laws are perceived differently from public laws and hence, cover marriage, divorce, inheritance, adoption and maintenance. The only Indian state which has adopted Uniform Civil Code is Goa. The Special Marriage Act, 1954 authorizes any citizen to undergo a civil marriage outside the monarchy of any sort of particular religious personal law.

These personal laws came into existence during the British Raj, focusing on Hindu and Muslim communities. The British agitated resistance from the leaders of society and also abstained themselves from interfering within this domestic sphere.

CONCLUSION

The history of personal laws in India has been prevailing since long. Both, Hindu and Muslim Personal Laws were brought in the early 20th century in order to preserve from the private domain of the colonial. The Hindu and Muslim Laws have been largely derived by Constitution at the time of Independence.

As observed the Personal Laws have great impact on customs, beliefs that society has which are favourable to native patriarchy. The Apex Court in respect to subject matter over family law, in past few years shows that it is promoting and motivating a lot of positive reforms in personal law. The amendments which were made took into account the fundamental rights. In order, to preserve the rights of every individual member that forms a family nucleus. Personal laws are formed out of socio-political consideration, but these laws massively rely on coercive power of State for authority. The discussions, citations, amendment and connection to the Constitutional law above keeps in mind the latest changes that have been made in legislature and how the rights pertaining to an individual citizen have further broadened. The social issues discussed are within the system codified of a Unified Civil Code[28] maybe an ultimate solution.

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[26] S R A,supra198.

[27] APURVA VISHWANATH, *Supreme Court to consider questions of law*, THE INDIAN EXPRESS (Feb. 11, 2020,12:24 am), https://indianexpress.com/article/india/supreme-court-hearing-uniform-civil-code-personal-law- 6261570/.

[28] Bakshi, *Supra* Note 5 at127.

Until, then the judicial decisions without any proper legislature keeps the momentum going. It is important to draft a code. This can also act as a path to progress, which will in turn aid in harmony at home. India can have a well-defined structure of personal laws only by some further changes and amendments in some areas. Also, in accordance with Indian Constitution, The Directive Principles of State Policy undertake that the State shall attempt to promote welfare of the people and promote equity and justice. These fundamental rights enshrined in context with personal laws shall be guaranteed to every person in the family.

SECULARISM CONCEPT AND DEVELOPMENT

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ABSTRACT

India is a place that is known for religion and culture. Numerous religions have been prospering here since long back, which have their own customs and traditions making India a multicultural nation. The quantity of intrusions, what's more, attacks from Aryans to Mughals added to social and etymological pluralism. English imperialism additionally added to its social and religious variety. Along these lines with each intrusion and invasion Indian culture turned out to be increasingly perplexing and rich. Maybe no other society of the world is as multi-social and multi-dimensional as Indian culture. It is properly said that 'here the Aryans, the non-Aryans, the Dravidians and the Chinese, the clans of Scythians and Huns, the Afghans and the Mughals have all converged into one body'. Indian culture resembles a relentless waterway nourished with numerous tributaries and the standard streams endlessly. Subsequently, Indian culture is rich, and is known for shrewdness and incredible considerations. India showed the world the significance of secularism. Secularism is a significant part of Indian culture, for which it is likewise notable on the planet. All persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion. The present paper reveals the insight into Secularism, its idea, history and impact with regards to India. The Hon‘ble Supreme Court of India has held in numerous cases that secularism is an important part of the Constitution.

Ramaswamy J in his separate opinion in *S.R bommai vs Union of India* declared that state has the duty to ensure secularism by law.

Keywords: - Secularism, society, religion, culture and India.

INTRODUCTION

In the greatest revolutionary of the Indian independence movement, Shaheed Bhagat Singh said ―religion is an individual‘s matter and no one else should interfere in it nor should one let religion push itself into politics because it does not unite everyone or make them work together".

The term secularism was coined by British writer George Holyoake in 1851 which means ―the principle of separation of the state from religious institutions".

Countries started to practice secularism during the late 19th century. Till now ninety-six countries practice secularism. Europe has the highest number of countries which practice secularism.

Secularism must be the most misunderstood and mangled ism. Commentators on the right and the left routinely equate it with Stalinism, Nazism, and socialism.

What secularism does concern itself with are relations between church and state? It is a flexible doctrine that can embody a lot of policy positions. Strict separationist is one, but not the only, of those positions. Secularism is different from atheism. Atheists do not believe in any god. Secularism does not mean that a person does not believe in God but respects other religions.[1]

The first attempt to separate religion from the state was done during the French revolution where the revolutionaries had attempted to remove religion from France by closing down churches, forcing priests to resign, or emigrate. France‘s leaders worked to define a new relationship between nation and religion[2]. There are two types of views about secularism

1. Liberal- where every religion is respected.

2. Marxian/communist-where state becomes anti-religion and religious organizations are subject to destruction.

In the former Soviet Union teaching, religion became illegal. Under Stalin, priests were rounded up and shot. The Soviet Union became more of Ananti's religious state rather than a secular one. [3]

Secularism does not mean that a person should not follow the religion or be anti-religion but means that person should respect every religion.

DEVELOPMENT OF SECULARISM IN WEST

Secularism first appeared in ancient Greece but disappeared soon after the fall of Greek civilization.

Thomas Aquinas is essential to the history of secularism, primarily because he drew a famous distinction between reason and revelation. His work in secularism was seen as equivalent to Aristotelian secularism. This led to the rise of Aristotle‘s teachings in universities. At that time the church prohibited the teachings of Aristotle at the University of Paris, but this could not be applied all over Europe where the study continued. During the age of Renaissance classical humanism was seen again in the form of art, literature, and architecture. It began in Italy but spread over to Germany, France, England, and Spain during the fifteenth and sixteenth centuries. During the Renaissance humanism took two forms- one was secular and the other was Christian. While Italian humanism was secular it did not oppose Christianity, but northern humanism was concerned about purifying Christianity. They used the revived classical arts of rhetoric, history, and language to attack medieval scholasticism and build a purer more scriptural Christianity. Renaissance also saw the rise of individualism and stress on human dignity. The man of the renaissance period was free, rational, and self-reliant unlike the man of the middle ages who was part of the church. The development of individualism is the reason for the movement we today

[1] JACQUES BERNILERBLAU, *Secularism is not Atheism*, HUFFPOST, (July 7,2012,08:50AM).

[2] SUZANNE DESAN, *The French Revolution and Religion,1795-1815*, THE CAMBRIDGE HISTORY OF CHRISTANITY 556-574(Stewart J. Brown & Timothy Tackett‘s ed. CAMBRIDGE UNIVERSITY PRESS,2006).

[3] GILES FASNER, *Why the Soviet attempt to stamp out religion failed*, THE GUARDIAN, https://www.theguardian.com/commentisfree/belief/2017/oct/26/why-the-soviet-attempt-to-stamp-out-religion-failed.

known as the human rights movement. This individualistic perspective is responsible for the way psychology, morality, and economics developed over the years to play a major role in the shaping of the modern movement. In Machiavelli's classical work The Prince, he took a shift from idealism to realism. According to him, morality is useless in the case of politics. Cruelty, malice, and deception are not immoral but simple is political methods. Religion accordingly has nothing to do with politics. He criticized Christian ethics for making men weak and causing them to become easy targets for evil-minded men.[4]

In Italy, the Roman Catholic church became very powerful in matters of enforcing religion. Scientists like Galileo Galilei Were imprisoned because he challenged the theory that Earth is the centre of the Universe. When he proved them wrong, he was arrested and imprisoned? Copernicus was also arrested because he challenged the same theory and he was sentenced to death by burning alive. Leonardo Da Vinci had to conduct his experiment carefully as conducting those experiments would have been considered blasphemy and would have been punishable by execution by the church. It took time before the church's power was taken away.

One of the major developments in the field of secularism was the French ―declaration of rights of man". In the declaration the tenth right says, ―No man ought to be molested on account of his opinions, not even on accounts of his religious opinions, provided his avowal of them does not disturb the public order established by law".

The question that arises in the minds of some people in France is whether Article 10 sufficiently guarantees the right it is intended to accord with? Besides, it takes off from the divine dignity of religion and weakens its operative force upon the mind to make it a subject of human laws. It presents itself to man, like light intercepted by a cloudy medium in which the source of it is obscured from his sight and he sees nothing to reverence in a dusky way[5].

Another major step was Marxism. According to Karl Marx, ―religion is the opium of people"

According to him ―Religious suffering is, at one and the same time, the expression of real suffering and a protest against real suffering. Religion is the sigh of the oppressed creature, the heart of a heartless world, and the soul of soulless conditions. It is the opium of the people.

The abolition of religion as the illusory happiness of the people is the demand for their real happiness. To call on them to give up their illusions about their condition is to call on them to give up a condition that requires illusions. The criticism of religion is, therefore, in embryo, the criticism of that value of tears of which religion is the halo.

Criticism has plucked the imaginary flowers on the chain not in order that man shall continue to bear that chain without fantasy or consolation, but so that he shall throw off the chain and plucks the living flower. The criticism of religion disillusions man, so that he will think, act, and fashion his reality like a man who has discarded his illusions and regained his senses so that he will move around himself as his own true Sun. Religion is only the illusory Sun which revolves around man as long as he does not revolve around himself". Even now the communist countries are atheists and are anti-religion.

[4] DOMENIC MARBANIANG, SECULARISM IN INDIA A HISTORICAL ANALYSIS, 16-20 (2011)
[5] THOMAS PAINE, RIGHTS OF A MAN, 65-68(1791).

The Marxist approach is more of anti-religion rather than secular. After the revolution of Cuba their leader Fidel Castro declared their state as an atheist.

Joseph Stalin executed the priests and stopped all religious education in schools and colleges. Practicing religion was also made illegal. In Countries like North Korea practicing religion is still illegal and people are sometimes sentenced to death for practicing any religion. In China practicing religion is not expressly illegal but people who practice religion are sometimes harassed by the government. In 2017 the Communist Party of China required the members to shun religion for maintaining party unity warning that religious belief is a redline for cadres and their party members are also forbidden from supporting or getting involved in religious affairs in the name of developing economy Criticism has plucked the imaginary flowers on the chain not in order that man shall continue to bear that chain without fantasy or consolation, but so that he shall throw off the chain and plucks the living flower. The criticism of religion disillusions man, so that he will think, act, and fashion his reality like a man who has discarded his illusions and regained his senses so that he will move around himself as his own true Sun. Religion is only the illusory Sun which revolves around man as long as he does not revolve around himself". Even now the communist countries are atheists and are anti-religion.

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SECULARISM IN INDIA

India has been a secular country even before the adoption of the constitution. The most famous example of that can be found in the remarkable story of minority India's Jewish community. India was the only country where Jews did not face anti-Semitism and racism. The Bene Israel group flourished for 2,400 years in a tolerant land that has never known anti-Semitism and was successful in all aspects of the socio-economic and cultural life of the people of the region.[7]

In some ways, this kind of Indian secularism has its roots in our history. Admired monarchs from Ashoka in third century B.C to Harsha in the sixth century CE gave their recognition and patronage to different religions. Ashoka's Rock Edict XII forbade people from honouring their sects at the expense of others and condemning the beliefs of the others. Citizenship and political status were never linked to one's religion in his state. The coexistence of religions is evident from that in Ellora cave temples some Jain, some Buddhists, and some

[6] China's communist party asks members to give up religion, ET, July 19,2017.

[7] Gary Weiss, *India's Jews*, FORBES, https://www.forbes.com/2007/08/05/india-jews-antisemitism-oped-cx_gw_0813jews.html.

Hindus were carved next to each other between the fifth and tenth centuries. This traditional approach towards secularism was not seen during Islamic kingdoms from the twelfth century onwards. One monarch, the Mughal Emperor Akbar went so far as to create his synthetic religion, Din e Ilahi to meld best features of Islam, Hinduism, and the other faiths of which he knew into a new national faith. The concept of Sarva dharma sambhava– accepting the equality of all religions was propounded by great Hindu sages like Ramakrishna and Vivekananda and upheld by Mahatma Gandhi and Indian nationalist movement.[8]

During the freedom struggle of India people from different religions were fighting for Independence.

Whether it was a peace movement led by Mahatma Gandhi where people from different religions joined him against British rule, or to fight in Indian national army which was founded by a Sikh officer Mohan Singh led by a Hindu Netaji Subhash Chandra Bose and served by numerous officers like Capt. Shah Nawaz Khan who faced the red fort trial for waging war against the king, or Kakori train raids carried out by Ashfaq Ulla Khan or assassination of governor Michael o‘ Dwyer carried out by Shaheed Udham Singh in England as an act of revenge for Julian Wala Bagh or throwing of bombs by Bhagat Singh on privy council. All of these examples show that even during the colonial period all of the freedom fighters fought for the independence of India rather than any particular religion.

SECULARISM IN CONSTITUTION

The Hon‘ble Supreme Court in the case of *S.R Bommai vs Union of India* held that secularism is one of the basic structures of the Indian constitution and also said that secularism is not anti-religion. [9]

Indian secularism is a bit different as it does not separate state and religion. Indian constitution has allowed interference of the state in religious affairs and the state is equally indulgent of all religious groups, favouring none. There was no established state religion; the adherent of every faith is a stakeholder in the Indian state.

Whereas the French concept keeps religion out of governmental institutions like schools and government out of religious institutions in turn, whereas Indian secularism cheerfully refuses to forbid such religious interpenetration. Whereas it is impermissible to sport any visible sign of religious affiliation in a French government school or office (a catholic may not wear a crucifix, a Muslim sport a hijab, or a Sikh don a turban) all these are permitted in the equivalent Indian embraces the practice of providing financial support to religious schools and the persistence of personal law for different religious communities.

Until fairly recently, an Indian‘s sense of nationhood lay in the slogan, ‗unity in diversity‘. In rejecting the case for Pakistan, Indian nationalism also rejected the very idea that religion should be a determinant of nationhood. We never fell into the insidious trap of agreeing that, since Partition had established a state for Muslims, what remained was a state for Hindus. To accept the idea of India you had to spurn the logic that had divided the country.[10]

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8 SHASHI THAROOR, THE PARADOXICAL PRIME MINISTER 91-92(2018).

9 *S. R. Bommai v. Union of India* ([1994] 2 SCR 644.

10 SHASHI THAROOR, THE PARADOXICAL PRIME MINISTER 90.

In the case of Ahmedabad *St Xavier's college society v state of Gujarat*, Justices Matthew. J and Chandrachud JJ gave a new dimension to the concept in the constitutional context.

"The constitution has not created a rigid wall of separation between the church and the state. It is only in a qualified sense that India can be said to be a secular state. There are provisions in the constitution that make one hesitate to characterize our state as secular. Secularism in the context of our constitution means only an attitude of life and helps live the term secular state is used in India to describe the relationship which exists between state and religion".[11]

The term secularism was added in preamble during the 1976 42nd amendment act.

The concept of secularism in India is derived from the liberal democratic tradition of the west. It is different from the secularism of the Marxian communist tradition, which is motivated by an active hostility to religion as such.[12]

The concept of secularism is implicit in the preamble of the Indian constitution which declares the resolve of the people to secure all its citizen's liberty to thought. Belief, faith, and worship. In India, a secular state was never considered as an irreligious or atheistic state. It only means that in matters of religion it is neutral.[13]

A recent study by researchers from the University of Bristol and the University of Tennessee revealed that secularisation of countries leads to more economic development and no other way around.

The Constitution of India has secured secularism in four articles.

1. Article 25- Freedom of conscience and free profession, practice, and propagation of religion.
2. Article 26-freedom to manage religious affairs
3. Article 27- freedom as to payment of taxes for promotion of any particular religion
4. Article 28- freedom as to attendance at religious instruction or religious worship in certain educational institutions.

WHAT IS THE EXTENT OF SECULARISM?

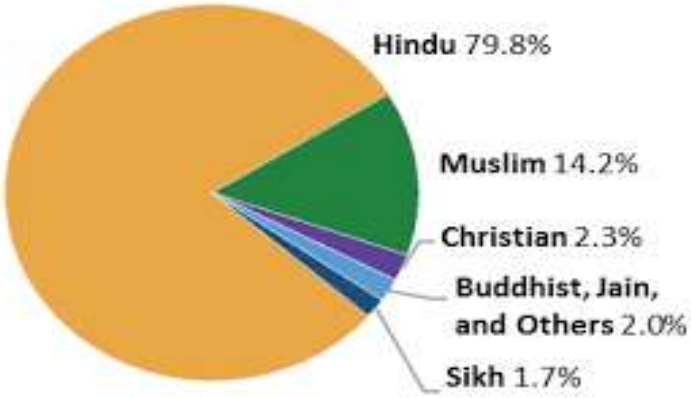
One of the famous cases is *Bijoe Emmanual vs the State of Kerala* also known as the National anthem case. In this case, three students belonging to Jehovah's witnesses of the Christian community were expelled from school for refusing to sing the National anthem. They challenged the validity of their expulsion on the ground that it was violative of their fundamental right under article 25. Their religion does not permit them to join in any rituals except if it is in their prayer to Jehovah, their god. The Kerala High Court held that it was their fundamental duty to sing the national anthem and the headmistress was therefore within her right to refuse them to attend classes till they gave in writing that they will participate in the singing of the national

[11] Ahmedabad St Xavier's College Society v. State of Gujarat 1975(1) SCR 173.
[12] DONALD EUGENE & SMITH, INDIA A SECULAR STATE,3-5.
[13] DR J.N. PANDEY, CONSTITUTIONAL LAW OF INDIA,371.

anthem. But this decision was overruled by the Supreme Court of India and held that no person can be compelled to sing the national anthem if he has a genuine conscientious religious obligation. Right under article 25 clause 1 cannot be regulated by executive instructions which had no force of law. Their conduct did not amount to an offense under the prevention of insults of national honour act 1971 [14]

Secularism in India does not mean anti-religion. It was held in the case of *Atheist Society of India v Government of A.P* the petitioner filed a writ of mandamus directing the state government to prohibit the practice of breaking of coconuts, performing of poojas chanting of mantras or sutras of different religions at a state function. The Andhra Pradesh High Court rejected their prayer and held that these activities have been part of Indian tradition. A secular state does not prohibit the practices of religion. It is not objected of the constitution to turn the country into an irreligious place [15]

Secularism in India can be seen from the following chart



The chart above shows that five different religions Hinduism, Islam, Christianity, Buddhism, Jainism, Sikhism are prospering in India.

But certain incidents like the 1984 Sikh riots, Exodus of Kashmiri Pandits, 2002 Gujarat riots, etc. Have been a threat to the secularism of India.

1984 riots – during 1984 riots tens of thousands of Sikhs were killed by mobs after the assassination of Prime Minister Indira Gandhi by her bodyguards

The exodus of Kashmiri Pandits- exodus occurred during the 90s when thousands of Kashmiri Hindus were either killed or were forced to flee from their homes.

2002 Gujarat riots- riots occurred after the terrorist attack on the train. Hundreds of Muslims were killed.

[14] *Bijoe Emmanuel v. state of Kerala* (1984) JSCC 615.
[15] Atheist Society of India v Government of A.P, AIR 1992 AP 310.

ACTS AGAINST FORCEFUL CONVERSIONS

Forceful conversions have caused a problem in the secular nature of India. To protect people against forceful conversions governments have enacted laws against it.

The Madhya Pradesh freedom of religion act 1968, the Orissa Freedom of religions act1967, The Arunachal Pradesh Freedom of Religion Act of 1978, The Gujarat Freedom of Religion Act.

(i) Madhya Pradesh freedom of religion act 1968or Madhya Pradesh Dharma Swatantrya Adhiniyam, 1968- Under this act conversion means ~~–re~~nouncing one religion and adopting another". This act makes conversion either by force or by allurement or attempted conversion illegal.

In case a conversion is done the punishment in case of an adult male is imprisonment up to one year or fine up to five thousand rupees or both. In case of conversion of minor, women or a person belonging to schedule caste or schedule tribe the punishment is up to 2 years and fine up to ten thousand rupees.

If conversion is not done forcefully or by allurement even then the person who is performing the conversion either directly or is taking part in such conversion shall inform the district magistrate of that such conversion has taken place, if he fails to do so then he shall be punished with imprisonment up to one year or with fine of one thousand rupees or both.

Nature of offences- The nature of offence is cognizable and will not be investigated by an officer below the rank of inspector of police.

And no prosecution will be made until the sanction of district magistrate or other such authority not below the rank of sub-divisional magistrate.[16]

(ii) Orissa Freedom of religions act1967- In this act instead of word allurement the word inducement is used, which means an offer of any gift or gratification, either in cash or in-kind and also a grant of benefit pecuniary or otherwise. Section three prohibits conversion by force, fraud, or inducement. The punishment is the same as mentioned in Madhya Pradesh's freedom of religion act, one-year jail or fine up to five thousand rupees or both.[17]

And in case of minors, women or persons belonging to a scheduled tribe or scheduled caste the punishment is up to two years or with a fine of ten thousand rupees or both. Under this act, if the conversion is legally carried out there is no need to inform the district magistrate, but if the prosecution has to be carried out then the district magistrate must be informed. The offense is cognizable.[18]

(iii) The Arunachal Pradesh Freedom of Religion Act of 1978- This act also prohibits conversion by fraud, force, or by inducement but also by abetment. The punishment is the

[16] MADHYA PRADESH FREEDOM OF RELIGION ACT 1968, No.27 ACTS OF MADHYA PRADESH
[17] ORISSA FREEDOM OF RELIGIONS ACT 1967, No. 2 ACTS OF ORISSA
[18] THE ARUNACHAL PRADESH FREEDOM OF RELIGION ACT, No. 4 ACTS OF ARUNACHAL PRADESH

same as above mentioned acts but does not have special provision for conversion of minors, women or persons from scheduled tribe or scheduled caste and fine is up to ten thousand instead of five thousand. Here if the lawful conversion is carried out then the deputy commissioner of the district has to be informed and if not informed then jail of one year and fine up to ten thousand. And in case of prosecution sanction from deputy commissioner is required

(iv) The Gujarat Freedom of Religion Act[19]. - In this act word conversion has not been defined instead word convert has been defined –make one person to renounce one religion and adopt another religion"

Punishment under this act is more than the acts mentioned above. The punishment for converting someone is jail up to three years and also fine which may extend to fifty thousand rupees.

In case a person is a minor, woman, or person belonging to a scheduled tribe or scheduled caste the punishment then is jail up to four years and fine which may extend to one lakh rupees.

In this act, if the lawful conversion has to be carried out then prior permission from the district magistrate shall be taken. In the above acts magistrate or commissioner was to be informed after conversion has taken place and also the person who has converted has to send intimation to the district magistrate after his conversion. In the above-mentioned act, the person who is converted need not send intimation to the magistrate or any other authority. If anyone of them fails, then they shall receive jail up to one year or with a fine up to one thousand rupees or both.

The special thing about this act is that it puts responsibility even on the person who has converted his religion. And if the amendment is done by the state legislature then it shall be mentioned in the official gazette.

Another act he Tamil Nadu Prohibition of Forcible Conversion of Religion Act, 2002 was enacted against forceful conversion but the act was repealed in 2004.

To curb derogatory remarks against any religion or place of worship the Indian penal code has a provision under section 295 and 295A which makes any insulting statement against any religion or destroys the place of worship shall be punished with imprisonment which may extend to three years or with fine or both.

Punjab government to curb defamatory statements against religions has proposed a new section IPC 295AA which penalizes people who make derogatory remarks against any religion. The punishment is life imprisonment. This proposed amendment has been controversial. According to some people, this violated the freedom of expression, and punishment is too harsh. This kind of punishment for insulting any religion is given mainly in Middle East nations who are governed by Sharia law. This law can be used against anyone who is expressing themselves.

[19] THE GUJARAT FREEDOM OF RELIGION ACT, No. 22 ACTS OF GUJRAT

But supporters of this proposed amendment say that this law would curb religious violence and riots and it would put control on those people who insult any religion.

The most important role that was played in secularism and reduction of the power of religious organizations was by scientists. Religious organizations used to tell people that storms and calamities are a punishment by god. But after numerous researches, it was found out that these are nothing but changes in the environment due to the water cycle and other chemical cycles. Treatment was done by giving donations to religious organizations.

The theory of creation was replaced by the theory of evolution by Charles Darwin. Even Bhagat Singh criticized religious organizations for fooling people with their theories. The creation of the universe was replaced by Big Bang Theory. [20]

CONCLUSION

As we can see from above research that it took secularism thousands of years to develop.

There were many hurdles which caused problems in the development of secularism.

It was achieved through peaceful and also violent means e.g. legislations, judgments, revolutions etc.

Secularism came in the west mainly due to abuse of power by the church. The churches would even command the crown and threatened them with consequences. The main change came during the Renaissance period when humanism and individualism began to rise.

An example of abuse of power of church is the arrest of Galileo Galilei when he challenged the theory that the sun revolves around the earth. Similarly, Copernicus was burned alive by the church when he challenged them for the same theory. The separation of church from state played a major role in development of secularism. The major step towards this approach was taken by French revolutionaries. The realist also took a major step especially Machiavelli, who according to him church has weakened men and made them an easy prey for evil men. Karl Marx also took this approach, but his approach turned anti religion which was then followed by General Secretary of Communist party of former Soviet Union Joseph Stalin who then killed all priests of Russian orthodox religion.

In India secularism can find its roots way before the adoption of the Constitution. The bene Israel community was safe from any racism or anti-Semitism. The Independence movement led by Netaji Subhash Chandra Bose, Mahatma Gandhi, Bhagat Singh, Udham Singh, Ashfaq Ullah Khan and various other nationalist leaders played an important role in establishing the idea of secularism.

[20] BHAGAT SINGH, WHY I AM AN ATHEIST, (1931).

The constitution has secured the rights of minorities for seventy years with the help of Hon'ble Supreme Court of India.

The cases such as *Kesavananda Bharti v State of Kerala* which secured basic structure of Indian Constitution, *S.R Bommai v Union of India*- which said that secularism is part of basic structure of our constitution, and various other cases have helped in securing secularism in India. Then Justice Hans Raj Khanna who was a judge in above cases and also a judge in *ADM Jabalpur case*. He gave judgments which have secured the constitution till today.

Then the acts that were made by state governments such as The Madhya Pradesh freedom of religion act 1968, the Orissa Freedom of religions act1967, The Arunachal Pradesh Freedom of Religion Act of 1978, The Gujarat Freedom of Religion Act have helped people against forceful conversions by missionaries.

HUMAN RIGHTS: THE PRISONER'S PERSPECTIVE

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ABSTRACT

Human rights refer to the basic and fundamental rights of an individual. These are certain inalienable rights and are essential for the existence of a human being in a free society. These are the rights conferred on a man on the virtue of his being a human being. These rights enable an individual to live freely and are a protector of dignity, individuality and spirit of a person.

Human rights, as internationally accepted inherent rights of an individual, are protected and guaranteed under domestic or municipal laws of almost every country in the world. In India, these rights are enshrined in the basic document i.e. ‗The Constitution of India'.

The rights of a prisoner are not mentioned expressly but are held to be derived from the existing rights. Article 21 of the Indian Constitution, i.e. Right to life and personal liberty in its wide ambit includes such rights which are available to a person even when his liberty is curtailed by due procedure of law, that in other words means Prisoner's Rights. A prisoner, though, guilty of an offence, never ceases to be a human being. A prisoner, though, deprived of his personal liberty, cannot be deprived of his life, which in its widest scope includes ‗living with dignity'.

The basic prisoners' rights include:

- Right to legal aid
- Right to speedy trials
- Right to fair trial
- Right to investigation
- Right to parole
- Right against handcuffing
- Right against long pre-trial confinement
- Right against delayed execution
- Right against custodial violence
- Right to privacy

These rights, not found expressly in the Constitution, form a part of the unenumerated basic rights of a person. Therefore, an attempt has been made in the paper to examine the rights of the prisoners.

Keywords: human, rights, constitution, basic, freedom

INTRODUCTION

'Right' as an expression is not a perfectly defined term. Broadly, it may be termed as the claim of an individual that he enjoys against all other individuals. The rights as enjoyed by human beings merely on the virtue of their being living humans are termed as 'human rights'. These are certain basic and inalienable rights that are essential for the existence of a human being. These are the rights enjoyed by humans from the very beginning of their birth and are inherent on them irrespective of their sex, language, race, religion or nationality.

"Human rights" means the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Indian Constitution or embodied in the international covenants and enforceable by courts in India.[1] The rights that are essential for the maintenance and protection of dignity of an individual and impose negative obligations on the state not to encroach on individual liberty may be termed as human rights.[2] Human rights are those minimal rights, which every individual must have against the State, or other public authority, by virtue of his being a member of the human family irrespective of any other consideration.[3]

Recognition of human rights as inherent rights are as old as the earliest civilizations of man. Human rights can be traced back to the vedic and post vedic period.

Human rights, as internationally accepted inherited rights of individuals, are protected and guaranteed under domestic or municipal laws of almost every country in the world. In India, these rights are also enshrined in the basic document, i.e., The Constitution of India.

INDIAN CONSTITUTION AND HUMAN RIGHTS

The Constitution of India, as adopted on 26th of November,1949 in its various parts includes the concept of human rights.

The formation of Indian Constitution as a document began as early as the beginning of 20th century and the framers were inspired by different Constitutions and International Charters and Declarations. As a result, they were also determined to include in the Constitution, certain basic rights for the people of India.

Part III of the Preamble, i.e. Fundamental Rights, and Part IV i.e., Directive Principles of State Policy, enshrines the idea of basic rights of an individual which are deemed essential for the full development of personality, individuality and spirit of human being. They are essential for the development of an individual's dignity.

'Dignity as a community value emphasizes the role of the state and community in establishing connective goals and restrictions on individual‘s freedom and rights on behalf of a certain idea of good life.'[4] The Constitution, under its various parts, casts a duty on the state to maintain this dignity of the human being.

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1 Protection of Human Rights Act, 1993(10 of 1994), Section 2(d).
2 *Maneka Gandhi v. Union of India,* AIR 1978 SC 597.
3 DD BASU, HUMAN RIGHTS IN CONSTITUTIONAL LAW (3rd ed. 2008).
4 *K.S. Puttaswamy v. Union of India*, 2019 (1) SCC 1.

Preamble and Human Rights

The Preamble to the Constitution of India is the first page of the document. It holds a supreme importance to the document itself and all people bound by it. The Constitution is to be read in the light of the preamble and various ideas laid down.

The preamble reads as-

"WE, THE PEOPLE OF INDIA, having solemnly resolved to constitute India into a SOVEREIGN, *SOCIALIST, SECULAR,*[5]DEMOCATIC, REPUBLIC and to secure to all its citizens,

JUSTICE, social, economic and political;

LIBERTY of thought, expression, belief, faith and worship;

EQUALITY of status and of opportunity, and to promote among them all;

FRATERNITY assuring the dignity of the individuals and the unity and *integrity*[6] of the nation;

IN OUR CONSTITUENT ASSEMBLY this twenty-sixth day of November 1949 do HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION."

Though the Preamble in itself is not enforceable in the court of law,[7] the objects enshrined in the Preamble seek to establish and promote general rights of an individual.

The Preamble to our constitution serves two purposes:

a) It indicates the source from which the constitution derives its authority;

b) It also states the objects which the constitution seeks to establish and promote.[8]

Briefly, preamble is the major fountainhead of the objects of the Constitution. It sets out the basic human rights, which represent the aspirations of the people who established it.

Fundamental Rights and Human Rights

The most important part of the Constitution of India which also constitutes the part of basic structure[9] are the 'Fundamental Rights' enshrined in Part III. The most outstanding feature of these rights is that they are made enforceable by the court of law and their enforcement is itself a fundamental right. The various fundamental rights granted to a person under the Constitution of India can be studied under the following heads:

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5 Inserted by Constitution (Forty Second Amendment) Act, 1976.
6 *Id*.
7 *A.K. Gopalan v. State of Madras*, AIR 1950 SC 27.
8 DURGA DAS BASU, INTRODUCTION TO THE CONSTITUTION OF INDIA (22nd ed. 2015).
9 *Keshwananda Bharti v. State of Kerala*, AIR 1973 SC 1461.

1. Right to Equality[10]

S.No.	Article No	Name of Rights
1	14	Equality before Law
2	15	Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth
3	16	Equality of opportunity in matters of public employment
4	17	Abolition of untouchability
5	18	Abolition of titles

2. Right to Freedom[11]

S.No.	Article No	Name of Rights
1	19	Six fundamental Freedoms
2	20	Protection in Respect of conviction of offences
3	21	Right to life and personal liberty
4	22	Right against arrest and detention in certain cases

3. Right Against Exploitation[12]

S.No.	Article No	Name of Rights
1	23	Prohibition of traffic in human beings and forced labour
2	24	Prohibition of employment of children in factories etc.

4. Right to freedom of Religion[13]

S.No.	Article No	Name of Rights
1	25	Freedom of conscience and free profession, practice and propagation of religion
2	26	Freedom to manage religious affairs
3	27	Freedom as to payment of taxes for promotion of any particular religion
4	28	Freedom as to attendance at religious instruction or religious worship in certain educational institutions

[10] The Constitution of India, Bare Act (as on 9th Nov. 2015).
[11] The Constitution of India, Bare Act (as on 9th Nov. 2015).
[12] The Constitution of India, Bare Act (as on 9th Nov. 2015).
[13] The Constitution of India, Bare Act (as on 9th Nov. 2015).

5. Cultural and Educational Rights[14]

S.No.	Article No	Name of Rights
1	29	Protection of interests of minorities
2	30	Right of minorities to establish and administer educational institutions

6. Right to constitutional remedies[15]

S.No.	Article No	Name of Rights
1	32	Remedies for enforcement of rights conferred by this part

Directive Principles of State Policy and Human Rights:

Directive Principles of State Policy, contained in part IV of the Constitution of India provides for certain social, economic and cultural rights vested in the people of India. These, however, do not exist as a matter of right, but are only the guidelines for the state which, being a welfare state must include and impart such rights on its citizens. The main purpose of directive principles is to ensure social, political and economic justice to all on the basic fundamentals of governing and is to be kept in mind by the law makers in enacting laws.

The Indian Constitution, thus, at various parts enshrines the objective of protecting the human rights of every individual.

ARTICLE 21: CONSTITUTION OF INDIA

Article 21 of the Indian Constitution states that no person shall be deprived of his life or personal liberty except according to the procedure established by law. This expression 'procedure established by law' was first taken in Gopalan case.[16] The expression may be said to mean any procedure which is enacted by the legislature and is also fair and reasonable. It incorporates the principle of natural justice, that a person cannot be deprived of his life and personal liberty, unless a specified procedure is laid down.

This clearly means that to deprive a person of his life or personal liberty:

a) There must be a law

b) It should lay down a procedure

c) The executive should follow this procedure while depriving a person of his life or public liberty.[17]

Article 21 which lay dormant for nearly three decades was again brought up by the decision of the Supreme Court in *Maneka Gandhi v. Union of India*.[18] Since then, a number of

[14] The Constitution of India, Bare Act (as on 9th Nov. 2015).
[15] The Constitution of India, Bare Act (as on 9th Nov. 2015).
[16] *A.K. Gopalan v. State of Madras*, AIR 1950 SC 27.
[17] M.P. JAIN, INDIAN CONSTITUTIONAL LAW (8TH ed. 2018).

decisions have found their way for establishment of a more concrete and solid form of right. Article 21 has been given a very expansive and wide meaning in terms of 'life' as well as 'personal liberty'.

P.N Bhagwati J., has observed in *Francis Coralie*,[19]

> It is not enough to secure compliance with prescription of Article 21 that there should be a law prescribing some semblance of a procedure for depriving a person of his life or personal liberty, but the procedure prescribed by the law must be reasonable, fair and just, and if not so, the law would be void as violating the guarantee of Article 21.

RIGHTS OF A PRISONER

A prisoner is a person who has been apprehended by a law enforcement officer and is in custody[20]. A prisoner, when detained and kept in a prison loses his personal liberty curtailed in accordance with law, but still he does not lose all his rights. The basic rights, i.e., human rights are still bestowed on him on account of his being a living human being.

Such a person only loses a part of his rights that enable him to live freely and is somewhat restricted in his free movement, and the rest of his rights are all very properly preserved.[21] The most important right of a prisoner is to have the integrity of his physical person and mental personality. Even within a prison, no person shall be deprived of his guaranteed rights save by methods which are fair, just and reasonable.[22]

A prisoner does not lose his basic constitutional rights and they have to be protected by due process of law. The basic right of life is a right protected even in custody and detention.

Krishna Iyer, J. speaking on behalf of the court in the *Second Sunil Batra case*[23] said:

"It is clear that a prisoner wears the armor of basic freedom even behind bars and that on breach thereof by lawless officials, the law will respond to his distress through ―writ" aid. The Indian human has a constant companion - the court armed with the constitution."

Prison in the form of dungeons has existed from times immemorial in the old civilizations all across the world. Prisons were deemed to maintain law and order by way of giving exemplary punishments to the wrong doers so as to give a message to the whole society, but in this view, the rights of a prisoner as a human being were totally neglected. The prison conditions, as per old records, had been barbaric and inhumane, and a person when became a prisoner lost all his rights.

The compassionate novelist, Charles Dickens, describes in "American Notes", the cruelty of solitary confinement against him in a Pennsylvania Penitentiary as:

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18 AIR 1978 SC 597.
19 *Francis Coralie v. The Administrator, UT Of Delhi*, AIR 1981 SC 746.
20 BLACK'S LAW DICTIONARY (8th ed. BRYAN A. GARNER, 2015).
21 *A.K. Roy v. Union of India,* AIR 1982 SC 710
22 *Sunil Batra v. Delhi Administration(I),* AIR 1978 SC 1675
23 *Sunil Batra v. Delhi Administration (II*), AIR 1980 SC 1579

> I am persuaded that those who devised this system of Prison Discipline, and those benevolent gentlemen who carry it into execution, do not know what it is that they are doing. I believe that very few men are capable of estimating the immense amount of torture and agony which this dreadful punishment, prolonged for years, inflicts upon the sufferers; and in guessing at it myself, and in reasoning from what I have seen written upon their faces, and what to my certain knowledge they feel within, I am only the more convinced that there is a depth of terrible endurance in it which none but the sufferers themselves can fathom, and which no man has right to inflict upon his fellow-creature.
>
> I hold this slow and daily tampering with the mysteries of the brain, to be immeasurable worse than any torture of the body: and because its ghastly signs and tokens are not so palpable to the eye and sense of touch as scars upon the flesh; because its wounds are not upon the surface, and it extorts few cries that human ears can hear, therefore, I denounce it, as a secret punishment which slumbering humanity is not roused up to stay.

ARTICLE 21 AND PRISONER'S RIGHTS

The criminal justice in the country and the conditions prevailing in the prisons had been extremely inhumane since long. The criminal trials were delayed inordinately, and police brutality had no bars.

Fortunately by reinterpreting Article 21 in *Maneka Gandhi case*, and by giving up the interpretation as made in *Gopalan case,* the Supreme Court has found a potent tool to seek to improve matters, and to fill in the vacuum arising from governmental inaction to undertake reform, in the area of criminal justice.[24]

The basic human rights now available to a prisoner may include:

1. Right to legal aid.
2. Right to speedy trial.
3. Right to fair trial.
4. Right to investigation.
5. Right to parole.
6. Right against handcuffing.
7. Right against long pre-trial confinement.
8. Right against delayed execution.
9. Right against custodial violence.
10. Right to privacy.

[24] M.P. JAIN, INDIAN CONSTITUTIONAL LAW (8th ed. 2018).

1. Right to Legal Aid:

Legal aid is a free or an inexpensive legal service, provided to those who cannot afford to pay full price.[25] The humanizing of the administration of criminal justice also suggested that legal aid should be made available to each and every individual.

This implies that even the poorer sections of society, who are unable to engage a counsel for themselves, shall be provided one by the state so that such a person is given a fair right of bringing forth his defence.

The obligation to provide free legal services to a poor accused arises not only when the trial begins but also when he is for the first time produced before the magistrate. In fact, it is the legal obligation of the magistrate or judge before whom such an accused is produced, to inform him that if he does not have the resources to engage a counsel for himself then he is entitled to free legal services at the cost of the state.

In the leading case of *M.H. Hoskot v. State of Maharashtra*,[26] it was held that the right to free legal aid is an essential ingredient of a reasonable, fair and just procedure of law. Free legal aid is a state's duty and not a government charity.

This right to free legal aid was further strengthened by Article 39-A[27] according to which it is the duty of all the state to provide free legal aid to the poor.

2. Right to Speedy Trial:

The right, though not specifically enumerated, the court has interpreted it to be inclusive in the broad sweep of Article 21. This Article requires that a person can only be deprived of his personal liberty in accordance with the procedure established by law which should be a just, fair and reasonable procedure.[28] One is considered innocent until proven guilty.

The Supreme Court, in respect to the right to speedy trial came up with the following propositions, to serve as guidelines in *AR Antulay v. RS Nayak*.[29]

1. Fair, just and reasonable procedure implicit in Article 21 of the Constitution creates a right in the accused to be tried speedily. Right to speedy trial is the right of the accused.
2. Right to speedy trial flowing from Article 21 encompasses all the stages, namely the stage of investigation, inquiry, appeal revision and retrial. This is how this court has understood this right and there is no reason to take a restricted view.
3. The concerns underlying the right to speedy trial from the point of view of the accused are: -
    a) The period of demand and pre-conviction detention should be as short as possible.

[25] BLACK'S LAW DICTIONARY (8thed. BRYAN A. GARNER, 2015).
[26] AIR 1978 SC 1548.
[27] Inserted by the Constitution (Forty Second Amendment) Act, 1976.
[28] NARENDER KUMAR, CONSTITUTIONAL LAW OF INDIA (10th ed. 2018).
[29] AIR 1992 SC 1701 (para 54).

b) The anxiety, expense, worry and disturbance to his vocation and peace, resulting from an unduly prolonged investigation, inquiry or trial should be minimal.

c) Undue delay may well result in impairment of the ability of the accused to defend himself, whether on account of death, disappearance or non-availability of witness or otherwise.

4. In every case, where the right to speedy trial is alleged to have been infringed, the first question to be put and answered must be who was responsible for the delay.

3. Right to Fair Trial:

Conducting a fair trial in a criminal trial is a sine qua non of right to personal liberty. A fair trial is the cornerstone of criminal justice.

If the trial of an offence in any case is not fair and free from bias, the trust of the people in the system of judiciary would be at stake and would result in shaking the confidence of the people in the system.[30]

Fair trial means a trial before an independent and impartial judge, a fair trial prosecution and a fair atmosphere. There would be no bias towards any accused, witness or any other person involved in the case in a fair trial. If witnesses are threatened or bribed, it would be a denial of fair trial.

4. Right to Fair Investigation:

Article 21 includes a fair trial, a fair procedure and a fair investigation. By reason of this right, an accused is entitled to be informed of all his fundamental and statutory rights included in due procedure. Such rights include actual proceedings in the court before a judge, and at the same time also includes a fair police investigation.

The apex court in *Siddharth Vashisth alias Manu Sharma v. State (NCT of Delhi)*[31] held that the criminal justice administration system in India places human rights and dignity for human life at a much higher pedestrian. The alleged accused is entitled to fairness and true investigation and fair trial and the prosecution is expected to play a balanced role in the trial of a crime. The investigation should be judicious, fair, transparent and expeditious to ensure compliance to basic rule of law.

5. Right to Parole:

Parole is the release of prisoner form imprisonment before the full sentence has been served.[32] It is a conditional release that may be granted to a convict for a certain period on account of good behavior.

Parole in recent times is seen as a method to enable the convict to return back to society. This release is given with the view to help the convict rehabilitate and reform himself by spending time with family.

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30 *K. Anbanzhagam v. Supd. of Police*, AIR 2004 SC 524.
31 AIR 2010 SC 2352 (para 82).
32 BLACK'S LAW DICTIONARY (8th ed. BRYAN A. GARNER, 2015).

6. Right against Handcuffing:

Handcuffing of under-trials and convicted prisoners has been taken to be a clear maltreatment. Imprisonment does not ipso facto mean that the fundamental rights are curtailed at once.

In the leading case of Prem Shankar Shukla v. Delhi administration[33] Krishna Iyer, J., observed that:

> Handcuffing is prima facie inhuman and, therefore, unreasonable, is over harsh and at the first blush, arbitrary. Absent fair procedure and objective monitoring to inflict –irons" is to resort zoological strategies repugnant to Article 21. Surely the competing claims of securing the prisoner form fleeing and protecting his personality from barbarity have to be harmonized. To prevent the escape of an under-trial is in public interest, reasonable, just and cannot, by itself be castigated. But to bind a man hand and foot, fetter his limbs with hoops of steel, shuffle him along in the streets and stand him for hours in the courts is to torture him, defile his dignity, vulgarize society and foul the soul of our Constitutional culture

7. Right against long Pre-trial Confinement:

Another aspect of the criminal administration in our country is the long pre-trial confinement of the accused persons. The persons are detained on the basis of mere suspicion and have to languish in prisons awaiting trial. Large numbers of accused are not even able to secure a bail for themselves. This perpetuates great injustice on the accused person and jeopardizes his personal liberty.[34]

This results in overcrowding of prisons. One of the reasons for this are the provisions regarding bail. Bail is granted on security and surety which not every accused can secure. Even for bailable offences, securing bail is not easy for poor persons.

8. Right against Delayed Execution:

The Supreme court in relation to the death sentence evolved a principle that if there is a prolonged delay in execution of a death sentence, it would be an "unjust, unfair and unreasonable" procedure to execute the sentence.[35]

The supreme court in T.V. Vatheeswaran v. State of Tamil Nadu[36] held that:

> The dehumanizing factor of prolonged delay in execution of a sentence of death has the constitutional implication of depriving a person of his life is an unjust, unfair and unreasonable way so as to offend the constitution guarantee that no person shall be deprived of his life or personal liberty except according to the

[33] AIR 1980 SC 1535.
[34] M.P. JAIN, INDIAN CONSTITUTIONAL LAW (8th ed. 2018).
[35] *Id*.
[36] AIR 1983 SC 361.

procedure established by law. A delay exceeding two years in execution of a sentence of death should be considered sufficient to entitle him to invoke Article 21 and demand quashing of sentence.

9. Right against Custodial Violence:

Right to life includes the right to live with human dignity and any kind of torture, assault and death in custody raises questions about the rule of law and administration of criminal justice system. The police brutality and torture on the accused person and under trials is condemned and it is a disturbing thing that tends to scare the minds of people.

The Supreme court in respect of this right came up with the following requirements to be followed in all the cases of rest in *D.K Basu v. State of west Bengal*.[37]

(1) The police personnel carrying out the arrest and handling the interrogation of the arrestee should bear accurate, visible and clear identification and name tags with their designations.

(2) The police officer carrying out the arrest shall prepare a memo of arrest at the time of arrest and such memo shall be attested by at least one witness.

(3) A person who has been arrested or detained and is being held in custody in a police station or interrogation centre or lock-up, shall be entitled to have one friend or relative or other person known to him, being informed, as soon as practicable.

(4) The time, place of arrest and venue of custody of an arrestee must be notified by the police where the next friend or relative of the arrestee lives outside the district or town.

(5) The person arrested must be made aware of this right to have someone informed of his arrest or detention as soon as he is put under arrest or is detained.

(6) An entry must be made in the diary of records at the place of detention regarding the arrest of the person and the person so informed about it.

(7) The arrestee should, where he requests, be also examined at the time of his arrest and major and minor injuries, if any present on his/her body, must be recorded at that time.

(8) The arrestee should be subjected to medical examination by a trained doctor every 48 hours during his detention in custody.

(9) Copies of all the documents including the memo of arrest, referred to above, should be sent to the Magistrate for his record.

(10) The arrestee may be permitted to meet his lawyer during interrogation, though not throughout the interrogation.

[37] AIR 1997 SC 610.

(11) A police control room should be provided at all District and State Headquarters, where information regarding the arrest and the place of custody of the arrestee shall be communicated by the officer causing the arrest.

10. Right to Privacy:

A prisoner within the four walls of a prison, although is under surveillance all the time, but a prisoner has also been given a right to his privacy.

This right to privacy includes in its ambit, his right to communicate with any of the inmates he wants to, and the right to not disclose any of his personal and family related details and information to anyone.

PROVISIONS FOR JUVENILES:

The criminology considers that the most important ingredients for constituting offences are: -

- Mens Rea
- Actus Reus

Also, law considers that any offence done by a person who is not capable of doing that offence is an act, as in case of a child below the age of 12 years.

However, there may be certain children who may commit any offence without knowing the consequences that may flow, and such children are called juveniles. A person who has not reached the age at which one should be treated as an adult by the criminal justice system is a juvenile.[38]

Under Article 15(3) of the Indian Constitution, the state is empowered to make special provisions for children. Juveniles are administered according to the Juvenile Justice (Care and Protection of Children) Act, 2015 and not according to the ordinary criminal administration system.

This is done so that they are provided with good and safe living conditions for their reformation and they might not be influenced by other hardened criminals to become future threats to society.

CONCLUSION

Penology has from times immemorial been the most traumatizing and daunting thing. An offender was considered worse than an animal. However, with the growth of society and the ideals of justice, equality and dignity, attention was also paid to the deplorable condition of the prisoners who were left to rot in prisons.

The formation of international organizations and recognition of human rights also included within its scope the prisoner‘s rights. The Constitution of India also provides for certain

[38] BLACK‘S LAW DICTIONARY (8th ed. BRYAN A. GARNER, 2015).

rights to the prisoners, but the system, time and again has mocked these. The only hopes of prisoners lie in the judiciary, which has succeeded a great deal to achieve these rights. However, a long way is yet to go, and milestones are yet to be achieved.

CAN THE GOVERNMENT SHUTDOWN THE INTERNET? - ANALYSING IN LIGHT OF ANURADHA BHASIN V. UNION OF INDIA

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ABSTRACT

Due to the recent rise in protests in India, whether due to the abrogation of Article 370 of the Indian Constitution which granted the State of J&K a semi-autonomous status or the Anti-CAA protests, many regions in India are facing the longest internet shutdown in any democratic country, earning India the moniker, ―Internet Shutdown Capital of the World". The alarming rise in internet shutdown orders is not only affecting the dissemination of ideas and expression over the Internet but is also negatively impacting trade and businesses which depend on the internet resulting in a huge loss in revenue. Such a disconcerting situation gave rise to a question in the mind of the author, whether a restriction on access to the internet infringes upon the fundamental right of the citizens?

The author, though the seminal judgement of *Anuradha Bhasin versus Union of India* has analysed the substantive and procedural elements of law regulating suspension of internet services, along with the principles guiding the orders restricting access to the Internet. The present paper is not restricted to constitutional provisions, but also encompasses relevant provisions of Indian Telegraph Act, Telecommunication Suspensions Rules and Section 144 of the Criminal Procedure Code.

KEYWORDS: Internet Shutdown- Internet Rights- Article 19(1)(a)- Section 144, Cr.P.C.- Suspension Rules, 2017

Per N.V. Ramana J. ―*Law should imbibe technological development and accordingly mould its rules so as to cater to the needs of society. Non-recognition of technology within the sphere of law is only a disservice to the inevitable."* [1]

INTRODUCTION

An ―Internet Shutdown" or ―Internet Kill Switch" is the intentional disruption of electronic communication or internet network, rendering it inaccessible or effectively unusable for a specific population or location in order to exert control over the information.[2]In other words, internet shutdowns are akin ―Digital Curfew" or ―Internet Blackout" as it places an absolute restriction on the use of internet services due to an order issued by a government authority.[3] A virtual shutdown extends beyond disruption of entire internet services, as it

[1] *Anuradha Bhasin v. Union of India*, 2020 SCC Online SC 25.
[2] RITU SRIVASTAVA & BIJO P. ABRAHAM, *Anatomy of Virtual Curfews : Human Rights vs. National Security*, APC, https://www.apc.org/en/pubs/anatomy-virtual-curfews-human-rights-vs-national-security .
[3] *Id*

includes activities such as throttling, blocking of websites or communication systems such as mobile or telephone network and restriction on broadcasting.[4] It may be limited to a specified time or place or sometimes it may even extend indefinitely.[5]

In recent times, due to the increased penetration of data and mobile services in India and along with the rise of real-time communication applications such as WhatsApp, among other, internet shutdown, i.e., suspension of mobile and fixed-line internet services is being increasingly used by the government as a preventive and reactionary tool in their disposal. This has led the country to be labelled as the "Internet Shutdown Capital of the World." Out of the estimated 385 internet shutdowns in India between January 2012 and February 2020, more than half of them were preventive, i.e., they were imposed due to anticipation of a law and order situation and rest were reactive, i.e., they were imposed to contain the law and order situation brewing in the specific region.[6] Some areas, such as the Kashmir region in the erstwhile state of Jammu and Kashmir, faced one of the longest internet shutdowns in the world of 213 Days from 4th August 2019 till 4th March 2020[7]. However, due to the lack of public notifications by the government, it is difficult to determine the duration of each shutdown.

Due to the alarming rise in instances of internet shutdown in India, there evolved the need to strengthen the nascent stage of internet freedom law in India. The author, through the prism of seminal judgment in *Anuradha Bhasin v. Union of India*[8], has analysed the substantive and procedural elements to determine the legality of the law regulating internet shutdown, along with the principles guiding the orders restricting access to the Internet.

BACKGROUND

In leading up to the abrogation of Article 370 of the Indian Constitution which granted the State of J&K, a semi-autonomous status, the government in anticipation of law and order situation restricted online communication which is still continuing as on 1st April, 2020. In response, a writ petition was filed by Ms. Anuradha Bhasin, the editor of the Kashmir Times, Srinagar Edition who argued suspension of internet services in the valley is tantamount to restriction on the right to free speech, and the said orders issued by the executive would not pass the test of proportionality and reasonability, and hence, internet access should be restored at the earliest.

FREEDOM TO ACCESS THE INTERNET: THE CONTENTION OF THE PETITIONER

Government overreach in imposing broad restrictions on fundamental rights, whether through the mechanism of IT Act, 2000 and its corresponding rules, or through a blanket ban under Section 144, Cr.P.C[9] would always result in individual liberty being subsumed by State to

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4 NAKUL NAYAK, *The Anatomy of Internet Shutdowns - I (Of kill Switches and Legal Vacuums)*, CENTRE FOR CORPORATE GOVERNANCE, https://ccgnludelhi.wordpress.com/2015/08/29/the-anatomy-of-internet-shutdowns-i-of-kill-switches-and-legal-vacuums/ .

5 SHADAB NAZMI, *Why India Shuts Down the Internet More Than Any Other Democracy*, BBC NEWS, https://www.bbc.com/news/world-asia-india-50819905/ .

6 *Longest Shutdowns*, SFLC, https://internetshutdowns.in/ .

7 *Id*.

8 2020 SCC Online SC 25.

9 Criminal Procedure Code, 1973, Section 144.

maintain social control over its populace. Such arbitrary and high-handed restrictions over access to the internet would always give a fear of turning a vibrant democracy into a Police State. With this in note, the submissions of the petitioner can be summarised as below:

A. Suspension of internet services has affected the dissemination of information through Print Media. Further, such a curtailment of access to the internet is an infringement of freedom of speech and expression under Article 19(1)(a)[10] which has to be tested on the touchstone of reasonability and proportionality.

B. The procedure under Temporary Suspension of Telecom Services (Public Emergency or Public Service) Rules, 2017 (hereinafter referred to as "Suspension Rules") contemplates a restriction of temporary nature. Moreover, such a blanket ban on the use of internet services under the Suspension Rules without providing any reasoning for such restrictions suffer from non--application of mind.

C. The restrictions orders were based on an apprehension of the likelihood that there would be a danger to the law and order situation, however, public order is not the same as law and order, and such blanket restriction on internet services which amount to a complete ban cannot be imposed on mere apprehension.

SECURITY OF THE STATE: THE CONTENTION OF THE GOVERNMENT

The State contended that the restrictions measures imposed in the State of J&K were made after taking into account the historical background of the State, especially the rising instances of digital and cross-border terrorism and militancy. This is in line with the paramount duty of the State to ensure security by protecting its citizens from online communication which could be used to incite violence or spreading fake news or images to spread the violence around the State. Further, the matter being of national security, the court has limited jurisdiction to interfere within the same, especially when there are no allegations of impropriety against the officials who passed orders under the appropriate mechanism.

IS RESTRICTING ACCESS TO THE INTERNET AN AFFRONT ON FUNDAMENTAL RIGHTS?

Individual liberty and security concerns of the State are two different sides of the same coin which always poses a challenge to maintain a balance between the two-extreme sides of the pendulum in order to ensure that preference of one, liberty or security does not compromise the other. This makes the judgment significant for the reason that the Hon'ble Supreme Court by taking measures to protect the individual right to access the internet *vis-à-vis* internet shutdown, has set the course for all future challenges to internet shutdown orders in India.

WHETHER THE GOVERNMENT CAN CLAIM EXEMPTION FROM PRODUCING THE ORDERS FOR THE RESTRICTIONS?

One of the most significant aspects of this judgment[11] is that the Hon'ble Court has held that the State is not exempted from producing the order which imposes internet restrictions. Earlier, the government could escape from scrutiny by claiming privilege over the order which prevented the orders from being tested upon the touchstone of reasonableness or proportionality

[10] The Constitution of India, 1950, Art. 19(1)(a).
[11] *Anuradha Bhasin v. Union of India*, 2020 SCC Online SC 25

or for the court to judge the order legality. Thus, the court has established that the State must disclose information for the petitioner to avail the remedy under Article 32 of the Indian Constitution. In other words, the state has to make public any order restricting the exercise of Fundamental Rights unless there is a countervailing public interest for maintaining secrecy, in which the court shall step into determine the portion of the order which can be redacted by the State.

Hence, any order which requires compliance from the people, needs to be notified reliably and directly to the people, especially if the order affects the liberty, lives and property of an individual. This is not only a prescriptive requirement under the settled principles of Natural Justice but is only an established value of a normative constitution.

II. WHETHER THE RESTRICTIONS INFRINGED UPON THE FUNDAMENTAL RIGHTS UNDER ARTICLE 21 AND ARTICLE 19, SPECIFICALLY CONCERNING FREEDOM OF SPEECH AND EXPRESSION, FREEDOM OF MOVEMENT AND RIGHT TO FREE TRADE AND VOCATION?

The court has followed its previous judgments[12] in extending protection to new forms of expression, which in the 21st century is the dissemination of information through the internet. Hence, the expression of thought through the medium of the internet is protected under Article 19(1)(a) and at the same time, restricted under Article 19(2) of the Constitution. On similar lines, the court acknowledged that the internet has played an important role in the growth of trade and commerce, hence freedom of trade and commerce encompasses the use of the internet as a constitutionally protected right under Article 19(1)(g), subject to the restrictions provided under Article 19(6).

However, the Hon‘ble Court did not declare the right to access the internet as a fundamental right and instead made a difference between the internet as a tool in itself and freedom of expression or carrying of trade through the medium of internet[13]. Without providing the right to access the internet as a fundamental right in itself results in a situation where there can be complete prohibition on access to the internet when read with Article 19(2). Earlier judgments[14] has shown that the Hon‘ble court has supported the notion that restriction would also include a complete prohibition in appropriate cases.

One of the significant aspects of the case is to avoid a situation where complete prohibition imposes an unreasonable burden on the freedom of speech and expression. The Hon‘ble Court has expounded upon the standard or the test of proportionality to determine the reasonability of the measure and whether it is the ―least restrictive measure" undertaken by the State to balance the security of the state with lawful exercise by an individual of their fundamental rights in the matter of internet shutdown.

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12 *Indian Express v. Union of India*, (1985) 1 SCC 641; *Odyssey Communications Pvt. Ltd. v. Lokvidayan Sanghatana,* (1988) 3 SCC 410.

13 *Anuradha Bhasin v. Union of India*, 2020 SCC Online SC 25

14 *Madhya Bharat Cotton Association Ltd. v. Union of India*, AIR 1954 SC 634;*Narendra Kumar v. Union of India*, (1960) 2 SCR 375; *State of Maharashtra v. Himmatbhai Narbheram Rao*, (1969) 2 SCR 392.

A. The government would have to justify the imposition of the complete prohibition by publishing the order and provide an explanation as to why lesser alternatives were deemed to be inadequate.

B. Reasonability of the measure would be dependent on factors such as the stage of public emergency, nature of urgency, the territorial extent and duration of the restriction, and the nature of such restriction.

C. The court would determine whether the restriction amounts to a complete prohibition after considering the circumstances and facts of each case.

In other words, the restrictions should be reasonable, proportional, prescribed by law, and should be for a legitimate purpose and the least restrictive alternative measure.

ARE THERE SUFFICIENT SAFEGUARDS PRESENT IN THE MECHANISM REGULATING INTERNET SHUTDOWN?

I. WHETHER THE ORDER FOR SUSPENSION OF TELECOM AND INTERNET SERVICES ARE VALID UNDER THE CURRENT FRAMEWORK?

To understand the validity of orders prohibiting access to the internet, the procedural law governing the existing framework of internet shutdown needs to be understood. The procedural mechanism underlying internet shutdown is found under the Telegraph Act, the Information Technology Act, and the Code of Criminal Procedure.

Under the Telegraph Act, the Suspension Rules, 2017 were notified which allowed the government to restrict access to the internet, subject to the fulfilment of requirements mentioned therein the rules. Reiterating from the Suspension Rules, the judgment held that order for suspension of telecommunications including the internet can only be given by the competent authority, which under ordinary circumstances, would be the Secretary to the Ministry of Home Affairs[15]. Further, if the competent authority does not confirm within 24 hours, the order shall cease to continue[16].

As a safeguard, the order shall state reasons for the suspension, which should arise from ‗necessary' and ‗unavoidable' circumstances. Further, the suspension orders can only be issued in the interest of public safety or in the situation of public emergency. Hence. The Hon'ble court has effectively ended the practice of the government using Section 144 of Criminal Procedure Code to shut the internet down and has held that internet services can only be suspended by following the procedure under Suspension Rules in the occurrence of a ―public emergency" or ―in the interest of public safety".

Moreover, the court has underscored that the executive cannot indefinitely suspend internet services under the Suspension Rules and such an extreme recourse can only be utilized for a temporary duration. As a check on the long shutdown in India, the review committee is to ‗Review' the suspension orders every seven days.

[15] Temporary Suspension of Telecom Services (Public Emergency or Public Safety) Rules, 2017. Rule 2(1).
[16] Temporary Suspension of Telecom Services (Public Emergency or Public Safety) Rules, 2017, Rule 2(1).

In a nod to transparency and accountability, the Hon'ble court has held that the government needs to make available to the public the suspension order, irrespective of whether the Suspension Rules or the Telegraph Act provided for the same. Even though the suspension rules were subjected to judicial review, by not making the orders public, the executive was able to evade through judicial scrutiny. Hence, the judgment has reaffirmed the constitutional right of an aggrieved person to challenge order for suspension of telecom and internet services under Article 226 and 32 of the Indian Constitution by ensuring the said order is available for public and judicial scrutiny.

II. Whether the state can impose restrictions on the access to the internet under section 144 of criminal procedure code?

A significant aspect of the judgment is that the Hon'ble court has recognized that Section 144 of Cr.P.C. cannot be used to suppress "legitimate expression of grievance or opinion or exercise of democratic rights". This is a significant step forward in the crusade for Internet freedom for the reason that the government is increasingly turning to the draconian powers under Section 144 of Cr.P.C. to order internet shutdown, even in cases of the likelihood of danger.

Though the court held that the power under Section 144 of Cr.P.C. is one of being in preventive and remedial, and the same can be exercised in cases of 'present danger' as well as when there is an apprehension of danger. However, to ensure the said power is not used unchecked, the court has laid down a test[17] to guide the exercise of Section 144 of Cr.P.C.

> The danger contemplated under Section 144 of Cr.P.C. to issue orders should be like an "emergency" and it should have a direct and proximate relation with the online expression sought to be restricted.
>
> The power under Section 144 of Cr.P.C. should be exercised in a reasonable and bona fide manner and should indicate application of mind. The said order should be published and state the material facts to enable judicial scrutiny of the same.
>
> The magistrate while exercising power under Section 144 ofCr.P.C. is bound by the principles of proportionality and thereafter applies the "least intrusive measure".
>
> Repetitive orders passed under this Section would amount to an abuse of power.

CONCLUSION

The present pronouncement of Supreme court in *Anuradha Bhasin*v. *Union of India* is the Hon'ble apex court's first attempt to curb the disproportionate, unnecessary and arbitrary use of network and internet shutdown by the government. The judgment though has its positive aspects, has left certain issues unaddressed.

Firstly, the Hon'ble court limited itself from declaring the right to access the internet as a fundamental right on the ground that it was raised as an issue by the petitioner, nonetheless, the court upheld the right to freedom of speech and expression under Article 19(1)(a), and the right to carry on any trade or business under 19(1)(g), using the medium of internet as constitutionally

[17] *Anuradha Bhasin v. Union of India*, 2020 SCC Online SC 25.

protected rights. Whether the Hon‘ble court would recognise the right to access the internet as a fundamental right in the future, is yet to be seen.

Secondly, in an effort to maintain the balance between right of individual and security of the state, the Hon‘ble apex court did not intrude upon government right to curb internet access in cases of public safety or other such necessary circumstance, rather, the Hon‘ble court laid down the extent to which the government can curb access to the internet services under the current legal framework and the principles which would guide the administration to issue the said suspension orders.

Lastly, on the issue of internet suspension in Kashmir, for which the writ petition was filed, the judgment fell short of providing relief to the people of Kashmir and instead, relied upon the good faith of the state government to review the orders without any specific directions given for the same.

STEPS TAKEN BY GOVERNMENTS DURING EPIDEMICS/PANDEMICS.

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ABSTRACT

The research paper studies steps taken by India, China and United States of America when faced by an Epidemic or a Pandemic. It contrasts and compares the steps and level of preparedness of a democracy (India), another democracy with the same ruling party since nearly a century (China) and a federation (United States of America).

Keywords: Pandemic, epidemic, government, COVID-19, government.

INTRODUCTION

Controlling the spread of deadly infectious diseases is the need of the hour in today's modern era. A period of isolation and quarantine is recommended to minimise the spread of such diseases. Quarantine is the period of time when an animal or a person that has or may have a disease is kept away from others in order to prevent the disease from spreading.

REVIEW OF LITERATURE

Epidemic Diseases and Pandemic Diseases: An epidemic disease is one, affecting many persons at the same time, and spreading from person to person in a locality where the disease is not permanently prevalent. The World Health Organization (WHO), further, specifies epidemic as occurring at the level of a region or community.[1]

A pandemic disease is an epidemic that has spread over a large area, i.e., it is prevalent throughout the entire country, continent, or the whole world. The WHO more specifically defines a pandemic as a worldwide spread of a new disease.[2]

In the history, a few epidemic and pandemic diseases have caused global turmoil. A few of such diseases are:

(i) Bubonic Plague: A highly infectious disease, also called The Black Death, caused by Yersinia pestis, via an infected flea. The first pandemic occurred in the spring of 542, second in 1347 killing one third of the European population and the third in the mid nineteenth century. This disease witnessed the first quarantine regulations.

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1 *—Epidemic" vs. —Pandemic" vs. —Endemic": What Do These Terms Mean?* , DICTIONARY.COM, https://www.dictionary.com/e/epidemic-vs-pandemic/.

2 *Supra* Note 1.

(ii) Influenza (H2N2): The pandemic struck the world in three waves between 1918-1919. The World Health Organization had implemented a global influenza surveillance network that provided early warning, when the novel influenza (H2N2) virus, began spreading in China in February, 1957 and worldwide later that year. Vaccines were developed in the Western countries, but, were not yet available when the pandemic began to spread simultaneously with the opening of schools in several countries.[3]

(iii) SARS coronavirus (SARS-CoV): Virus was identified in 2003. SARS-CoV is thought to be an animal virus from, as-yet-uncertain animal reservoir, perhaps, bats, that spread to other animals (civet cats) and at the first place, infected humans in the Guangdong province of Southern China in 2002. The epidemic have spread to 26 countries and resulted in more than 8,000 cases.[4] 774 deaths occurred due to this infection. Clinical isolation and quarantine are the most effective methods of prevention and of cure. There are no vaccines for SARS.

(iv) H1N1 Influenza Virus — Swine Flu: The pandemic caused havoc worldwide, after its outbreak in North America in 2008 with 700 million to 1.4 billion confirmed cases and death of 18,036 (WHO confirmed) and 286,000 (CDC estimation). It is an airborne respiratory disease. Quarantine and prevention systems were established by the countries, after which prevention vaccines were developed. Even, in today‘s time, severe cases of Swine Flu (which develop into pneumonia) can be fatal.

(v) COVID-19: Coronavirus outbreak was declared a pandemic on the 11th of March,2020 by WHO. It is 95% the same as SARS (severe acute respiratory syndrome). The outbreak started at a wet market in Wuhan, China which sells exotic animals. Even, though, the source of the virus is not confirmed, it has been suspected that bats infected a chicken which lead to the spread. There is no vaccine for prevention of the virus and quarantine is the only prevention technique. Currently, most of the countries in the world are under complete lock down. The most affected country at the moment is Italy with 80,589 cases and 9,134 deaths (till 27/03/2020).[5]

INDIA — LARGEST DEMOCRACY IN THE WORLD

Diseases and Steps taken by the government:

India has faced a few outbreaks. Few of the diseases are:

1. Plague Pandemic: More than 10 million people died in India, due to the reoccurrence of plague, after 28 years between 1898 and 1950. It hit 7 States of India, again in the February 2002; a vector and rodent surveillance system was activated and the issue was brought under control in the shortest time. However, it is still active in 7 states.

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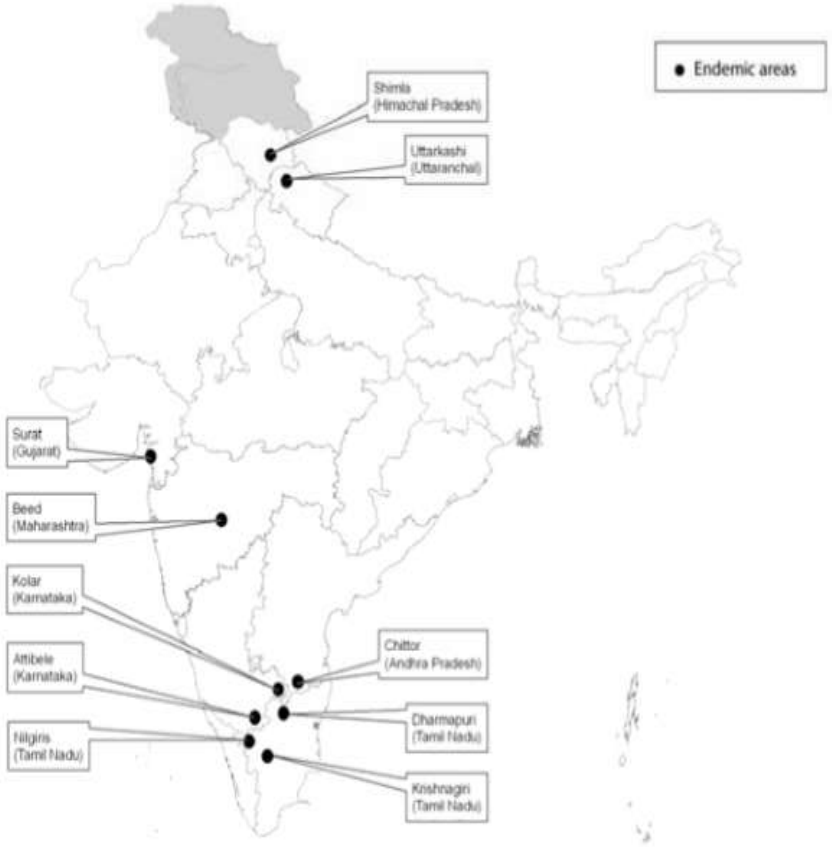
3 EUGENIA TOGNOTTI, *Lessons from the History of Quarantine, from Plague to Influenza A*, 19(2) PMS JOURNALS: EMERGING INFECTIOUS DISEASES 254, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3559034/.

4 *SARS(Severe Acute Respiratory Syndrome)*,WORLD HEALTH ORGANISATION, https://www.who.int/ith/diseases/sars/en/.

5 WORLDOMETER, https://www.worldometers.info/coronavirus/country/italy/.

Figure 15 - Plague-endemic areas in India



Data Source: National Institute for Communicable Diseases, New Delhi, India. Map Production: Public Health Mapping & GIS; Communicable Diseases (CDS); World Health Organization

Legal Steps: A surveillance network is active. The National Central Plague Laboratory in Delhi, co-ordinates plague surveillance in the country, maintains laboratory facilities and quality assurance procedures, performs outbreak investigations, maintains, isolates, organizes inter-state plague co-ordination meetings and advises on control measures. The plague surveillance unit in Bangalore,is in charge of trapping and collecting rodents, collecting dog sera, bacteriological, serological and entomological investigations, rodent ecto-parasite surveys, insecticide susceptibility testing and investigation of rat falls and suspected outbreaks. It organizes field-based training and co-ordinates the surveillance activities of State plague control units. Seven State plague control units traps and collects rodents, collect sera and rodent organs, transport them to the respective laboratories, and conduct rodent ecto-parasite surveys and rodent and flea control when required.[6]

[6] *Id.*at 3.

2. EBOLA VIRUS DISEASE (EVD) / EBOLA HAEMORRHAGIC FEVER (EHF), 2014 EPIDEMIC

The epidemic is transmitted via, a virus, from the wild animals which affects the human population. Deaths occur in 90% of the infected cases. No special treatment or vaccine is available for this disease. The prevention method comprises of isolation and barrier nursing techniques.

Legal Steps:

A PIL was filed by Advocate Vineet Dhanda.

- The Supreme Court issued a notice to the Centre on the PIL, seeking immediate steps for proper screening of international flyers coming to India from Ebola virus-affected countries to prevent the deadly virus from spreading.
- A bench of Chief Justice R M Lodha, Justice Kurian Joseph and R F Nariman, also issued notice to the Ministries of Health, Home Affairs, Civil Aviation and External Affairs and the Governments of Delhi, Karnataka, Maharashtra, Tamil Nadu and West Bengal.
- International passengers at the airport and sea ports were quarantined under Section 270 of the Indian Penal Code, 1860 - Whoever malignantly does any act which is, and which he knows or has a reason to believe to be, likely to spread the infection of any disease dangerous to life, shall be punished with imprisonment, of either description for a term which may extend to two years, or with fine, or with both.

3. COVID — 19 Pandemic

India has faced 724 cases and 17 deaths in the country (as of 27/03/2020).

Legal Steps:

- Besides the above lockdown, a notice on home quarantine was issued by the Ministry of Health and Family Welfare. This notice issues guidelines on home quarantine.
- The notice includes, tips for people in contact with COVID-19 patients and tips for isolation for the patients.
- 3 categories were made for the passengers coming from China, Korea, France, Germany, Spain, Italy and Iran for Airport Screening.[7]

  (i) Category A (High Risk): A passenger with fever, cough, shortness of breath, with a history of travel to or residence in a country/area or territory reporting local transmission of COVID-19 disease, during the 14 days prior to symptom onset or a patient with any acute respiratory illness and having been in contact with a COVID-19 case in the last 14 days prior to the onset of symptoms;

  Action: - Segregated from other passengers and sent for Isolation.

[7] *SOP for Categorization of Passengers for COVID 19 coming from China, Democratic Republic of Korea, France, Germany, Spain, Italy, Iran for Airport Screening. Ministry of Health and Family Welfare*, MINISTRY OF HEALTH AND FAMILY WELFARE, https://www.mohfw.gov.in/pdf/SOPforqurantine.pdf.

(ii) Category B (Moderate Risk): An asymptomatic passenger coming from China, Democratic Republic of Korea, France Germany, Spain, Italy, Iran and are elderly (above 60 years), Hypertensive, Diabetic, Asthmatic.

Action: - To be shifted by the State Government to a dedicated quarantine facility and monitored daily by the State Government for next 14 days. In case, they develop any symptoms, they should be isolated.

(ii) Category C (Low Risk): An asymptomatic passenger coming from any Covid-19 affected country, including passengers coming from China, Democratic Republic of Korea, France Germany, Spain, Italy, Iran.

Action: - To be kept under Home Quarantine and will be monitored by IDSP network for 14 days, if, they develop fever/ cough or difficulty in breathing, within 14 days after return from any Covid-19 affected countries, should immediately contact the National helpline for further management.

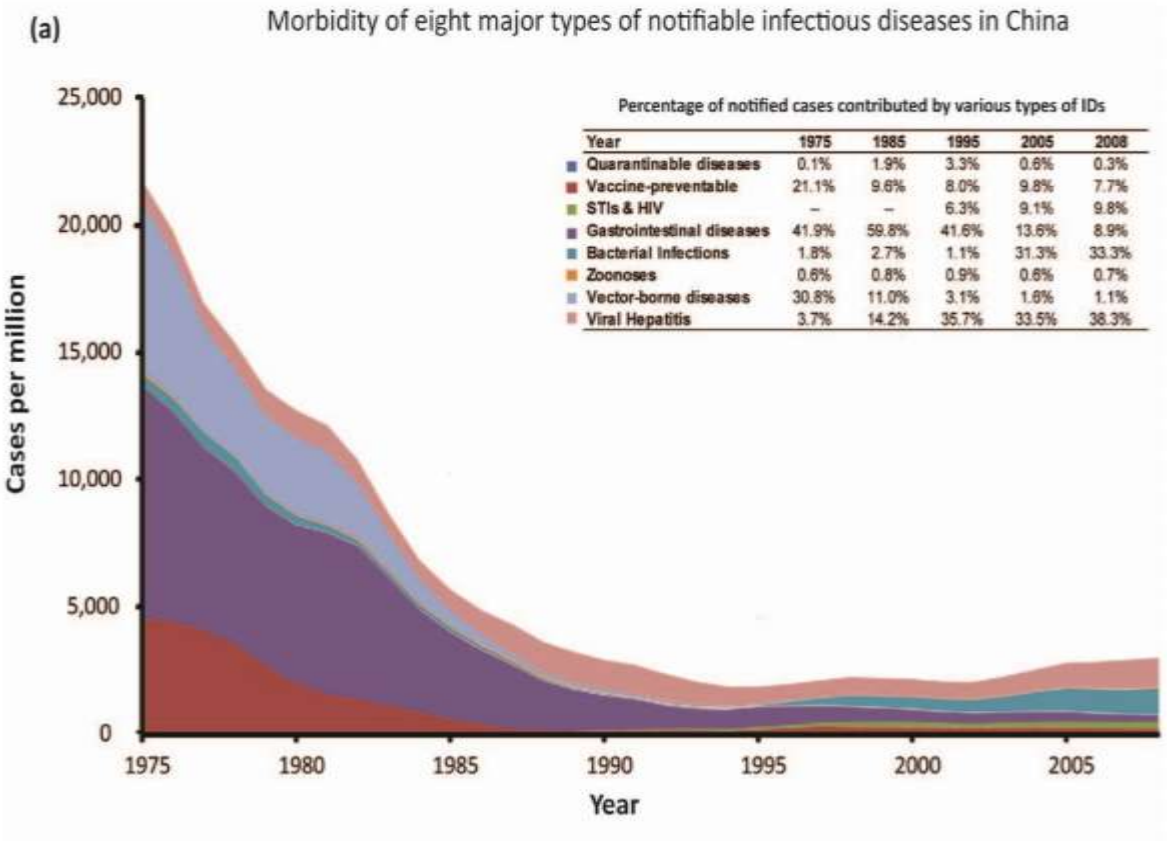
- The Supreme Court of India has indefinitely extended the period of limitation on filing petitions, applications, suits, appeals, and other proceedings at courts and tribunals across the country, in light of the present circumstance, caused by the Covid-19 pandemic.[8]

- A 14-hour voluntary public curfew, at the instance of the Prime Minister was observed on 22nd March, 2020. Due, to further worsening of the situation, a 21-day nation- wide lockdown was announced which began from 24th March, 2020. Home delivery for groceries and other essential items is recommended.

People's Republic of Chdina — Ruled by the Communist Party of China since 1945

Diseases and Steps taken by the government:

[8] NITHIN THOMAS PRASAD, *Supreme Court: No Hearing of Petitions and No New Petitions Can be filed due to Covid-19*, MERCOM, https://mercomindia.com/supreme-court-no-hearing-petitions-covid-19/.



Source: Zhang L., (2012). Trends in notifiable infectious diseases in China. Trends in notifiable infectious diseases in China.

1. YELLOW FEVER EPIDEMIC

The Chinese Centre for Disease Control (CDC) reported 11 imported yellow fever cases by April, 2017. These cases were mainly because of the Chinese workers, working in large firms in Africa. Yellow fever virus is estimated to cause 200,000 cases of disease and 30,000 deaths each year, 90% in Africa.[9] If, not controlled, the disease can cause many casualties.

Legal Steps: [10]

- Intensifying multi-sectoral co-ordination and collaboration,
- Strengthening surveillance, vector monitoring and risk assessment,
- Enhancing clinical management of yellow fever cases,

[9] *Yellow Fever*, CENTERS FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/globalhealth/newsroom/topics/yellowfever/index.html.

[10] *Yellow Fever- China*, WORLD HEALTH ORGANISATION, https://www.who.int/csr/don/22-april-2016-yellow-fever-china/en/.

- Conducting vector control activities,
- Carrying out public risk communication activities,
- Deploying a medical team to Angola, to provide yellow fever vaccine to the unvaccinated Chinese nationals.

2. MIDDLE EAST RESPIRATORY SYNDROME CORONAVIRUS (MERS-COV)

The above, is a viral respiratory disease that originated in Saudi Arabia in 2012. One new confirmed case was again found in China in May, 2015.

Legal Steps:

Actively treating the patient and strengthening hospital infection control measures;

Testing of the patient samples and sequencing the virus and ensuring laboratory biosafety;

Strengthening of the emergency surveillance, in particular, fever screening in outpatient settings;

Strengthening tracing, management and health monitoring of close contacts;

Ensuring risk communication to the public.

3. COVID — 19 Pandemic

Coronavirus originated in a market in Wuhan, China and has caused global distress. There is no preventive vaccine for this pandemic. Elderly people are most prone to this virus. As, of March 27, 531,898 cases have been recorded around the world; 81,298 of which have been reported in China. The province of Hubei, where Wuhan City is located, accounts for 67,801 of these cases.

Legal Steps:

Using Article 4 of the Frontier Health and Quarantine Law, China imposed Airport Screening / Port Screening for international or Chinese passengers entering or leaving the country.

- The Chinese government isolated the Covid patients in a hotel in the south-eastern city of Quanzhou. 58 of 71 people, present in the hotel were under quarantine. 3 days later, on 7th March, the building collapsed, killing 29 people. 42 people survived the accident. Quanzhou is about 600 miles from Wuhan, the epicentre of the corona virus outbreak in China, where more than 3,000 people have died from the virus. An investigation is going on, to find the reason behind the collapse and several people have been taken into custody, majority of them being the hotel staff.
- Wuhan city was initially put under lockdown on 23rdJanuary, 2020. After a few weeks, entire China was kept under lockdown. People were not allowed to leave their houses for essential items such as food and medicine. School and colleges were closed indefinitely and so was the public transport. The streets were wiped out of human presence. Only the

vehicles with special permission, were permitted on the roads. Chinese police stepped out and visited door- to- door, to force ill people to get into isolation. A disabled boy reportedly died, after his father and brother were taken to be quarantined, due to starvation and dehydration.

- The Chinese government, after nearly 2 months, relaxed the order and allowed some people to travel for work. Restaurants were opened with the condition that, they have to check the temperature of the customers, before entering. Travellers from heavily hit countries, to isolate themselves at their homes or in government-mandated centres for 14 days.

- Chinese government has announced that, it will lift the lockdown of Wuhan on 8thApril, 2020.

- China‘s Central Bank launched a $79 billion stimulus effort, to help the country‘s corona virus-stricken companies as an attempt to cover up the financial restraint, caused due to the lockdown.

- People‘s Bank of China also plans to lower lending rates to support the companies, while, financial regulators have delayed the introduction of new rules, in order to avoid further tightening market liquidity.

Law suits filed against China:

- A 20 trillion-dollar law suit was filed in the United States District Court creation and release, accidental or otherwise, of the Novel Coronavirus (COVID-19) as a biological weapon in violation of China‘s International obligations.

- It is alleged that, the virus was recklessly released in Wuhan and is a biological weapon for mass destruction.

- The plaintiffs, now cite the following causes of action, to sue the Chinese Government for the viral outbreak, i.e.,:[11]

  (i) Aiding and abetting the risk of death or serious bodily injuries to US citizens

  (ii) Provision of material support to terrorists

  (iii) Conspiracy to cause injury and even death of US Citizens

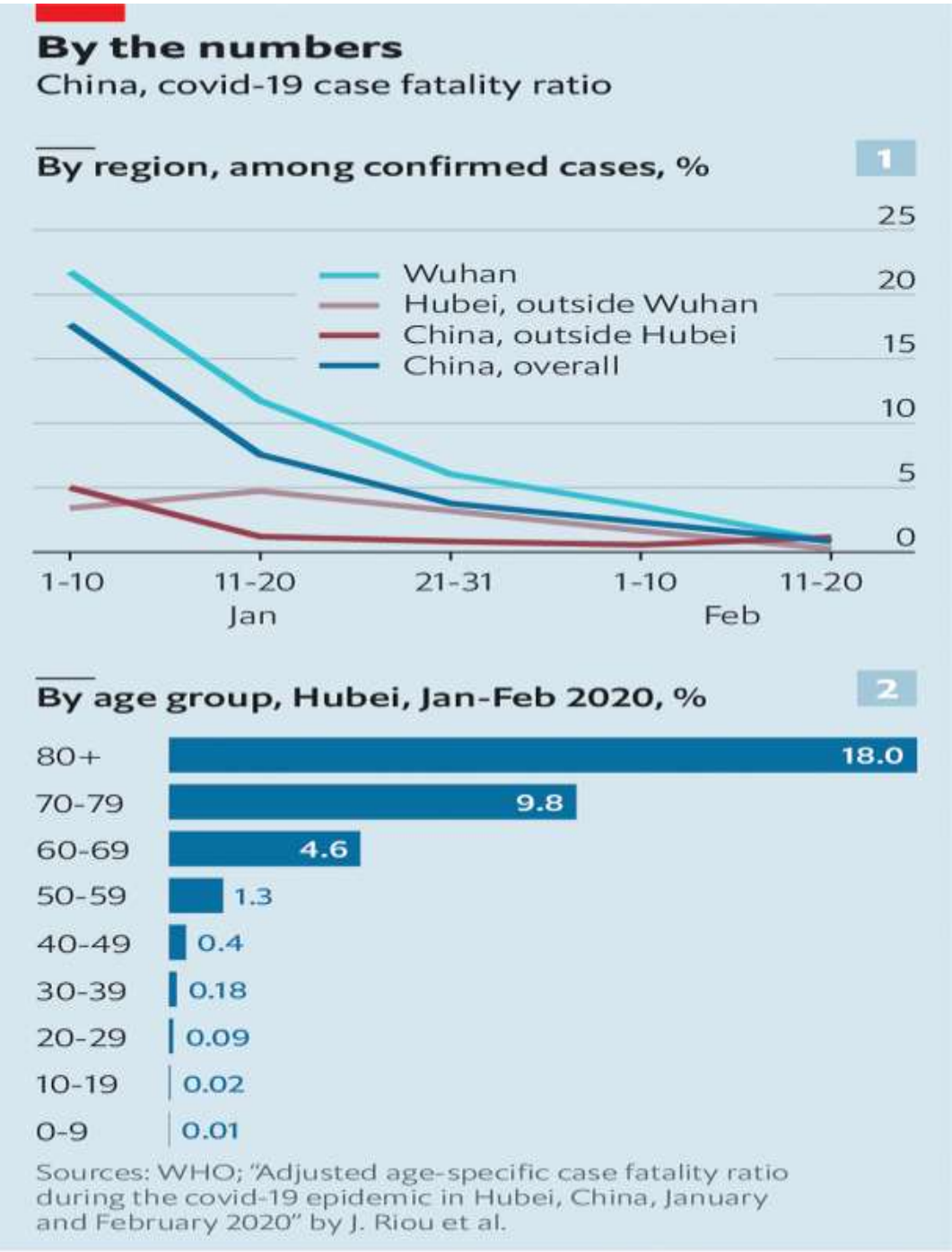
  (iv) Negligence

  (v) Wrongful death

  (vi) Assault and battery

[11] MEERA EMMANUEL, *Covid-19 was designed by China as a biowarfare weapon*, BAR AND BENCH,https://www.barandbench.com/news/litigation/covid-19-was-designed-by-china-as-a-biowarfare-weapon-20-trillion-dollar-lawsuit-filed-against-china-in-us-district.

- In India, a Court in Bihar, is yet, to hear a complaint filed by an Advocate Sudheer Kumar Ojha, alleging that, the Chinese President Xi Jinping and Chinese ambassador Sun Weidong, manufactured the Coronavirus virus in a lab in Wuhan pursuant to a conspiracy to become a "super power".[12]



[12] *Id.*at 11.

United States of America — Worlds Oldest Surviving Federation

- Section 361 of the Public Health Service Act (PHS Act), grants the Secretary of Health and Human Services (Secretary), the authority to make and enforce regulations necessary ~~–to~~ prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the States or possessions, or from one State or possession into any other State or possession."

- A Federal Isolation and Quarantine Law was introduced, to protect citizens from infectious diseases. Violation of a federal quarantine or isolation order is a criminal misdemeanour, and individuals may be subject to a fine of up to $100,000, one year in jail, or both; organizational violations may be subject to fines of up to $200,000 per event.

- Under 42 Code of Federal Regulations parts 70 and 71, CDC (Centre for Disease Control and Prevention), is authorized to detain, medically examine, and release persons arriving into the United States and traveling between States, who are suspected of carrying these communicable diseases.

- By Executive Order of the President, federal isolation and quarantine are authorized for these communicable diseases: [13]

  (i) Cholera

  (ii) Diphtheria

  (iii) Infectious tuberculosis

  (iv) Plague

  (v) Smallpox

  (vi) Yellow fever

  (vii) Viral haemorrhagic fevers (like Ebola)

  (viii) Severe Acute Respiratory Syndrome (SARS, MERS, COVID-19)

  (ix) Flu, that can cause a pandemic

  - National Strategy for Pandemic Influenza

  - USA came up with a National Strategy in 2005, with an aim to stop, slow down, control and prevent the spread of pandemic influenza such as Avian Influenza, Swine Influenza and A(H5N1) viruses.

[13] *What diseases are subject to Federal isolation and quarantine law?,* U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES,https://www.hhs.gov/answers/public-health-and-safety/what-diseases-are-subject-to-federal-isolation-and-quarantine-law/index.html.

- National Strategy for Pandemic Influenza Implementation Plan was also formulated in May, 2006, with comprehensive plans on command, control and co-ordination of federal response to pandemic, transportation and border control, human and animal health protection and law enforcement, public control and safety.

1. Yellow Fever Epidemic

A bite of an infected mosquito causes yellow fever. The virus is epidemic in Africa and South America, which started in 1799 and continued till 1905, causing 100,000 to 150,000 deaths.[14]

Legal step: In 1799, a quarantine station and hospital were built at the port of Philadelphia, in response to the outbreak that started in 1793 (according to CDC timeline). The epidemic had already killed 5,000 of the city‘s 45,000 residents and prompted approximately another 17,000 to flee. Philadelphia served as the nation‘s capital at that time.

2. Severe Acute Respiratory Syndrome - SARS

A total of 8,098 people became sick worldwide, in 2003, leading to 774 deaths. Even though, only 8 US citizens died, the government took steps, to further prevent the disease from occurring.

Legal Steps: [15]

- Activated its Emergency Operations Centre to provide round-the-clock co-ordination and response.
- Committed more than 800 medical experts and support staff to work on the SARS response.
- Deployed medical officers, epidemiologists, and other specialists, to assist with on-site investigations around the world.
- Provided assistance to the State and local health departments, in investigating possible cases of SARS in the United States.
- Conducted extensive laboratory testing, of clinical specimens of SARS patients, to identify the cause of the disease.
- Initiated a system for distributing health alert notices to travellers, who may have been exposed to cases of SARS.

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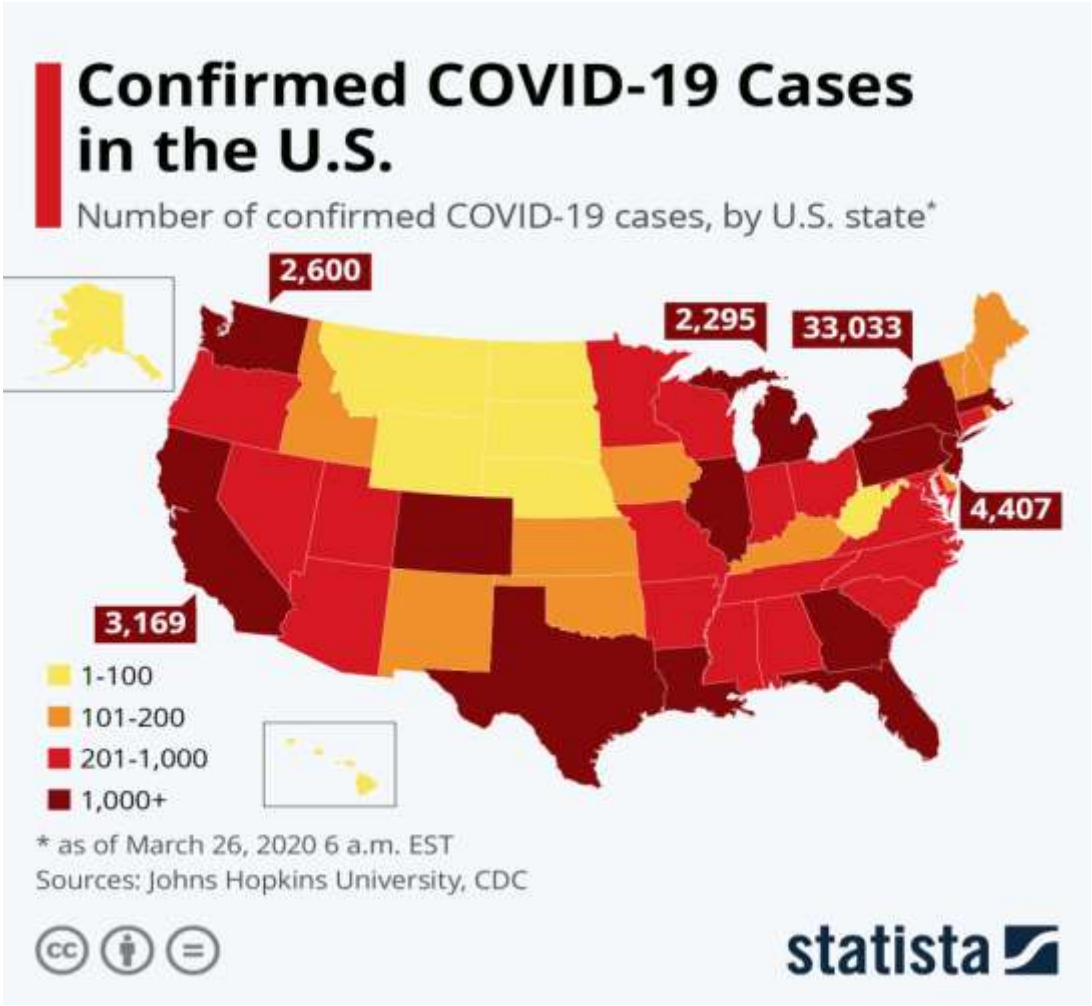
[14] K D Patterson, *Yellow Fever Epidemics and Mortality in the United States, 1693-1905*, NATIONAL LIBRARY OF MEDICINE, https://www.ncbi.nlm.nih.gov/pubmed/1604377.

[15] *SARS Basics Fact Sheet*, CENTERS FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/sars/about/fs-sars.html.

- CDC increased the number of quarantine stations from 8 to 22 between 2004- 2007, as a result of SARS and concerns about 9/11 bio terrorism.[16]

3. COVID — 19 Pandemic

104,837 cases have been reported and 1,711 deaths have been recorded in USA (as of 27/03/2020). It is now, the world's highest number.

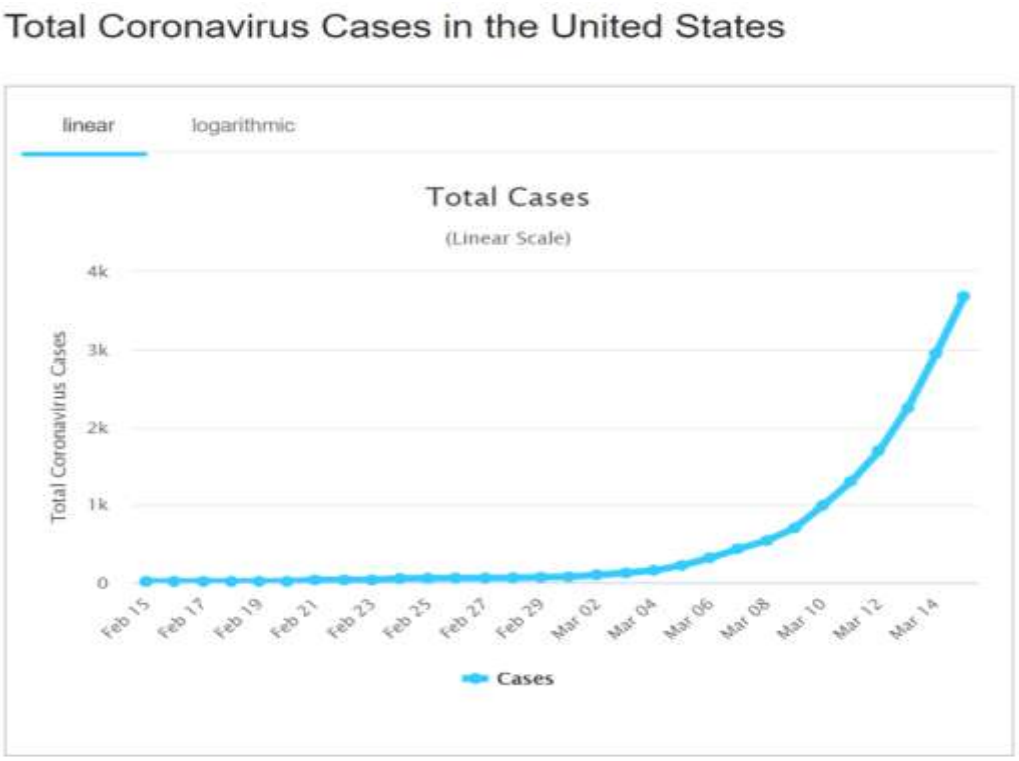


LEGAL STEPS

- On, 31st January 2020, US declared public health emergency and banned travel from China by the foreign nationals. Americans, returning were made to undergo an Airport Screening. Those, showing symptoms, were placed in quarantine stations, while, the others were made to self-quarantine for 14 days.

[16] JOSH HICKS,*A brief history of quarantines in the Unites States*, THE WASHINGTON POST,https://www.washingtonpost.com/news/federal-eye/wp/2014/10/07/a-brief-history-of-quarantines-in-the-united-states/.

- Washington, NYC, California, Ohio, Illinois and Los Angeles bars and restaurants were shut down on 15/03/2020.On the very day, CDC recommended the cancelling of events with more than 50 people.



Retrieved from https://www.forbes.com/sites/startswithabang/2020/03/17/why-exponential-growth-is-so-scary-for-the-covid-19-coronavirus/#5d6d26ca4e9b.

- A corona virus relief bill was passed by the Senate on 25/03/2020 and President Trump signed a 2.2 trillion-dollar stimulus bill, to combat the financial strain on the economy by the pandemic. They aim to support households and small businesses, facing massive loses.

- On, 26/03/2020, USA surpassed China in confirming the coronavirus cases. As of 27/03/2020, 101,242 confirmed cases of coronavirus have been found and 1,588 deaths. This is because, there is no vaccine for the cure of Covid and anti- malaria drugs are being given to seriously ill patients, even though, these drugs haven‘t been scientifically proven as a cure for the virus.

- million Americans filed for unemployment in midst of the pandemic. The economy is suffering a fall out. Trump declared the re-opening of businesses in large parts of the country on 4th April. He was reluctant in implementing the Defence Production Act, to force the companies to produce supplies and is pushing on re-opening the economy on the said, despite, the advice of the health experts. It was finally implemented on 27/03/2020.

- The country is not on a nation-wide lockdown, the number of cases per day are sky rocketing, Americans are frightened and the President is looking forward to opening up the economy soon.

CONTRAST BETWEEN THE THREE COUNTRIES

- Reactions of the governments of India, the largest democracy; China, most populous country and ruled by the Communist Party of China, since 1945 and USA, the largest surviving federation are diverse.

- India and China, both are the republican democracies with very high population. The steps taken, especially in India, are not initiated by one person, but, by the entire government. USA has better medical facilities, more quarantine stations (22 as of March, 2017) and lesser population, but, is dependent highly on the views of the President.

- On one hand, both democracies (India and China), especially in the case of the recent COVID-19 pandemic responded with a nation-wide lockdown, while USA still has a running economy.

- India‘s response has been well timed. The citizens were made aware using media and even caller tone ringtones by Airtel. The time for the nation-wide shut down seems apt, to prevent the economy from crashing down as it is in the case of USA.

- China has claimed to have successfully eradicated COVID-19, which is a milestone that is only possible due, to the well-planned relocation of patients. China has taken very strict actions as discussed above, such as, not allowing people to leave home quarantine for even essential items.

- Even, though, USA has 22 quarantine wards and much lesser population as compared to the above two, the economy is crashing down because decisions and steps that are to be taken are heavily dependent on the President, who believes that the economy should be re-opened soon and has a different view point on how to fight the virus which doesn‘t seem to be working because the number of confirmed coronavirus cases are sky rocketing.

CONCLUSION

The three governments have divergent systems and political environment, but, all are working for the people. Whether it is India, or China, which has a majority ruling party or USA, which is aiming on stabilizing the economy of the country.

COVID-19: VIRUS USED AS A WEAPON AGAINST HUMANITY.

- Sandeep Prasad
(LL.M Student, IMS Unison University)

ABSTRACT

I have seen different types of battles in my life till now, whether it is chemical war or non-chemical, every country has every right to look better and more powerful than other countries. But, when it comes to the question of humanity, no country has such right to play with it. In present situation, we all are fighting with such a virus which is known as ***Corona Virus or Covid-19.*** The virus is thought to be natural and has an origin, through spill over infection[1].But there are certain communities who are misusing the virus, to take revenge from others because they think that their community has been underestimated by the others. But they do not know that their act is punishable under the provisions of The Constitution of India, the Indian Penal Code and various other Acts. Due to the shameful work of some people of the community, we also raised and targeted those who were innocent. As of now, our highly educated and experienced doctors and scientists are trying to find the solution to cure from this virus. On the other hand, some criminal ideology and criminal personality people must be thinking about the misuse of the virus for their benefit. Besides thinking the misuse of it, we have to think and establish new ways to defeat this virus, so that, we can set an example of unity for our new generation.

Keywords: Covid-19, Virus, Unity.

INTRODUCTION:

There are several theories about this virus, but according to the official Chinese sources, this virus is transmitted between animals and peoples, due to eating seafood and these were mostly linked to the Human Seafood Wholesale Market, which also sold live animals, from where this virus is originated[2]. Corona virus is zoonotic, which means that it is transmitted between animals and people[3]. The virus is primarily spread between people, during close contact, most often via small droplets produced by coughing, sneezing, and talking. The droplets usually fall to the ground or onto surfaces, rather than travelling through air over long distances[4]. Common symptoms includes fever, cough, fatigue, shortness of breath, and loss of smell and taste. While, the majority of cases result in mild symptoms, some progress to acute respiratory distress syndrome (ARDS) possibly precipitated by cytokine storm, multi-organ

1 WIKIPEDIA, https://en.wikipedia.org/wiki/Co.
2 *Coronavirus disease 2019*, WIKIPEDIA, https://en.wikipedia.org/wiki/Coronavirus_disease_2019#History.
3 *Coronavirus disease (Covid-19)*, SLIDESHARE, https://www.slideshare.net/mehmmetmusa/coronavirus-disease-covid19-230290931.
4 *Id*. at 2.

failure, septic shock, and blood clots. The time from exposure to onset of symptoms is typically around five days, but, may range from two to fourteen days.

Recommended measures to prevent infection include frequent hand washing, maintaining physical distance from others (especially from those with symptoms), quarantine (especially for those with symptoms), covering coughs, and keeping unwashed hands away from the face. The use of a cloth face coverings such as a scarf or a bandana, has been recommended by the health officials in public settings, to minimise the risk of transmissions, with some authorities requiring their use. Health officials also stated that, medical-grade face masks, such as N95 masks, should only be used by healthcare workers, first responders, and those who directly care for infected individuals. There are neither vaccines, nor specific antiviral treatments for COVID-19.Management involves the treatment of symptoms, supportive care, isolation, and experimental measures.

As of 29 June, 2020, more than 10.1 million cases have been reported across 188 countries and territories, resulting in more than 501,000 deaths. More than 5.12 million people have recovered[5]. In India, at present 5,48,318 are confirmed and 3,21,723 are recovered and 16,475 are dead. After every 24 hours, a lot of infected persons are admitted in the hospital of different age groups because of their weak immunity system. During this period, many countries have adopted lockdown method for partial control on this virus, so that,our highly educated and experienced doctors and scientists can get enough time to find the solution to cure from this virus. During this lockdown, many countries faced the situation of economy crises. On one side of the coin, we all are trying to build vaccines, so that we can control this virus at any cost, simultaneously, on the other side of the coin, some people are making plans to spread this virus, to increase the number of infected person.

Corona Virus Hotspot in Delhi: Tablighi Jamaat.

On, March 2020, corona virus super-spread event took place in Delhi‘s Nizamuddin Markaz Mosque, which was is well known as Tablighi Jamaat, a religious congregation, in which more than 4,000 confirmed cases were detected and at least 27 deaths are linked to the event reported across the country. Over 9,000 missionaries many have attended the congregation, with the majority being from various states of India, and 960 attendees from 40 foreign countries. On, 18 April, 4,291 confirmed cases of COVID-19 were reported to be linked to this event by the Union Health Ministry, representing one- third of all the confirmed cases of India. Around 40,000 people, including Tablighi Jamaat attendees and their contacts, were quarantined across the country. Due to this, tablighijamaat has received widespread criticism from Muslim community, for holding the congregation despite a ban on public gathering being issued by the Government of Delhi on 13 March.

[5] *Coronavirus disease 2019*, WIKIPEDIA,https://en.wikipedia.org/wiki/Coronavirus_disease_2019#Signs_and_symptoms.

Discrimination against Muslims:

"One dirty fish can contaminate a pond". Same thing happened with the Muslim community in which our social media users projected Muslims as the spreaders of Covid-19 in the light of Tablighi Jamaat event in Delhi. Due to the shameful work of some people of the community, we also discriminated and targeted many innocents. As a result, Muslim vegetable vendor, groceries vendors were barred from selling on the streets and other local places in different parts of India. In some parts of the country, Muslim women were targeted. On, 12 April, a Muslim nurse in Punjab was beaten, molested and told to "Go back to Pakistan, and do your duty there". In, Rajasthan and Jharkhand, pregnant Muslim women allegedly faced discrimination in hospitals, ultimately leading to the loss of their baby's lives. In some cases, our healthcare professionals have also discriminated against Muslims. A local daily advisory announced that, it no longer would allow Muslim-dominated local patients due to the Covid-19 pandemic in a private cancer hospital in Uttar Pradesh district. The CNN has also identified cases of Indian Muslims. In New Delhi, volunteers handing out ration packs to Muslim families were exposed to police abuse. Muslim Punjab dairy farmers were threatened by their neighbours, the police raided their homes, and local populations were afraid of purchasing their produce.

Muslims were forced to become Hindu in several villages of Haryana as well as in the Bawana area of Delhi, on the border of Haryana's Sonipat district, according to media reports, as a result of the coronavirus spread. In, Bidhmira Village of Haryana, more than 250 members of 40 Muslim families were, therefore, converted to Hinduism. In addition, according, to The Inquilab, 12 Muslim families in the Harewali region of Bawana, Haryana since, the second week of May, have been forcibly converted into Hinduism following the notification by the villagers that one of the Muslim villages has participated in the Tablighi community. Moreover, in Haryana's Jind district, 35 people from six Muslim families have become Hindu.

Legal Action:

According, to print media and social media, various video and audio clips has been leaked in which, some were fake and some of them were genuine. Reports showed that around 160 participants who had been "misbehaved" and "spat" in an installation at a Delhi railway facility, were attended by doctors and health staff. In contravention of expectations of the isolation ward, they even reportedly objected to food served and roamed around in the hospital[6]. The patient quarantined in a Ghaziabad facility allegedly walked nude around and talked lewdly and sent obscene signs to the nurses[7]. The Hindu, was however, informed by a medical officer from the government of Delhi, who also helped to evacuate the Markaz Nizamuddin, that he

[6] *Tablighi Jamaat attendees misbehave with staffers, spit at doctors at Delhi quarantine units*, INDIA TODAY, April 4, 2020.

[7] *Tabligh members undergoing treatment not cooperating: Doctors to Delhi govt*., THE ECONOMIC TIMES, April 3, 2020.

faced no misconduct by the corona virus suspects. Most of them read namaaz and seemed to be unaware of what was going on beyond their own universe, she said[8].

Apart, from this, in some parts of the country, police officers who went to trace Tablighi Jamaat's participants have been trapped in stones[9]. News reports reported that Tablighi Jamaat members have threatened some television anchors or journalists with covering the "Tablighi Jamaat role in corona virus propagation"[10]. Not only this, there are many cases which appeared from March 2020 to till now because everyone want to protect their family members like father of a woman, whose husband had tested positive for corona virus in Bengaluru, was booked by Agra police for allegedly misleading authorities about the whereabouts of his daughter, who was a suspected patient[11]. A chemist was booked by the Himachal Pradesh police for selling N95 masks over four times higher than the fixed price in Kangra district[12].

UNDER THE CONSTITUTION OF INDIA:

Certain Article of The Constitution of India has been violated during this lockdown and corona virus.

Article 15(2): No one should be discriminated on the grounds of religion, sex and caste and everyone is entitled to get the medical facility to overcome this corona virus at the time when we do not have vaccine to cure this virus. The introduction of Covid-19 has primarily impacted the basic right to health and is starting to place people in quarantine centres, in particular. Some of the troubling consequences of this lock-down is, the absence of a hospital that breaches the health right to a routine care reviews such as cancer patients. Although, government is trying to help the people in need, in this moment of pandemic, it is very difficult[13]. Under the guise of Corona virus, many local clinics are charging illegal money for virus test.

Article 21: Some of the States had published the addresses of the person found corona positive in which name, house number, street number, street name, localities, recently visited place in India or Abroad, phone number are included. If, we think normally, this is all because for their and others safety, but in the eye of law, the Supreme Court recognized the right to privacy in Puttaswamy's case[14], the patients had the right to their personal information. The Court acknowledged that, patients had a right to confidentiality and privacy with relation to medical data as early as 1998 in the case of Mr. X v. Hospital Z. That privilege was not

8 *Tablighi Jamaat members didn't misbehave during evacuation*, THE HINDU, April 9, 2020.

9 *3 held in Bihar's Madhubani for pelting stones at cops tracking Tabligi Jamaat attendees*, THE NEW INDIAN EXPRESS, April 4, 2020.

10 *TV Journos Receive 'Threats' Over Tablighi Jamaat-Coronavirus Report, NBA Expresses Concern*, NEWS18, April 6, 2020.

11 *India's first coronavirus FIR: Father of infected techie's wife booked for 'misleading authorities*, THE WEEK. (16th March, 2020)

12 *FIR against Chemist for Selling N95 Masks at Four Times of Fixed Price in HP's Kangra*, NEWS18 INDIA, March 28, 2020.

13 APOORVA MANGAL, *Impact of COVID- 19 on Constitutional rights of India*, LAWSIST.COM, https://lawsisto.com/legalnewsread/NDcxMg==/Impact-of-COVID-19-on-Constitutional-Rights-of-India.

14 *J. K.S. Puttaswamy (Retd) and ors. v. UOI*WRIT PETITION (CIVIL) NO 494 OF 2012

universal, though, and could be denied where the public interest was greater[15]. In such cases the disclosure of these people's personal information on the assumption that some people are potentially infected or outsourced, some of whom may disregard the quarantine order, and some of these people who leave their homes may infect others, is juxtaposed with their privacy rights, which are definitely being broken. It appears unethical to risk the dignity, life and freedom of these quarantined citizens, if the countervailing rights are not counteracted according to the rules of proportionality. It is more alarming because many of these people have told the government that since the time their names were distributed, they are faced with ostracization and fear the eviction.

UNDER INDIAN PENAL CODE:

Section 188: Disobedience to order duly promulgated by public servant.

The provision states, that, if a public servant authorised to execute any order, than no one can restrain public servant from executing that order, if any one does so be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to two hundred rupees, or with both. If such disobedience causes or tends to cause danger to human life, health or safety, or causes or tends to cause a riot or affray, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both[16].

Section 269: Negligent act likely to spread infection of disease dangerous to life.

This section forbids anyone who does anything that introduces infectious diseases in society; cholera, plague and smallpox, etc. are infectious diseases. Such a person, however, must be aware that, his behaviour could spread infectious diseases. Where a man became conscious of the contagious nature of cholera, while travelling by train, without telling the railway authority of his illness, he became held responsible for the spread of cholera infection[17].

Section 270: Malignant act likely to spread infection of disease dangerous to life

If any person behaves malignantly and may transmit the illness of a disease that is life-threatening, he is prosecuted. This felony is an exacerbated form of crime, punishable under the last clause of this law. The term "malignantly" refers to an intent to allow the victim to spread some illness. The act of Tablighi Jamaat was covered under this provision[18].

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15 ANCHAL BHATEJA, *Publishing names and addresses of quarantined persons: the Constitutional question of privacy during the coronavirus pandemic*, BAR AND BENCH, https://www.barandbench.com/apprentice-lawyer/the-constitutional-question-of-privacy-in-the-pandemic.

16 PROF. S.N MISHRA, INDIAN PENAL CODE, Section 188, (Central Law Publication).

17 PROF. S.N MISHRA, INDIAN PENAL CODE, Section 269, (Central Law Publication).

18 PROF. S.N MISHRA, INDIAN PENAL CODE, Section 270, (Central Law Publication).

Section 271: Disobedience to quarantine rule

This sentence punishes disobedience to the law of quarantine. There is no substantive justification for such disobedience. Anyone, who intentionally disobeys a government regulation, shall be disciplined, whether or not adverse consequences occur. But, to execute this in large amount of people seems to be impossible[19].

CONCLUSION AND SUGGESTION

Although, we have highly educated and experienced doctors and scientist, but, it is also true that we are still trying a convenient method to overcome from this corona virus situation and to develop antivirus for Covid-19. Today, our print media and social media provides different rumours about vaccines but still we are unaware about the truths. But, we know one thing that a person having strong immune systems reduces the chances of this infection. Preventive measures to reduce infection opportunities include staying at home, preventing crowded places, keeping distance from others, often and for at least 20 seconds washing hands with soap and water, good respiration hygiene practices and preventing eyes , nose or mouth from touching with unwashed hands. And, also not to discriminate from those person who are serving quarantine period or from those who had fought this virus bravely and are now back to their respective homes safely with their negative reports.

[19] PROF. S.N MISHRA, INDIAN PENAL CODE, Section 271, (Central Law Publication).

IMS Law Review: Student Edition

Edition – I, July 2020

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IMS UNISON UNIVERSITY

Nurturing Knowledge. Empowering Minds.

CALL FOR PAPERS

About the Journal

The IMS Law Review Journal (Student Edition) is an annual, student-edited, peer-reviewed law journal published by the School of Law, IMS Unison University. Through this, the School aims to foster the spirit of scholarship amongst the student population across the country and set in motion the intellectual curiosity and prosperity of law students.

Call for Papers

The IMS Law Review Journal (Student Edition) is delighted to invite submissions for its second edition. The Journal accepts submissions on any topic of law of contemporary relevance, from law students all over the country and abroad in the form of:

- **Articles:** 2000-3000 words. (These are evaluations of specific contemporary issues and aim at conceptualizing the issues in a unique and unconventional manner. The assessment of contemporary issues shall be appreciated, though not mandatory).
- **Case notes/comments:** 1000-2000 words. (These are assessments of the aim and legal impact of contemporary judgments and legislations).
- **Essays:** 3000-4000 words.

Submission Guidelines

The formatting shall be as per the following:

Content

- Font: Times New Roman
- Font size: 12 pts.
- Line spacing: 1.5
- Margin: 1" from all sides
- Alignment: Justified

Footnotes

- Font: Times New Roman
- Font size: 10 pts.
- Line Spacing: 1.0
- Alignment: Left

All the sources in the footnotes must be properly cited strictly in accordance with the latest Bluebook 20th edition format. No endnotes are allowed.

General Instructions

- An abstract of about 250-300 words and 5 keywords should be mandatorily included in the same word document as a part of the submission.
- The title should be Bold, Underlined, in Capitals, Size 16, and Centre Aligned.
- Headings should be Bold, in Capitals, Size 14, and left aligned.
- The contents should in no way, directly or indirectly, indicate or reference the identity of the author(s).
- The submission should be original and non-plagiarised. They should exhibit originality in thought, critical evaluation, and careful interpretations. Submission of a paper shall be taken to imply that it is an unpublished work and is not being considered for publication elsewhere.
- The author(s) must send in the cover letter in the body of the mail, which must contain all the relevant biographical details (Name of the author(s), their degrees, Designation, Name of College/University/Institution, Postal Address(es), Phone Number and E-mail ID). A separate attachment as a cover letter will not be entertained.
- The mail bearing the manuscript must indicate the category that the submission is intended for, i.e. Article/ Essay/ Case Comment/Book Review.
- Co-Authorship to a maximum of two members is allowed. However, co-authorship is not allowed in "book reviews" and "case Comment".
- Editors' decision shall be final and binding. They reserve the sole rights to the publication of the selected articles in addition to; inter alia, any edits/amends/ reproduction.

- The contributions presented to and accepted for publication and the copyrights therein shall be the intellectual property of the School of Law, IMS Unison University.

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Submissions are to be made only in electronic form and must be sent to **imslrw@iuu.ac**in Microsoft Word (.doc or .docx) format. The attached submission in the email, i.e., the name of the document must be the name(s) of the author(s).

The subject title for the mail must be _Article/Essay/Case Comment/Book Review for IMS Law Review. Please note that only one submission per author or a team of co-authors is permissible. In case of more than one submission, only the one received first would be considered for review.

Submission Deadline and Review

- The deadline for submission of the manuscript is **30th March 2021.**
- There shall be a rigorous review process and the authors shall be intimated about the status of their manuscript at every stage.

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The Chief Editor
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ABOUT IMS UNISON UNIVERSITY

IMS Unison University, a constituent of Unison Group is a premier educational and research University nestled amidst beautiful and serene surroundings offering an environment that fosters learning and stimulates creativity.

The journey started in 1996 as IMS Dehradun, a nonprofit organization set by a group of visionaries dedicated to the cause of changing the face of professional education in Northern India.

IMS Unison University has been rated as one of the top private universities of India, it boasts of picturesque campus surrounded by the Shivalik range of the mountains. The well laid out campus with buildings standing tall in red-brick design, amongst the serene atmosphere, offers the most conducive ambience for the learners in pursuit of higher education. The University believes in continuously evolving through the adoption of the best practices in the education industry with a strong focus on the growth of its students, faculty and staff.

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The University presently offers undergraduate, post-graduate and doctorate programs in several streams of Management, Law, Mass Communication, Hospitality Management, and Liberal Arts under the following five schools:

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2. School of Law
3. School of Mass Communication
4. School of Liberal Arts
5. School of Hospitality Management

Printed at : S.S. Technoprint, Dehradun. Ph.: 0135-2715092