ISSN 2249-2232

UGC Approved Journal (Previously No. 41080)

AMITY LAW REVIEW

Volume 17

December, 2021

AMITY LAW REVIEW

A JOURNAL OF AMITY LAW SCHOOL, DELHI

volume 17

December, 2021

AMITY LAW SCHOOL, DELHI

ISSN 2249-2232 UGC Approved Journal (Previously No. 41080)

Amity Law Review
(A Peer Reviewed/ Refereed Journal)

Volume 17 2021

Chief Patron
Dr. Ashok K. Chauhan
Founder, Ritnand Balved Education Foundation (RBEF)

Dr. Atul Chauhan
President, Ritnand Balved Education Foundation (RBEF) & Chancellor, Amity University, Noida

Patrons

Prof. (Dr.) Balvinder Shukla
Vice Chancellor, Amity University Uttar Pradesh (AUUP)

Professor Tahir Mahmoood
Distinguished Jurist Chair,
Professor of Eminence
& Chairman
Amity Institute of Advanced Legal Studies & FRC (Law)

Prof. (Dr.) D. K. Bandyopadhyay
Chairman, Amity Law Schools

Editor
Prof. (Dr.) Arvind P. Bhanu
Acting Director, Amity Law School

Editorial Advisory Board

Mr. Lalit Bhasin
Sr. Advocate, Supreme Court of India
Honorary President, Amity Law School

Prof. (Dr.) Ranbir Singh
Former Vice-Chancellor
NLU, Delhi

Dr. Arun Mohan
Senior Advocate
Supreme Court of India

Prof. Gurdeep Singh
Former, Vice-Chancellor
Dr. RMLNLU, Lucknow

Prof.(Dr.) M. Afzal Wani
Former Dean,
USLLS, GGSIP University,
Delhi

Prof. (Dr.) Vijendra Kumar
Vice- Chancellor
MNLU, Nagpur

Prof. (Dr.) V. Vijaykumar
Vice- Chancellor,
NLIU Bhopal

Prof. (Dr.) V.K Ahuja
Vice-Chancellor
NLUJA Assam

Prof. (Dr.) Nuzhat Parveen Khan
Former Dean, Faculty of
Law, Jamia Millia Islamia,
Delhi

Paul Babie
Professor of Law
Adelaide Law School (ALS)
University of Adelaide,
Adelaide, Australia

Ronald H. Rosenberg
Chancellor, Professor of Law
William & Mary Law School
University of Adelaide,
Williumburg, Virginia, USA

Assistant Editors

Dr. Santosh Kumar
Associate Professor
Amity Law School, Delhi

Dr. Ila Joshi
Assistant Professor- I
Amity Law School, Delhi

Dr. Alok Gupta
Assistant Professor -II
Amity Law School, Delhi

Ms. Venu Parnami
Assistant Professor-I
Amity Law School, Delhi

Published and Distributed by
Amity Law School

Amity Law Review is published annually.

ISSN: 2249-2232

© 2021 Amity Law School All rights reserved.

Disclaimer:

Views expressed in the Amity Law Review are those of the contributors. The Editors and Amity Law School do not necessarily subscribe the views expressed by the contributors. The Editors and ALS disclaim all liability and responsibility for any error or omission in this publication. In the case of binding defect, misprint, missing pages etc., the publisher's liability is limited to replacement of the defective copy.

All enquiries regarding the journal should be addressed to:

Editor,
Amity Law Review,
Amity Law School
F-1 Block, Sector 125, Amity University Campus
Noida-201313 (U.P.) Tel: 0120-4392681
E-mail:alsdelhi@amity.edu

Electronically published at

Amity Law School (https://amity.edu/als/alr/)
F-1, Block, Amity University Campus Sector – 125, Noida,
201301

Amity Law Review Volume 17

A Peer Reviewed/ Referred Journal 2021

CONTENTS

ARTICLES

Conserving Fair Use in Academia: a Legal Perspective
Anika Rafah 1

Cultural Appropriation and Intellectual Property Rights of Tribals in Northeast India: Case Study of Thangchhuah Kawr (Mizoram), Leirum Phee (Manipur), Rira and Rura Shawls of Chakhesang Tribe (Nagaland)
Irwin Lalmuanpuii Hnamte 27

Law on Healthcare Waste Management in India: with special Emphasis on Household Healthcare Waste
Trishla Dubey 43

Expanding Contours of Abusive Relationships in the Eyes of Law
Arvind P. Bhanu 69

Contours of Presidential Power Across Constitutional Systems
Avinash Singh 103

Indian Legal Health Care Regime and Pandemic- the Archaic Saga
Shabda Mishra and Salil Kumar Tripathy 125

Right to Internet: A Look at the Present with the Lens of the Future
Vidya Menon 163

Cross Border Insolvency Under The Indian Regime: Necessity of Amending The Legislation Post Covid-19 Pandemic
Shrabani Kar and Pratik Dash 181

Women Entrepreneurs' Economic and Trade Rights in India
Bhavana Rao. 196

The Concept of Mandatory Mediation: Meaning and Practice
Sarvesh Sharma & Ms Upma Shree 212

Policy Shortcomings: Effective Implementation of the
Rights of Persons with Disabilities Act, 2016
Apurva Thakur 233

BOOK REVIEW

Prof. V.K. Ahuja, Prof. Pinki Sharma and Dr. Ashutosh Acharya (2021)
International Law-Contemporary Developments
(Essays in the Honour of Prof. A. K. Kaul)
Dr. Santosh Kumar 258

CONSERVING FAIR USE IN ACADEMIA: A LEGAL PERSPECTIVE

Anika Rafah[1]

ABSTRACT

The fair use clause within the copyright law provides individuals with the freedom to make unauthorized secondary uses of copyright protected materials. This article discusses the concept of fair use from an educational perspective by analyzing the factors which determine whether a particular use is fair or an infringement, as well as by showing the criteria for fairly using copyrighted work in education with some cases. A comparative analysis is drawn out to demonstrate how the interpretation varies by countries like India where the courts take a stricter approach compared to the USA where it is more open-ended. Moreover, while it is true that stricter copyright laws would promote more original work and foster creativity, the article also recommends that expanding the scope of fair use would have beneficial effects by allowing the general public to have more access to copyrighted educational material.

Keywords: *Copyright, fair use, educational purpose, technology, infringement.*

I. INTRODUCTION

Copyright is an essential legal concept for professionals in academia which protects their intellectual property from being used without their

[1] *Lecturer, Department of Law, North South University, Dhaka, Bangladesh*

authorization. Through copyright laws, not only are creativity and formation of original ideas encouraged, but original authorship is also protected from being replicated. [2] Fair use is an exception to copyright law which remains as "one of the most unsettled areas of copyright law."[3] This allows individuals to use copyright protected material without the permission of the copyright owner. For instance, when a teacher uses an excerpt from a book for teaching purposes, then the concept of fair use takes effect. Therefore, students and educators are able to depend on it for their academic work . While educators often use portions of newspaper articles, books and journals to complement their teaching, students also refer to these texts to aid their research and scholarship.

II. THE CONCEPT OF FAIR USE IN COPYRIGHT LAW

The basic idea of fair use is that individuals can use copyright protected materials for reasons such as education, commentary, criticism, review, parodies and so on. As long as the use does not replace the need for purchasing the work, it is considered as a fair use.[4]

Fair use is defined as the "privilege in others than the owner of a copyright to use the copyright protected material in a reasonable manner without his consent, privilege in others than the owner notwithstanding the monopoly granted to the owner".[5] Because of fair use, authors, teachers

[2] Crews, Kenneth D. "The Law of Fair Use and the Illusion of Fair-Use Guidelines." *Ohio State Law Journal* 62 (2001): 599-702.

[3] Princeton Univ. Press v. Mich. Document Servs., Inc., 99 F.3d 1381, 1392 (6th Cir. 1996).

[4] Crews, Kenneth D. '*Copyright Essentials for Librarians and Educators'.* Chicago: American Library Association, 2000.

[5] Basic Books v. Kinko's Graphics Corp., 758 F. Supp. 1522 (S.D.N.Y. 1991), which dealt with the question of whether photocopy stores may sell copied excerpts of books to college students

and artists are encouraged to portray their creativity as they have been guaranteed the right to produce and gain from their original work.

III. HISTORICAL DEVELOPMENT OF COPYRIGHT AND FAIR USE

Copyright laws were first enacted in England when The English Crown granted a monopoly to the Stationer's Company in order to regulate the spread of negative information concerning the Crown.[6] Afterwards, Parliament enacted the Statute of Anne, which enabled publishers of books to have legal protection for 14 years, during which time, reproduction of their work without authorization was not legally permissible.[7]

In the United States, the Constitution incorporated copyright in the American law to protect original authorship.[8] It was modeled after the Statute of Anne and provided the same incentives for individuals to create original work by ensuring copyright protection. It was during the case of Lawrence v Dana (1869), when the term "fair use" was first introduced in the American court system, where Lawrence had sued Dana for unfairly using his notes on Wheaton's "Elements of International Law." Lawrence had previously edited and commented on two editions of the

without authorization from the books' publishers. The decision in the case ultimately affected the price that the public must pay for access to copyrighted information.

[6] Willam F. Party, 'Copyright Law and Practice' 10 (1994).

[7] Marshall A. Leaffer, 'Understanding Copyright Law' 1-2 (2d ed. 1995).

[8] The Constitution states that Congress shall have the power "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. CONST. art I, Sec 8, cl. 8.

book for the benefit of the late author's family; however, after the death of Mrs. Wheaton, Dana proceeded to publish another edition with no credits given to Lawrence. While Dana argued that he had abridged and "fairly used" Lawrence's notes, the court eventually ruled that Lawrence's notes "involved great research and labor" and that their use by Dana was not fair – rather it was a reprint.

Copyright law gives the original author a limited monopoly to encourage their intellectual creativity; but the monopoly is restricted by the first sale doctrine,[9] the fair use doctrine[10] and the concept of copyright privilege which only provides for a limited duration of copyright protection.[11]

IV. THE PRESENT ADMINISTRATION OF FAIR USE IN THE UNITED STATES

The common law doctrine was legislatively recognized as Section 107 of the Copyright Act of 1976.[12] The bill lists four non exhaustive factors to analyze fair use: (1) the purpose and character of the secondary use, (2) the nature of the copyrighted work, (3) the amount or substantiality of the portion used, and (4) the effect of the use on the copyright owner's

[9] The first sale doctrine allows a person who has legally acquired a copyrighted work to use that work so long as that person does not violate any exclusive rights of the copyright holder. This doctrine allows individuals to share or resell novels and enables libraries to loan books to the public. Title 17 U.S.C. Sec 109 (1994)

[10] Title 17 United States Copyright Law, Sec 107 (1994).

[11] The exclusive rights of copyright holders are limited to reproduction, distribution, preparation of derivative works, public performance, public displays, and public performance of audio works. Title 17 U.S.C. Sec 106 (1994 & Supp. IV 1999)

[12] Title 17 United States Copyright Law, Sec 107 (1994).

potential market. Since fair use is interpreted as "an equitable rule of reason."[13] The list of exceptions under Section 107 was neither viewed as an extension to the common law doctrine of fair use, nor were the listed factors intended to be the sole determiners of fair use.

The Copyright Act does not state the importance or considerations given to each factor. The Supreme Court disapproves a strict interpretation of the statute and has expressed that fair use permits and requires "courts to avoid rigid application of the copyright statute when, on occasion, it would stifle the very creativity which that law is designated to foster."[14] On that account, the four factors within Section 107 should be regarded as general guidelines rather than clearly defined rules. The aforementioned factors for examining fair use are considered in the following points in more detail.

A. Factor One: The Purpose and Nature of Use

First, courts must assess the nature of the use by determining whether it is for commercial purposes. The 1976 Copyright Act House Report stated that "the commercial or non-profit character of an activity, while not conclusive with respect to fair use, can and should be weighed along with other factors in a fair use decision." The inspection of the secondary use focuses on the type of use being made rather than the type of entity making it. Furthermore, fair use also cannot be ruled out solely based on the factor of commercial gain.

[13] Sony Corp. of Am. v. Universal Studios Corp., 464 U.S. 417, 448 (1984); And Geophysical Union v. Texaco Inc., 60 F.3d 913, 931 (2d Cir. 1994).

[14] Title 17 United States Copyright Law, Sec 107 (1994).

A commercial use can be modified by a transformative use. Transformation implies that the new work has a non-identical purpose from the original work and makes some new "contribution of ... intellectual value." The prelude to Section 107 of the Copyright Act of 1976 states that plausible purposes of fair use include "criticism, comment, news reporting, teaching, scholarship or research." In general, the greater the transformation, the less any commercial purpose influences the analysis of fair use. When producing a scholarly paper, for instance, it is considered acceptable to quote other researchers' writings for reference.

B. Factor Two: The Nature of the Copyrighted Work

The second factor considers whether the original work is informational or creative in nature and whether it was published. As copyright protects expressive materials such as fiction more than facts or particulars, creative works receive more substantial copyright protection.[15] Facts receive less copyright protection because rewarding the mere acquisition of facts would frustrate the intent of a copyright monopoly to distribute ideas by retarding the disclosure of facts and thoughts.[16]

C. Factor Three: The Amount and the Substantiality of the Portion Used

In each case, the court will examine the quality and proportion of the original work which has been taken for secondary use. If the copied amount is large enough to replace the need for purchasing the original

[15] Melville B. Nimmer & David Nimmer , Nimmer on Copyright, Sec 13. 5(A)(2)(a), at13-170 (49th ed. 1999).
[16] Harper & Row, Publishers, Inc. v. Nation Enters., 471 U.S. 539, 563-64 (1985).

work then the use is to be judged as not fair. While copying a small percentage would generally be regarded as fair use, using a majority of the work would point towards copyright infringement. However, in rare cases, copying a mere 5 second clip from an entire movie may be determined as an infringement if the court deems those 5 seconds to be highly "substantial."

D. Factor Four: The Effect on the Plaintiff's Potential Market

The fourth factor considers the probable harm to a copyright holder's potential market.[17] It evaluates whether the copied work would result in the devaluation of the copyrighted material and whether it would lead to lost income for the original creator. Furthermore, copyright infringement must directly cause the alleged market harm. The Copyright Act does not provide protection against harms caused by criticism or reviews of the original work.[18] Instead, other areas of law such as slander and defamation deal with such issues.

V. CASE ANALYSIS ON MULTIPLE COPYRIGHT FOR THE PURPOSE OF EDUCATION AND RESEARCH

Fair use has been tested in court as an affirmative defense only on rare occasions when it comes to educational settings. The following cases apply the fair use factors in academic contexts, where the court's

[17] Rubin v. Brooks/Cole Publ'g Co., 836 F. Supp. 909, 920 (D. Mass. 1993) (holding that plaintiff's work had been published previously numerous times without any harm to the market and therefore a similar use would have little effect on the market).

[18] Campbell, 510 U.S. at 591-93. A court must distinguish between those harms caused by the defendant's product becoming a substitute in the same or derivative market for the original work sand those harms that result from criticisms of the original work.

decisions demonstrate a pattern of increased protection for copyright holders and reduced lawful fair use.

A. Williams & Wilkins Co. v. United States

In 1974, the National Institute of Health and the National Library of Medicine were charged with copyright infringement[19] for distributing unauthorized photocopies of articles taken from medical books and journals published by the copyright owner Williams & Wilkins.[20] The defendants would make these photocopies available upon request to their medical researchers who were engaged in scientific studies. However, the court found that the defendant's use of the articles constituted fair use due to the nonprofit nature of both the institutes, which signified that there was no intent to make economic gain from the distribution. Furthermore, not only did the plaintiffs fail to prove that the defendant's practices could cause them substantial harm, but the court also had strong concerns that holding defendants' practices to be copyright infringement would harm future medical research.

B. American Geophysical Union v. Texaco Inc.

The American Geophysical Union v. Texaco Inc.[21] case involved Texaco scientists photocopying articles from various journals for research

[19] Williams & Wilkins Co., 487 F.2d at 1346. Although the case was decided under the 1909Copyright Act, the court applied the same factors later prescribed by the 1976 Copyright Act.
[20] 172 U.S.P.Q. (BNA) 670 (1972), rev'd, 487 F.2d 1345 (Ct. Cl. 1973), aff'd, 420 U.S. 376 (1975)
[21] 60 F.3d 913 (2d Cir. 1994).

purposes. Although the journals were used for research, Texaco's objective was to use the research to develop profitable products; therefore, the court concluded that Texaco's use was commercial. Texaco's use was not transformative either, as complete texts from the articles were photocopied verbatim. Thus, this factor also worked in the copyright holder's favor. Moreover, it was found that Texaco could have purchased a license for photocopying the articles through the Center for Copyright Clearances, but by not doing so, they had deprived the copyright holder from potential economic gain in the form of licensing fees. On these accounts, the court ultimately judged Texaco's use to be not fair and the defendant was accordingly fined.

C. Princeton University Press v. Michigan Document Services

Princeton University Press v. Michigan Document Services[22] addresses multiple duplication for educational use where Michigan Document Services (MDS) photocopied packets of course materials and offered them for sale to students without obtaining the necessary copyright permissions.

The court held that the copies made by MDS were not fair use based on several indicators. Firstly, MDS replicated entire chapters or articles without any alteration, which made the use non-transformative; some excerpts were greater than ninety-five pages in length,[23] thus exceeding the limits prescribed in the Educational Guidelines. Moreover, it was a

[22] 99 F.3d 1381 (6th Cir. 1996).

[23] The court did not distinguish between a 95-page excerpt representing 30% of a work and a 17-page excerpt representing 5% of the work. The court ended its analysis after deciding the use did not fit within the Educational Guidelines.

profit-oriented photocopy shop, which meant that they operated for profit and therefore the use was commercial. Some of the excerpts taken for duplication also contained creative material which are considered to have substantial value, thus making the duplication of these materials to not be a representation of fair use. Lastly, the court found the existence of a market where the copyright owners licensed their books and articles for legal replication. This meant allowing photocopy shops such as MDS to continue duplicating without authorization could potentially diminish the revenue earned by the copyright owners through licensing.

VI. FAIR USE IN THE FIELD OF EDUCATION

Due to the equitable nature of fair use, the controversies surrounding it seem particularly profound in the area of education. Fair use promotes the goals of copyright by encouraging the spread of information for the enrichment of society while education promotes the cultivation of society, provides access to information, and encourages creativity. Having said that, eliminating copyright protections throughout education would hinder monetary incentives for creation of original work. Although educational fair use should not be viewed as a complete protection to use copyright protected materials, the elimination of educational fair use would be similarly harmful.

A. Education Benefits Derived from Fair Use

Education provides the foundation of an informed populace by teaching reading, critical, analytical and problem-solving skills. All citizens, not

just scholars, benefit from openly available information. It is evident that education creates social welfare by broadly disseminating ideas and exposing many people to new concepts.[24]

Educational fair use has beneficial effects upon further creative constructions, teaching expertise and student flexibility. In academia, students and instructors must constantly create new and original materials. Without the protection of fair use, the costs of producing secondary works would increase. This is because many students are restricted to limited educational budgets, which would prevent them from bearing the cost of licensing. As a result, students may be discouraged from enrolling in classes which require expensive reading materials.

Fair use allows instructors to provide the most appropriate and cultivated education possible. Instructors are able to utilize newly discovered materials that expose students to a more comprehensive understanding. This also enables instructors to keep classes up-to-date, especially in rapidly changing fields.

B. Limitations in the Economic Model of Fair Use

From an educational perspective, there are various flaws in the economic model of fair use despite there being high external benefits of distribution of information. For instance, although students are the primary consumers of copyrighted materials such as books and articles, the

[24] A complete exemption for education would be over-expansive. This Note does not seek a broad right of fair use in education, but seeks to preserve a reasonable right of fair use in the educational realm.

entities making the purchasing decisions are the educators or the school authority. Instructors making decisions usually focus on the higher objective of intellectual development rather than economic efficiency, which is why in the educational setting, it is less appropriate to use an economic model to explain efficient resource allocation.[25]

Instructors primarily focus on the academic benefits of obtaining a published work rather than its economic benefits. When presented with an option to choose from a number of articles with similar viewpoints, instructors would often determine their choice of article based on the content and academic satisfaction instead of economic factors such as the price. Moreover, finding alternative articles in search of a lower price may be more difficult and could raise the transactional costs to the instructor.

The absence of a central system for acquiring copyright permissions may further give rise to transactional costs. While large universities often use such systems to control future liability, smaller institutions may not have sufficient funds to arrange similar services which can help obtain copyright permissions. As a result, instructors often have to bear the cost of obtaining the licenses themselves when the institution does not have an available budget and it is not possible to spread the cost among students.

C. Educational Guidelines According to The US Copyright Act of 1976

[25] Buranen, Lise and Alice M. Roy, eds. *'Perspectives on Plagiarism and Intellectual Property in a Postmodern World.'* Albany: State University of New York Press, 1999.

Although the factors and circumstances explained above apply to all cases involving fair use, educational uses of copyrighted materials pose special challenges to courts and thus have received particular attention from the legislature. Sections of the House Reports from the Copyright Act of 1976 specifically laid out guidelines for educational uses.[26] The Committee on the Judiciary concluded that broad copyright exceptions need not be granted to nonprofit educational institutions but nevertheless included explicit guidelines to provide educators with some predictability. Thus, the Educational Guidelines were designed to provide a safety net for educational uses of copyrighted materials.[27]

D. Guidelines for Classroom Use of Books and Periodicals

The Educational Guidelines show specific instances when educators may reproduce copyrighted works without permission for research or classroom use. However, the preamble to the guidelines states that some reproductions not mentioned in the guidelines may still be considered as fair use. Although the Educational Guidelines clearly allow educators to make single copies of portions of books for research or class preparation,[28] the real issues arise when multiple copies are created in order to distribute in a class. In this case, the guidelines provide for the

[26] 1976 HOUSE REPORT, The "Educational Guidelines" are formally titled The Agreement on Guidelines for Classroom Copying in Not-for-Profit Educational Institutions with Respect to Books and Periodicals.

[27] Agreement on Guidelines for Classroom Copying in Not-for-Profit Educational Institutions with Respect to Books and Periodicals, March 1976. (U.S. Congress. House. Copyright Law Revision, 94th Cong., 2d sesss. [1976]. H. Doc. 1476: 68-70.)

[28] The Educational Guidelines indicate that for research or preparation, a teacher may make a single copy of (a) a chapter of a book; (b) an article from a periodical or newspaper; (c) a short story, essay, or poem; or (d) a chart, graph, diagram, drawing, cartoon, or picture from a book, periodical, or newspaper.

reproduction of multiple copies as long as the use is brief, spontaneous, not cumulative, and includes appropriate copyright notices.[29]

Even if an educator fulfills those initial requirements for creating multiple copies, the Educational Guidelines present further limitations: educators may not make multiple copies to create or replace an anthology, materials may not be photocopied from term to term, no charge may be made to students in excess of the copying costs, and finally, the Educational Guidelines do not apply to consumables.

E. Criticism of the Educational Guidelines

The Ad Hoc Committee of Educational Institutions and Organizations on Copyright Law Revision, members of the Authors League of America, Inc., along with the Association of American Publishers, Inc., who proposed the Book Guidelines, represented the interests of authors and publishers. However, educators disagreed with the committee's findings.[30]

The American Association of University Professors and the Association of American Law Schools wrote the Judicial Committee and criticized the Educational Guidelines on the basis of its standards for multiple copying.

[29] The brevity factor limits the amount that an educator can reproduce to a maximum amount of 1,000 words or 10% of a work or 250 words of a poem. Id. The spontaneity factor requires that only educators who are unable to obtain the appropriate approvals due to time constraints may make multiple copies. This factor states that teachers must need the work at that time for the "maximum teaching effectiveness," and that therefore, it "would be unreasonable to expect a timely reply to a request for permission."

[30] The three individuals who endorsed the Educational Guidelines represented the Authors League of America, the Association of American Publishers, Inc., and the House of Representatives Copyright Committee. Notably absent were the representatives from educational institutions.

Critics proclaimed that the Guidelines create additional confusion over legally permissible secondary uses. Although the prelude to the Educational Guidelines states that the guidelines represent the minimum permissible uses and that other uses could still be considered fair, academic institutions are relatively conventional and would adopt the Guidelines to avoid litigation expenses.[31] Consequently, adopting the guidelines would inadvertently narrow the acceptable applications of fair use in education.[32] The courts have adopted the same conventional view by looking at the permissible uses as requirements instead of guidelines. Moreover, it is argued that the requirements of being spontaneous, brief and non-cumulative are excessively limiting. In the case of spontaneity, the Educational Guidelines suggest that educators can meet this criterion if they had insufficient time to obtain a license for using a particular work; it further requires educators to know about this service, be able to obtain necessary funding for copyright fees, and receive approval from an authorized representative of the educational body. However, critics argue that this requirement provides very minimal guidance for educators.

A different issue arises when educators lack the monetary resources needed to obtain copyrighted materials from the publisher, even though the work is essential for educational purposes. Publishers often claim that not paying fees such as royalties would signify that their work is not being appropriately valued at their economic rate. However, this argument would be valid if it was the case that educational institutions possess

[31] Gregory Klingsporn, The Conference on Fair Use (CONFU) and the Future of Fair Use Guidelines, 23 COLUM.-VLA J.L. & ARTS 101, 108 (1999).
[32] Stephana I. Cobert & Oren R. Griffin, The Impact of Fair Use in Higher Education: A Necessary Exception?, 62 ALB. L. REV. 437, 440 (1998).

unlimited resources for obtaining copyright materials and their licenses for teaching purposes. The amount that an educator is willing and able to pay would correlate with the value and importance that is placed on the material only when it is true that resources of an institution are unlimited. There is further confusion about the extent to which the Educational Guidelines are legally persuasive as they are not included in the Copyright Act of 1976.[33] As they were originally drafted after negotiations by concerned parties such as educators and publishers, the involvement of congressional committee members during the drafting of the Guidelines is not clear. As a result, they do not extensively reveal congressional intent despite being accepted by the judicial committee. Moreover, the Guidelines particularly being excluded from Section 107 of the Copyright Act by Congress further weakens the importance of this proposal.

VII. THE CONFERENCE ON FAIR USE (CONFU), 1994

Due to rapidly advancing technology, a Conference on Fair Use (CONFU) was held in September 1994 to examine the effects of digitalization on fair use provisions of the Copyright Act and to develop new guidelines which were more suitable. The conference involved representatives from various interest groups including educators, publishers, Congress and the White House who were present to discuss issues regarding fair use in the digital world. [34] The White House

[33] MDS, 99 F.3d at 1390. Justice Scalia would agree that the meaning of the statute can only be determined by the words comprising the statute itself.

[34] The Copyright Act of 1976 also granted limited reproduction rights to libraries and archives. Section 108 allows libraries and archives to create at least one copy of a work if it is done without the intent of direct or indirect commercial advantage, the library is open to the public, and the reproduction includes the appropriate copyright notice.

Administration Task Force on Information Infrastructure, along with publishers, intended to narrow down the scope of fair use of copyrighted works in digital platforms. [35] Conversely, educators argued that the guidelines should provide counsel and recommendations rather than act as a strict set of rules. Due to a large number of divergent views and opinions, the conference failed to develop guidelines for fair use in a digital learning environment even though there is a greater requirement for legislative solutions.[36]

VIII. ADVANCING TECHNOLOGY

The historical, economic, and legal backgrounds as well as the educational controversies surrounding fair use in copyright law highlight the conflict between maintaining creative incentives and promoting public accessibility. Technological advances further enhance this conflict as new technology lowers transaction costs and allows for greater ease of infringement. With advancing technology, copyright holders advocate for expanding copyright protection, which is for the purpose of reducing public access to information for individual and educational use. Much of the debate concerning educational fair use centers on these technological advances and their effects on intellectual property rights.

A. Development of Copyrights Due to Technology

[35] Conference on fair use: Final report to the Commissioner on the conclusion of the conference on fair use, available at http://www.uspto.gov/web/offices/dcom/olia/confu/(last modified Nov. 24, 1998)

[36] For responses to the CONFU Final Report, see NINCH, Fair Use in Education: Responses to "Final" CONFU Meeting,http://www-ninch.cni.org/ISSUES/COPYRIGHT/FAIR_USE_ (May 19, 1997).

Changes in copyright law emerged as new inventions appeared during the past fifty years. To counteract the increased threat of infringement caused by technological advances such as the copy machine, the Copyright Act of 1976 and the legislation that followed it provided copyright holders with additional intellectual property.

The Copyright Act of 1976 significantly increased the rights of copyright holders to include all fixed, original works. This new protection was automatic, as neither a copyright notice nor registration was necessary for protection. It extended the duration of copyright protection from a maximum of fifty-six years to fifty years after the death of the creator. Thus, new technologies forced copyright law to adapt in order to provide adequate protections and incentives to produce.[37]

The anticipation of threat from copy machines was eventually replaced by concerns regarding digital technology. The Clinton Administration envisioned the Internet as a channel for increased distribution and communications, both nationally and internationally. The White House Administration created the Information Infrastructure Task Force (IITF) to research implementation of digital networks, such as the Internet, and the effects of those structures on intellectual property rights. The IITF created the Working Group on Intellectual Property Rights to investigate the feasibility of a global communications network.

---

[37] Association for Computing Machinery (ACM). *Intellectual Property in the Age of Universal Access: A Collection of Articles from Leading Authorities Defines and Interprets the Emerging Technologies and the Laws They Instigate.* NewYork: ACM (1999)

The Digital Millennium Copyright Act (DMCA) [38] is the latest amendment to American copyright law which does not clearly address fair use but still has an impact on the fair use doctrine. It has provisions for criminal penalties to prevent people from making unauthorized use of copyright protected material in digital platforms. This also provides publishers and their works with additional copyright protections in the form of encryption or similar software. Furthermore, it enables them to monitor and keep track of the use of their works through Copyright Management Information systems, which allows them more extensive control of their digital materials along with enforcing copyright protections.

Although providing additional copyright protections increases the profit of the copyright holders, it is at the expense of public access as it raises costs to individuals and educational institutions and decreases the number of expressive works in the public domain.

B. The Impact of New Technology on Copyright

Beyond new legislation, copyright holders are also able to restrict use of their works without relying on the law due to advancing technology.

1. Global Communications on the Internet

[38] Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified in scattered sections of 17 U.S.C.).

The Internet is a network of computer facilities expediting access to information. Not only does the Internet facilitate applications such as the World Wide Web, but e-mail, newsgroups, electronic bulletin boards, and Telnet are also included. The Internet creates an enormous resource center by locating and distributing information or ideas in text, video, audio, or photographic format.

Computers and the Internet provide individuals with greater duplicating abilities than the simple copy machine.[39] Advanced software, digital graphics, scanners, and other technology allow individuals to make copies of works in digital format and disseminate that information quickly, with minimal cost, and without any concern for geographical borders.

2. Technology hampering the spread of Information

The Internet allows for decreasing copying and distribution costs by enabling creators and copyright holders to better prepare and monitor the use of their works. For example, software programs such as Copyright Management Systems are embedded in other documents or programs allowing copyright holders to keep the accessibility and distribution of works under their surveillance.

In addition to preventing and deterring infringement, technology also increases the ability to prosecute infringement. Encryption,[40] digital

[39] Vincent J. Roccia, Note, What's Fair Is (Not Always) Fair on the Internet,29 RUTGERS L.J. 155, 161-62 (1997)

[40] Encryption encodes information so that only users with an authorized decoder can access the document, software, or information.

watermarks,[41] software metering,[42] and cryptolopes[43] all enable copyright holders to exert greater control over their works.

IX. FAIR DEALING FROM THE INDIAN PERSPECTIVE

In Indian copyright law, the importance of fair dealing is highlighted in the Copyright Act of 1957 which allows for exceptions for educational uses. Section 52 subsection (1) of the Act explicitly deals with certain circumstances which do not represent a copyright infringement. More specifically, sections 52(1)(g), (h) and (i) consider fair use in the area of education which is why Indian lawmakers who aim to ensure the maximum possible fair use provisions for educational purposes should examine whether these sections are appropriate for achieving the educational policy objectives of the nation.

Section 52(l)(g) further states that, as long as it is for the purpose of school use, it is legally permissible to include short passages from copyrighted published literary works in a different collection which mainly consists of material which are not copyrighted. This exception is

[41] A digital watermark is an irremovable identifier embedded in a document. Although it does not alter the original document, if the user attempts to print or disseminate the document, a message will appear that conceals the original document and states that the use is unauthorized.

[42] Software metering requires that hardware be attached to a computer system. The hardware records and charges for each download or program used.

[43] A cryptolope is a program that allows a user to search documents for key terms, but charges auser for the encryption key to open the document and view the actual content. Michael J. Meurer, Price Discrimination, Personal Use and Piracy: Copyright Protection of Digital Works, 45 BUFF. L. REV.845, 891 (1997).

available subject to certain conditions, which are to be fulfilled in this regard.

The Copyright Act provides that the reproduction of a literary, dramatic, musical or artistic work or any translation or adaptation of such work:

(i) by teacher or a pupil in the course of instruction; or
(ii) as part of the questions to be answered in an examination; or
(iii) in answers to such questions, shall not constitute infringement of copyright in the work.[44]

Section 52(1)(i) provides that the performance of a literary, dramatic or musical work by the staff and students of the institution is not an infringement of the copyright if the audience is limited to such staff and students, the parents and guardians of the students and persons directly connected with the activities of the institution. The exception is wider in scope as the parents and guardians of the students also constitute part of the audience who are allowed.

In Wiley Eastern Ltd. and Ors vs. Indian Institute of Management,[45] the court clearly traced the purpose of the defense of fair dealing to the Indian Constitution: 'The basic purpose of Section 52 is to protect the freedom of expression under Article 19(1) of the Constitution of India so that research, private study, criticism or review or reporting of current events

[44] Copyright Act 1957. s 52(1)(h) and s 52(2)
[45] (1996) PTR 46 (Del).

could be protected. Section 52 is not intended by Parliament to negatively prescribe what infringement is'.[46]

The specified circumstances under which fair use is permissible, as per Section 52, has been said to be inflexible and exhaustive as any use not complying strictly with the mentioned purposes is deemed to constitute an infringement. Indian courts have repeatedly stated that it is not possible to formulate a strict principle to adhere to when dealing with cases of fair use as each case must be judged upon its own merits and context. The legal principles of fair dealing have been primarily drawn from approaches led by the United Kingdom and United States, but Indian courts have further included specific factors which are not provided by the Copyright law of India.

Fair use and fair dealing both act as defenses when it comes to making secondary uses of copyrighted materials but the legal nature of these concepts and the extent of their provisions vary greatly. In common law jurisdictions such as India, Great Britain and Canada, their copyright statute allows fair dealing by laying out a set of specific purposes under which using a copyrighted work would be permissible. If the court finds that the use is for a commercial purpose then the use would not constitute fair dealing. However, the United States copyright law takes a more flexible approach by avoiding a specific and restricted list; instead, it uses more versatile language and provides an open-ended list of purposes which may be a representation of fair use. Ultimately, the differences

[46] 61 (1996) DLT 281 Para 19.

between the treatment of fair use and fair dealing in India vs its US counterparts depend upon the unique circumstances of each case and the policy preoccupations of the respective courts.

X. RECOMMENDATIONS

The fair use doctrine is an integral part of copyright law which allows for the legal reproduction of copyrighted work for certain situations. From the above discussion about educational fair use must be met for academic fair use are as follows:

1. The academic research paper must be the original work of the author.

While this factor is open to interpretation, a paper which is supervised by a particular instructor for a course in a recognized educational institution will almost always qualify, as the reputation of the instructor and institution support the paper's "legitimacy." Conversely, individuals without formal academic connections who are writing on their own may need to establish the "legitimacy" of their work.

2. The material used must be directly relevant to the topic.

In the examples of the student papers cited below, the language and pictures of the cartoons were explicitly discussed in the explication of the papers. However, if a cartoon had not been explicitly discussed, but had been used as a decoration, illustration, or just to add color or style, this would not qualify.

3. The references must be provided for the original sources.

   It must be clear from where the material was taken and, if possible, who created it. If the material was copied from a website or scanned from a print reference, this distinction should be clear. In all cases, a citation must be given for the original source.

4. The paper must be for non-profit educational purposes.

   Academic fair use does not allow one to profit from the use of another person's copyrighted work. Typically, as in the case of papers written by Translation Department students which may be selected for the FAST website (or the Master's, Licentiate and Doctoral theses that are published in PDF format elsewhere in the university website), there is no question of profit or other financial benefit to the author of the paper, the website or the university, as all are non-profit educational instances. However, if the student were later to sell copies of his paper which included copyrighted work that may have established or increased the market value of the paper, this would disqualify one from academic fair use. In this case the student would need to seek permission to use the copyrighted material and possibly arrange for royalties payments.

5. The amount of copyrighted material used must not be excessive, and must not affect the market value of the original work.

   The amount of copyrighted material used must not infringe on the original authors' ability to make an economic gain from their own works. An individual cannot use such an amount of the author's material that the

paper in which this material appeared could be considered an alternative to purchasing the original work of the author.

XI. CONCLUSION

Intellectual property laws and principles, especially those related to copyright, are especially relevant for professionals who work in the field of education. A basic understanding of these laws is important for informed use as well as for the development of ethical students. It is only when these laws are understood and applied that scholars, teachers and professionals in higher education can derive the proper benefits from the rights given by this doctrine.[47]

There is a very notable public interest in the controversies surrounding copyright and wider access to educational materials. It is evident that education has a special status as 'fair use' within the interests of the international copyright framework, and lawmakers should make the optimal use of the exception.[48] Considering that the nature of a country's copyright policy could have a significant impact on its ability to meet its developmental and educational goals, the most important objective for lawmakers in India is to reflect on the current fair use provisions for education in India not only for traditional education, but also for distance education and e-learning.

[47] Tom Bell, Fair Use vs. Fared Use: The Impact of Automated Rights Management on Copyright's Fair Use Doctrine, 76 N.C. L. REV. 557 (1998).
[48] Lape L G, Transforming fair use: The productive use factorin Fair Use Doctrine, Albany Law Review, 58 (1995) 677-724.

CULTURAL APPROPRIATION AND INTELLECTUAL PROPERTY RIGHTS OF TRIBALS IN NORTHEAST INDIA: CASE STUDY OF *THANGCHHUAH KAWR* (Mizoram), *LEIRUM PHEE* (Manipur), *RIRA* AND *RURA* SHAWLS OF CHAKHESANG TRIBE (Nagaland)

Irwin Lalmuanpuii Hnamte[1]

ABSTRCT

Blame it on the pandemic or is it because of our insensitivity or ignorance, there have been several cases of misappropriation or misuse of cultural traits belonging to minorities in the recent past both internationally and nationally. Some prefer to use the term "cultural appropriation" justifying it as promotion of culture of minorities, while others see it as plain misuse without acknowledging the source or where it actually comes from. The term cultural appropriation is widely known in the fashion industry and has been much debated. However, unless there are appropriate laws in place it can become a means to threaten the very existence and the purpose for which these cultural expressions are intended to be used. This article is an attempt to study cases on cultural appropriation belonging to tribals in Northeast India and to find out if intellectual property law is the answer to the vexed question whether cultural appropriation can be protected or not.

Keywords: *Cultural traits, minorities, intellectual property, tribal.*

[1]* *Assistant Professor, Law Center II, University of Delhi*

I. INTRODUCTION

Northeast India is a mixed culture of different tribes and languages belonging to similar communities collectively termed indigenous peoples or tribals. The seven sister states Arunachal Pradesh, Assam, Manipur, Meghalaya, Mizoram, Nagaland, Tripura and one brother state Sikkim comprises the Northeast region. In this region alone there are more than 200 tribes and is one of the most culturally diverse regions. The culture of Northeastern states is characterized by the diverse ethnic groups settled in the region. Each tribe has its own distinct custom, cuisine, attire and dialect. With time their age-old customs are slowly disappearing and their rich culture is deeply embedded in their ways of living even up to this present day.

The advent of technology has made access to culture and traditions of such tribes and indigenous peoples easier due to their availability in the public domain. There is therefore a threat posed to these tribes as the casual use of most of their culture and traditions are not permitted even in their own communities. The traditional designs and symbols do not serve a purely aesthetic fashion and have meaning. These communities have struggled to ensure their culture's survival and failure to appreciate and acknowledge is hurtful. However, clear rules prohibiting the harmful exploitation of Indigenous designs do not exist and have been termed 'cultural appropriation'.

This article is an attempt to understand the issue surrounding what is called an "attempt to appropriate traditional forms of expression" or

"cultural appropriation" and whether intellectual property laws is suitable to protect it? An analysis of three case studies selected from three states in Northeast India will be made to find out what would be the best way to protect traditional designs belonging to these communities.

II. THE THREE CASES AND THEIR ISSUES

CASE NO 1: A Facebook post of *Thangchhuah* and *Thangchhuah* patterned shirt manufactured by the brand Levis in the month of September, 2020 raised quite a hue and cry with concerns from the public in Mizoram as to how a traditional pattern embodying the culture of the *Mizo* tribe could be copied by Levis. The similarity between both the shirts is very apparent. Traditionally *Mizo* men wore no shirt, a wrap-around and a "*Thangchhuah diar*" (a scarf wrapped around the head and tied on the side). The *diar* has this pattern on it. Historically "*Thangchhuahpa*" was one of the highest statuses a *Mizo* man could achieve. It was not easy to achieve this feat. The title came with its own advantage, giving him a good place in the social hierarchy. It was on the achievement of this title a *Mizo* man earned the right to wear the "*Thangchhuah puan*" (cloth).

Fig 1: The original *Thangchhuah Diar* (head-scarf)[2]

Fig 2: Present design of the *Thangchhuah*[3]

[2] The original *Thangchhuah Diar* available at: https://traditinalphotodahkhawmna.blogspot.com/2019/10/thangchhuah-diar_30.html (last visited on Jul.18, 2021).

[3] Modern version of *Thangchhuah* cloth. available at: https://www.facebook.com/mizofashionstore/posts/thangchhuah-kawr23-free shippinghttpswwwebaycomusrmizo-2/1824813957834373/ (last visited on Jul.18, 2021).

Fig 3: The Levis shirt sold on Flipkart and Myntra[4]

It was not only a symbol of achievement but it carried with it great responsibilities.[5] As men did not have any modern day silhouette the *diar* pattern is now transferred into a shirt which is now culturally accepted as traditional attire for men. In Mizoram, the *diar* or the "*Thangchhauh kawr"* is traditionally hand-woven as with other textiles. The characteristics are a black base with striped red, white, yellow and green. In the olden days it was only black base with red and white stripes. As years passed and with more access to dyes the other colours were gradually incorporated. The Levis store website had displayed a long-

[4] The uncanny resemblance of *Thangchhuah* shirt sold online by Levis, available at: https://www.flipkart.com/levi-s-men-checkered-casual-dark-blueshirt/p/itma6620e1c940a2?pid=SHTFTGHH4SFXTZFJ&cmpid=product.share.pp (last visited on Jul.18, 2021).

[5] Lalthlanchhuaha, "SE LU NGE TUMPANG SIAL?: An analysis of Siallu (and its critique) as an Iconography in Mizo Art" 3JLCS, MZU 63 (Dec.2016) available at: https://mzu.edu.in/wp-content/uploads/MZU%20Journals/Literature_CulturalStudies/Volume_III_Issue_II_Dec2016.pdf. (last visited on 16 Nov. 2021).

sleeved shirt and in the description claimed that it is made in India. The short-sleeved version of the shirt was also made available by Levis on other online platforms like Flipkart and Myntra.

CASE NO 2: Our Prime Minister Narender Modi was recently in the news (April 14th 2020) for wearing a scarf known as *Leirum Phee* belonging to the *Meiteis* and *Tangkhul* communities of Manipur. The gesture was welcomed and appreciated by many as it had brought forward traditional attire to the nation. The *Leirum Phee* is traditionally hand-woven and carries with it important cultural and historical significance.

Fig 4: *Leirum Phee* sold in Manipur markets[6]

History shows that the *Leirum Phee* was gifted to the *Meiteis* by the *Tangkhuls* as a sign of establishing healthy bond between the hill and

[6] Leirum Phee sold in Manipur markets available at: http://epao.net/epPageExtractor.asp?src=features.Of_Geographical_Indication_Leirum_Phee_and_others_By_Ringo_Pebam_and_Sunanda_RK.html. (last visited on Jul. 18, 2021).

valley communities in Manipur. Since then, it has been an essential item of a Meitei wedding. However the result of this much appreciated gesture had a backlash that was not expected. After a few days of its national display on television weavers in Uttar Pradesh's Barabanki started a mass production of the scarves using power looms. This led to many uttering displeasure over the cultural appropriation presented in this manner.[7]

CASE NO 3: The last case concerns the *Rira* and *Rura* Shawls belonging to the *Chakhesang* tribe in Nagaland. These shawls locally known as *Chi Pi Khwu* have received Geographical Indication (GI) tags in the year 2016 as *Chakhesang* Women Welfare Society (CWWS) as its registered proprietor. The GI specifications emphasise on the social and cultural importance of these shawls. It is also mentioned that different shawls are worn according to the status held by an individual in the society. Some are only worn by men, some by women and still others by elderly women. The *Rira* is a shawl worn only by men and *Rura* is a female version of Rira and is worn only by females.

***RIRA** is a men shawl which is worn with dignity.*

***RURA** is a feminine version of Rira worn by women.*

[7] Trishna Wahengbam, 'Modi's Gamusa'? The Cultural Appropriation of Manipur's *Leirum Phee* available at: https://livewire.thewire.in/politics/modi-gamusa-the-cultural-appropriation-of-manipurs-leirum-phee (last visited on Jul. 19, 2021).

Source: https://www.eastmojo.com/news/2020/09/22/civil-suit-against-designer-ritu-beri-trifed-over-misuse-of-naga-shawls/[8]

The dispute arose sometime in February 2020, in the Surajkund's Crafts Mela, an international fair held at Faridabad. It was alleged by CWWS that Ritu Beri and the Tribal Marketing Development Federation of India (TRIFED) wrongfully represented *Rira* and *Rura* shawls during a fashion show held in the fair. This case is slightly different considering that these shawls are protected under the Geographical Indications Act, 1999 (GI Act). However, the question arising out of this dispute is an important one which is whether the GI Act is equipped to protect traditional designs as an expression of culture embedded in the *Chakhesang* shawls?[9]

III. CULTURAL APPROPRIATION: MEANING

Cultural appropriation can be defined as something that happens when a person or a group of persons from a certain culture take tangible or intangible products from a different culture. Therefore it refers to "the unacknowledged inappropriate adoption of customs, practices, ideas, etc., of one peoples or society by members of another and typically more dominant people or society."[10] The complexities surrounding cultural appropriation is difficult to comprehend. It is a very popular phenomenon

---

[8] Medolenuo Ambrocia, Civil Suit Against Designer Ritu Beri, TRIFED Over Misuse of 'Naga' shawls available at: https://www.eastmojo.com/news/2020/09/22/civil-suit-against-designer-ritu-beri-trifed-over-misuse-of-naga-shawls/ (last visited on Jul.19, 2021).

[9] Can the Geographical Indications Act Provide Relief to Nagaland's Chakhesang Women. Available at : https://thewire.in/rights/geographical-indications-act-nagalands-chakhesang-women (last visited on Jul.19, 2021).

[10] Naomi Roht-Arriaza, "Of Seeds and Shamans: The Appropriation of the Scientific and Technical Knowledge of Indigenous and Local Communities" 17 MJIL 919, 919-920 (1996).

in the fashion industry. Cultural appropriation commercializes years of traditional knowledge that the community have and the cultural heritage is made into just another fad in the market. The most offensive form of appropriation can be described as one wherein 'members of one culture or community represent certain aspects of a culture they do not belong to.'[11] Indigenous peoples belonging to native America, Africa and Asia have always been very prone to cultural appropriation.

In simple words the term cultural appropriation refers to the use of a culture's sign, artifact, ritual etc. not belonging to one's own culture, without compensating or acknowledging the source community for such use. This leads to perversion of the culture thereby making them vulnerable to harmful exploitation. There are arguments raised on behalf of the proponents of cultural appropriation that such acts are ethical. This view leans heavier on consumption of food items not available in one's own community and wearing things belonging to the other people's culture. There is a very thin line between an act of malice and appreciation when it comes to the use of indigenous people's culture. We need to keep in mind that there must be some criteria for establishing that the act of using elements belonging to an indigenous community or application of traditional designs/expressions of culture by a dominant group is offensive or has potential to become offensive. The line between appropriation and appreciation can best be highlighted in the recent troll on Rihanna's twitter account against 'Black braids' worn by non-Black

[11] The Week Staff, "What is cultural appropriation and how can you spot it?" THE WEEK, Jun. 01, 2020. Available at: https://www.theweek.co.uk/cultural-appropriation (last visited on Oct.6, 2021).

models at the Savage X Fenty show.[12] The outcome of this is the 'Black Lives Matter' movement that has been gaining ground in America where the dominant group has been accused of enjoying elements belonging to the marginalized African-American community yet at the same time causing prejudiced and racist attacks against the marginalized.

There is however no legal definition to cultural appropriation and is so overused that it is not possible to say for sure if a traditional design is culturally appropriated or not. But to determine if it is cultural appropriation it is important to keep these few points in mind: whether the design is used outside its traditional or cultural context; existence of power imbalance between the user and the source of the indigenous design; is the design acknowledged or was permission sought from the source; and whether it cause social, cultural or economic harm?[13]

IV. CULTURAL APPROPRIATION AND IPR

The law does not protect cultural practices as such. It has always been argued that IPR law is the most suitable protection of culture heritage. However traditional designs cannot be protected and the law on IPR cannot protect the offensive uses of it either. WIPO through its Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) on its 40th Session

---

[12] Lifestyle Desk, "Rihanna accused of cultural appropriation after models wear braids at Savage X Fenty Show available at: https://indianexpress.com/article/lifestyle/life-style/rihanna-cultural-appropriation-models-braids-hairstyle-black-savage-x-fenty-show-7541782/ (last visited on Oct.6, 2021).

[13] Brigitte Vezina, Cultural Appropriation Keeps Happening Because Clear Laws Simply Don't Exist available at: https://www.cigionline.org/articles/cultural-appropriation-keeps-happening-because-clear-laws-simply-dont-exist/ (last visited on Jul. 20, 2021)

which took place from June 19 to June 21 in Geneva published a document titled *The Protection of Traditional Cultural Expressions: Draft Articles – Rev.*[14] The most plausible way to protect components of culture can be as Traditional Cultural Expressions ("TCEs") as long as they come within the scope of the term as laid out in the Draft Article. TCEs have been defined as "tangible and intangible forms in which traditional knowledge and culture are expressed, communicated or manifested". There are two kinds of protection provided to TCEs through the document:

Positive Protection**:** Protection is termed 'positive' when the use of these expressions for IP and non- IP purposes is permitted by putting a check on others from what is known as "illegitimate access to traditional knowledge". This will protect to prevent others from using such expressions for commercial gain.

Defensive Protection: This protection ensures the formulation oF procedures to establish a strict system wherein third parties will not be able to secure illegitimate or unjustified IP rights over these expressions.

The Draft Article on *The Protection of Traditional Cultural Expressions* is an ongoing initiative of WIPO and it remains to be seen whether it will be accepted by the indigenous peoples, whose "expressions of culture" are sought to be protected through it. Much has been debated about the

[14] The Protection of Traditional Cultural Expressions: Draft Article – Rev. available at: https://www.wipo.int/meetings/en/doc_details.jsp?doc_id=439176 (last visited on Aug.17, 2021).

limitations the Draft Articles pose to the indigenous community; hence it has not been able to move forward as expected. The difficulty also lies due to differences in the protection sought amongst the indigenous communities themselves. It is must therefore be taken up promptly and on priority to finalize it as soon as possible.

A. The Cases and IP Law

The cases highlighted in this article are demonstrations that will help understand that IP laws in most countries do not recognize such situations. Let us find out what kind of IP can be used to protect traditional designs belonging to Tribals in Northeast India by using the three cases as examples:

Copyright: Copyright law gives protection to products of intellectual creativity, but such traditional kinds of creativity such as designs, stories and songs are not covered by it. According to section 2(c) of the Copyright Act, "artistic work" has been defined as work of "artistic craftsmanship". From this definition we can gather that the designs on the shirt (*Thangchhuah*), scarf (*Leirum Phee*) and *Rira* and *Rura* shawls would qualify for protection, with the exception that they are original works. The Copyright Act also gives exclusive rights to copyright in a work, to the owner of the particular work. In case of these three examples, the traditional designs on the products do not exclusively belong to any one person as the designs have been handed down to the community form one generation to another. Hence we cannot establish a single owner to such works. The other issue would be the question of tenure and duration of copyright which can also not be determined as the source of the work

cannot be ascertained. The Berne Convention has made mention of "anonymous works"[15] which has been incorporated in the Copyright Act but the term does not seem to pass the test in such cases as well owing to the fact that the term of duration of copyright has to be determined from the date of "publication" of the work. As has already been mentioned owing to the nature of the work such determination is not possible in such traditional designs.

Trademarks: These traditional designs will not be protectable as trademarks because the statutory requirement under Trademarks Act does not include traditional designs. According to section 2z (b) Trademarks Act, 1999 "trade mark" is defined as a "mark capable of being represented graphically and which is capable of distinguishing the goods or services of one person from those of others." Again here the traditional designs will not satisfy the requirement calling for ownership to a person as such designs belong to the community and not to one person.

Geographical Indications (GIs): This may be the best and safest way to protect traditional designs. The GI tag will protect the process used by the artisans for creating the traditional design with exclusive rights belonging to them. A GI tag ensures traditional design is protected as it derives its unique qualities due to its existence in a particular region or an area and therefore attributes its qualities and features to it. With the exception of the *Rira* and *Rura* shawls belonging to the *Chakeshang* tribe

[15] Berne Convention for the Protection of Literary and Artistic Works (Paris Text, 1971), Art. 15(4) (a).

of Nagaland, both the *Thangchhuah* and *Leirum Phee* are not protected under the GI Act. It must be mentioned here that the protection afforded through GI tag is for a limited period (10 years) renewable after the expiry of this term.

However, protection through GIs may not take care of cultural appropriation in the long run as expected. The reason being the most important step in the protection of GIs is the involvement of the government in marketing and promoting the GI. This has not gained much popularity with many of the goods which have received a GI tag so far. Therefore it is unlikely to receive accolades and recognition in the international market when so little is known about these traditional designs in the national level. The consequence of this is the downfall of market access of the artisans of these traditional designs. Hence the much needed impetus and boost expected to be secured through the GI Act becomes an empty promise to the artisans.

V. CONCLUSION

We can therefore conclude from the foregoing discussion that IP laws are not fully equipped to holistically protect traditional designs belonging to the indigenous peoples and tribes. The idea that these designs must be made known to the public because only then will they be promoted seems to be the reason they are being exploited today. The so–called promoters have benefitted through these designs/expressions of culture but many have failed to acknowledge the real people behind these works. In fact,

with their 'art' having been made public there is no viable means to sustain themselves with the help of it.

It has been witnessed through several cases (not only with the ones we are discussing with in this paper) TCEs often are in conflict with IP. We find that our IP legal framework in India is not strong enough to protect TCEs.[16] Thus, traditional creativity is copied and recreated as there is no legal protection to it.[17] One of the most important question we can ask ourselves is what do we want to protect under the expression "Traditional Cultural Expressions"? Do these traditional designs (mentioned in these three cases) belonging to a tribal community qualify for protection under the term "Traditional Cultural Expressions" in India?

Today, since the laws protecting traditional cultural designs from offensive use do not exist we can expect more cases of cultural appropriation to take place. Due to lack of laws protecting their cultural and traditional rights, there is a need to sensitize the public. To the tribals or indigenous communities both tangible and intangible goods are not for monetary gain but are deeply rooted in their customs and traditions. There is a lot of commercial exploitation of traditional designs belonging to the tribals. The tribes in this region are slowly waking up to their responsibilities in protecting and preserving their culture and heritage. Indigenous peoples must be allowed to have control over their own culture. Unless there is legal protection to their traditional designs and

[16] Sreyoshi Guha, People Tree v Dior: IP Infringement, Cultural Appropriation or Both? available at: https://spicyip.com/2018/02/people-tree-v-dior-ip-infringement-cultural-appropriation-or-both.html (last visited on Aug.17, 2021).

[17] *Ibid.*

other expressions, their culture remains vulnerable to harmful exploitation. Keeping in line with the United Nations Declaration on the Rights of Indigenous Peoples, the time has indeed come to reform intellectual property law through policy considerations by policy makers to protect “traditional cultural expressions” of indigenous peoples.

LAW ON HEALTHCARE WASTE MANAGEMENT IN INDIA: WITH SPECIAL EMPHASIS ON HOUSEHOLD HEALTHCARE WASTE

Trishla Dubey[1]

ABSTRACT

Healthcare waste is one of the most pressing challenges of present times, which has seen an upsurge, especially during this pandemic. A vast body of knowledge already exists on hazardous impacts of these biomedical wastes (hereinafter "BMWs") and their disposal, the research aims to redirect the focus of our authorities and general public towards effective disposal of those BMWs which essentially goes unaccounted for, like healthcare wastes in households, chemists shop and places other than hospitals and research labs. These wastes are in the form of tablet wrappers, syringes, syrup bottles, face masks, gloves, hot water bags, sanitary napkins, etc. This paper attempts to highlight the statutory legal provisions in India to prevent further deterioration of the ecosystem by analysing the legal framework that can be invoked for improving the safe disposal of BMWs and to critically examine the hurdles in the existing laws and their effective implementation. The paper has reviewed the approach of the judiciary to remedy the issue of bio-medical waste management. The authors have also highlighted the best practices followed by other jurisdictions to deal with BMWs

[1] *Assistant Professor of Law, Maharashtra National Law University, Nagpur.*

management. At the culmination of the paper, the authors will try to suggest pragmatic solutions for effective segregation, collection, and disposal of such wastes that ultimately become non-point sources of medical waste pollution in India.

***Keywords**: biomedical waste, health, households, law, pandemic, pollution*

I. INTRODUCTION

World Health Organization (hereinafter "WHO"), the premier body working in the field of health-related issues worldwide, defines healthcare waste as follows:

"Health-care waste includes all waste from health care facilities, research facilities, and laboratories. It also includes waste from "minor" or "scattered" sources — such as that produced during home-based health care (dialysis, injections of insulin, etc.)."[2]

It classified healthcare waste in 1985 for the first time based on its hazard potential. The eight-fold classification includes general, biological, chemical, genotoxic, infectious waste, sharp waste, radioactive and pharmaceutical waste.[3] For the 8 groups, in this paper, the researchers have focussed only on the following categories of waste. *General waste,* usually non-hazardous, includes waste commonly found in households like packaging materials, wrappers, syrup bottles, food, and kitchen

---

[2] Definition and characterization of health-care waste. See generally, B. Ramesh Babu et. al., "Management of Biomedical Waste in India and Other Countries: A Review" *J. Int. Environmental Application & Science, Vol. 4 (1)*: 65-78 (2009).
[3] *Ibid.*

waste, etc. *Chemical waste* encompasses discarded diagnostic, clinical, liquid, and gaseous chemicals, therapeutic, cleaning, housekeeping, and disinfection procedures. *Infectious Wastes* are another category dealing with the spread of infections to those who come in contact with it, like wastes infected with pathogens from lab cultures, surgical, biological, or liquid wastes from patients. There is another category called *Sharps* which includes syringes, scalpels, needles, and other prickly materials. The last category is the *Pharmaceutical Waste* which include expired/outdated or partially used or returned drugs.

WHO claims that only 10-25% of this waste is hazardous and the major chunk is non-hazardous waste.[4] According to WHO, if this waste is not segregated and mixed with other kinds of waste it will become 100 % infectious.[5] These hazardous wastes have wide ramifications on the health of people and the environment. Untreated and openly discarded hazardous medical waste releases drug resistant microorganisms into the environment.[6] In 2016, a WHO report revealed that almost five lakh people around the world have multidrug- resistant tuberculosis and this drug-resistance is further impairing our fight against HIV and malaria. Out of these five lakhs, 65,000 cases were found in India alone.[7] This

---

[4] *Ibid*.
[5] Toxic Link Report 2020, "Failed or Ignored? The Disastrous Case of Bio-Medical Waste Management in Jharkhand" p.no. 1; *available at* http://toxicslink.org/docs/BMW%20%20-%20Jharkhand%20without%20blank.pdf (last visited on August 14, 2021).
[6] *Ibid*.
[7] Isher Judge Ahluwalia and Almitra Patel, "The three bin solution", *The Indian Express, available at* https://indianexpress.com/article/opinion/columns/domestic-waste-who-segregation-recycling-waste-management-5467901/ (last visited on August 14, 2021).

percentage of hazardous household medical waste is likely to have risen in this pandemic and so are the problems associated with the management of these wastes.

The household medical wastes mixed with other domestic wastes become even more toxic and create further problems in their effective treatment and disposal. To avoid this situation, the individuals must take responsibility to segregate these wastes right at the point of origin i.e. in their households. Since the primary responsibility lies with the consumers, it has become extremely important that they are made aware of the potential hazards of this intermixing of waste, not only on their health but on the environment in general. In this time of crisis, awareness can prove to be a game-changer in our fight against the rising tide of medical waste pollution in India.

II. HEALTHCARE WASTE MANAGEMENT SCENARIO IN INDIA

In response to Ms. Kumari Selja 's question to the Minister of Health and Family Welfare in Rajya Sabha on the tragedy of biomedical waste incineration in India, the Minister stated on 17 March 2020 that the quantity of bio-medical waste produced in 2018 is 608 tons/day, 528 tons/day of which is handled.[8] This data has come from the compilation of individual data provided by States and UTs through pollution control

[8] Government Of India, Ministry Of Health And Family Welfare, Department Of Health And Family Welfare, Rajya Sabha, Unstarred Question No.2665, 17th March, 2020, Burning Of Biomedical Waste *available at* https://pqars.nic.in/annex/251/AU2665.pdf (last assessed on August 14, 2021)

boards operating in respective states. In a CPCB report,[9] it was admitted that inventory on biomedical waste generation is incomplete because biomedical waste generation reported by SPCBs is not proportional to the population in States/UTs. Generation of biomedical waste across the States is reported as Bihar (6 %), Delhi (4.4 %), etc.[10] which is not proportional to the population of States. Consequently, it was mentioned in the report that the inventory is unreliable till the time complete information is furnished by all the states.[11]

The existing rules of waste collection and lack of reliable data make the work of municipal bodies more tedious and jeopardize every effort to deal with these wastes. In addition to that, there is a total absence of any data on medical wastes originating from homes. In recent years, the life expectancy of Indian people has increased owing to improving health care facilities in India, shooting purchasing power of Indian families, changing lifestyles leading to a greater number of non-communicable diseases like diabetes, etc. All these reasons have contributed to the increased consumption of medicines in Indian households.[12] The more the consumption, the larger will be the waste generated.

In the absence of a law specifically targeting such wastes, there is no obligation on the authorities to promote the door-to-door collection of

---

[9] Annual Report on Biomedical Waste Management as per Biomedical Waste Management Rules, 2016 (2018), Central Pollution Control Board, Ministry of Environment, Forests and Climate Change; https://cpcb.nic.in/uploads/Projects/Bio-Medical-Waste/AR_BMWM_2018.pdf (last assessed on August 14, 2021).

[10] *Id*. 14-32.

[11] *Id*. at 14. Also see, *Shailesh Singh v. Sheela Hospital & Trauma Centre, Shahjahanpur and Others,* 2019 SCC OnLine NGT 156 para 6.

[12] Aarthy Ramasamy and Sambit Dash, "Neglect of Household Biomedical Waste" 54 *Economic and Political Weekly* 49 (2019).

these wastes or to create awareness among people on the catastrophic consequences. As a consequence, one study conducted in Bangalore city revealed that 98 % of the biomedical wastes get mixed with other forms of domestic wastes originating at homes.[13] The untreated household medical waste is ultimately drained into nearby river/water bodies[14], sewers, landfills[15], etc affecting the health of people, biodiversity, and environment at large. Hence it is time that authorities in India pay due attention to this simultaneously generated waste in India.

III. LEGAL FRAMEWORK ON BIOMEDICAL WASTE UNDER ENVIRONMENTAL LAWS IN INDIA

The Environment Protection Act, 1986 is India's umbrella environmental protection legislation. It does not talk about healthcare waste directly but enormous powers given to the central government u/s 6, 8, and 25 led to the passing of Biomedical Waste Management Rules, 2016 (hereinafter "BMWM Rules"). These rules define biomedical waste as,

"Bio-medical waste" means any waste produced during the diagnosis, treatment or immunization of humans or animals or research activities

[13] Reshma Ravishanker, "98% of domestic biomedical waste mixed with solid waste", *Deccan Herald*, December 30, 2018 *available at* <https://www.deccanherald.com/98-domestic-biomedical-waste-710497.html> (last visited August 14, 2021).

[14] "Rampant dumping of biomedical waste continues on Adyar river banks in Chennai", *The Indian Express*, August 16, 2019 *available at* <https://www.newindianexpress.com/cities/chennai/2019/aug/16/rampant-dumping-of-biomedical-waste-continues-on-adyar-river-banks-in-chennai-2019474.html> (last visited August 13, 2021).

[15] "Household biomedical waste adds to hazards at landfill sites", *Deccan Herald*, March 20, 2018, *available at* https://www.deccanherald.com/content/665443/household-biomedical-waste-adds-hazards.html (last visited August 13, 2020)

related to it or in the manufacture or testing of biological or health camps, including the categories referred to in Schedule I attached to those laws."[16]

Such rules apply to all persons producing, collecting, processing, storing, transporting, treating, disposing or handling bio-medical waste of any manner, including hospitals, nursing homes, clinics, pharmacies, veterinary institutions, animal houses, pathological laboratories, blood banks, AYUSH hospitals, scientific institutions, research or educational institutions, health camps, vaccination camps, blood donation camps, first aid rooms of schools, medical or surgical camps.[17]

The use of the term 'including' above clearly shows that the application provision u/r 3 of the rules are non-exhaustive rather than only indicative.[18] It talks about 'all persons' but does not expressly mention the consumers or buyers of the medicines, gloves, masks, or other health care equipment who purchase these items for self-treatment or temporary storage. After using these articles, common people usually discard it in their dustbins and the medical waste – hazardous or non-hazardous gets mixed with their domestic waste. BMWM rules, 2016 prohibit such mixing by occupiers of institutions generating all kinds of medical waste.[19] Here, the institutions seem to be limited to part of section 3 after *'including'*. The occupier is defined under the rules as,

---

[16] Biomedical Waste Management Rules, 2016, rule 3(f).

[17] Biomedical Waste Management Rules, 2016, rule 2.

[18] This proposition is supported in *W.B. Nursing Homes Association and Ors. v. W.B. Pollution Control Board and Anr.* 2001 SCC OnLine Cal 5: (2001) 1 CHN 293 para 3.

[19] Biomedical Waste Management Rules, 2016, rule 4. Also see, *Global Warming Environment Protecting Society (Regd.) Rep. by its President Swami Govinda Ramanuja Dasa v. Chief Secretary of Tamil Nadu and Others* 2018 SCC OnLine Mad 8632 para 19.

"occupier means a person having administrative control over the institution and the premises generating bio-medical waste, which includes a hospital, nursing home, clinic, dispensary, veterinary institution, animal house, pathological laboratory, blood bank, health care facility, and clinical establishment, irrespective of their system of medicine and by whatever name they are called;"[20]

This definition of occupier seems to restrict the scope of the applicability of BMW rules, 2016. In contrast, if we look at the definition of occupier under EPA, 1986

""occupier", in relation to any factory or premises, means a person who has control over the affairs of the factory or the premises and includes, in relation to any substance, the person in possession of the substance;"[21]

The plain reading of definitions provided by EPA shows that it is simple and facilitative. It includes *'the person in possession of the substance'*, which can be used to cover all persons in possession of health care items and equipment. If we substitute the meaning given u/r 3 (m) with the meaning given u/s 2(f), we might get the desired result but that is not the case. Due to the above-mentioned provisions, the responsibility of biomedical waste collection, treatment, and disposal largely remains on the shoulder of local/municipal bodies (hence, the 'Government' within the scope of Article 12 of the Constitution of India) and there is no

[20] Biomedical Waste Management Rules, 2016, rule 3(m).
[21] Environment Protection Act, 1986, s. 2(f).

liability imposed on individuals who generate these healthcare wastes domestically.

The toxic journey of these household medical wastes begins with this inter-mixing. These wastes are then collected by the municipal bodies and form part of open landfills, pits, or other garbage storing areas where they become more hazardous after blending with other kinds of wastes present in these places. The unscientific disposal of bio-medical waste has the potential of causing serious diseases such as skin infection, eye infections, breathing problems, AIDS, haemorrhagic fevers, septicaemia, hepatitis type A, B, and C, etc.[22] Such unscientific disposal also causes environmental pollution leading to the unpleasant odour, growth, and multiplication of vectors such as insects, rodents, and worms and can lead to the transmission of diseases such as typhoid, cholera, hepatitis, and AIDS through syringes and needles contaminated with various transmittable diseases.[23]These wastes adversely affect rag pickers,[24]

[22] Chandrappa, Ramesha, and Diganta Bhusan Das. "Biomedical Waste." Solid Waste Management: Principles and Practice p.no. 147–175. (June 30, 2012) *available at* <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7122413/> (last accessed on June 18, 2021)
[23] *Shailesh Singh vs. Ganga Charan Hospital (P) Ltd., Bareilly and Others* 2019 SCC OnLine NGT 156 para 2
[24] Ravi Agrawal, "Medical Waste, Issues, Practices and Policy, An Indian and International Perspective", Seminar on Health and the Environment, Centre for Science and Environment, July 6-9th, 1998, New Delhi p.no. 39 *available at* <http://toxicslink.org/docs/06078_Medical_Waste__Issues_Practices_Policy.pdf> (last accessed on August 12, 2020)

sanitization workers,[25] animals and birds[26], and the environment in general. They contaminate underground waters, soils[27], and air quality also gets deteriorated due to the open incineration of these wastes.[28]

The BMWM Rules, 2016 fails to talk about household healthcare waste due to which they remain largely untracked and the absence of data on the generation of these household health care waste further aggravates the problem. The BMWM (Amendment) Rules, 2018 suggested the usage of technologies like barcoding and GPS for the handling of bio-medical waste by March 27, 2019, following Central Pollution Control Board Guidelines, but so far, no such guidelines have been issued. Once this technology enters our everyday usage of drugs and other medical equipment, it will become easier to undertake micro-level management of wastes generated from these products.[29]

---

[25] Vijaya Pushkarna,"45 sanitation workers test positive for COVID, 15 succumb, but where are the yellow bins?", *Citizen Matters* (June 9, 2020) *available at* https://citizenmatters.in/delhi-threat-to-community-and-sanitation-workers-from-covid-biomedical-waste-19380 (last accessed on August 15, 2021)

[26] Rayies Altaf, "Garbage dumps leading to shift in food habits of wild animals: study", *Business Line* (January 14, 2019) *available at:* <https://www.thehindubusinessline.com/news/science/garbage-dumps-leading-to-shift-in-food-habits-of-wild-animals-study/article25992042.ece> (last accessed on August 15, 2021).

[27] Fundamentals of health-care waste management, WHO p.no. 7,8 *available at* https://www.who.int/water_sanitation_health/medicalwaste/en/guidancemanual1.pdf (last accessed on August 10, 2021).

[28] See generally, *Global Warming Environment Protecting Society (Regd.) Rep. by its President Swami Govinda Ramanuja Dasa vs. Chief Secretary of Tamil Nadu and Others* 2018 SCC OnLine Mad 8632.

[29] See also, "Bio-medical Waste Management Rules Amended to Protect Human Health": Dr. Harsh Vardhan, Press Information Bureau, Government of India, Ministry of Environment, Forest and Climate Change (March 24, 2018) *available at* https://pib.gov.in/Pressreleaseshare.aspx?PRID=1526326 (last accessed on August 15, 2021).

Surprisingly, the *Guidelines of June 10, 2020*[30] issued by MOEFCC talks about 'Responsibilities of persons operating Quarantine Camps/Homes or Home-Care facilities' where the procedure of collection of biomedical wastes in yellow bins by urban local bodies from quarantine centres/camps and individual households operating as quarantine homes/homecare facilities is mentioned. Unfortunately, these guidelines suffer from several criticisms in the context of household healthcare waste management:

i. Their applicability is limited to quarantine homes/home care facilities for COVID-19 patients while there are other households which are possessing healthcare waste but no provision is made for them.
ii. It leaves everything at the discretion of the ULBs (Urban Local Bodies) who are already overburdened with old and emerging challenges during this pandemic. Hence waste management remains the last thing they care about.
iii. The lack of awareness about these guidelines among the general public is quite high.
iv. There is no methodology specified for the disposal of these wastes in the guidelines.

In its revised guidelines,[31] CPCB has issued further clarifications. The relevant portions of these guidelines are reproduced below:

[30] Guidelines for Handling, Treatment and Disposal of Waste Generated during Treatment/Diagnosis/Quarantine of COVID-19 Patients, Central Pollution Control Board, June 10, 2020 *available at* (last accessed on August 15, 2021).
[31] Guidelines for Handling, Treatment and Disposal of Waste Generated during Treatment/Diagnosis/ Quarantine of COVID-19 Patients – Revision 2, Central Pollution Control Board, April 18, 2020 *available at* http://www.cpcbenvis.nic.in/pdf/BMW-GUIDELINES-COVID_1.pdf (last accessed on August 15, 2021)

The main aim of this Revision 2 of the Guidelines is to provide basic criteria and obligations for persons in the healthcare sector who operate sewage treatment plants and explain general waste disposal for quarantine households and perhaps other household masks/gloves. [32]
The masks and gloves used should also be stored in a paper bag, either for a home or for other homes, for a minimum of 72 hours before disposal, the same as waste. To prevent reuse, it is advised to cut masks before disposal. [33]

It is praiseworthy that CPCB is gradually acknowledging the hazards associated with healthcare wastes originating in households other than quarantine homes/ home care facilities, but, the application of these guidelines is limited to COVID-19 related wastes like masks, gloves, etc and not to normally originating medical wastes like expired drugs, their packaging, etc. A comprehensive long-term policy is required at this stage to deal with all kinds of healthcare wastes commonly found in households.

IV. MEDICAL WASTE: LIABILITY UNDER OTHER STATUTES

The lackadaisical handling of medical waste poses an immediate danger to healthcare staff and the general public; this issue came in limelight because of the ongoing pandemic where due to untreated medical waste

[32] *Ibid* at 2.
[33] *Ibid* at 4.

more and more people are getting affected by COVID-19.[34] The government, as well as the public, are placing their reliance on the officials to take proper punitive action against the perpetrators, but, the question is under which statute an action should be initiated to prevent public harm. This part of the paper will highlight the offenses and judicial interpretations encompassed under a series of statutes and judgments that empowers the state authorities and its instrumentalities to take suitable actions against the violators.

Liability under Indian Penal Code

The Indian Penal Code under Sections 268 and 269 enshrine the prohibitions on public nuisance and spread of infection. The provision traces its origin from the Roman maxim *sic tari tuo alienum non lecdus,*[35] enjoy your property in such a way that it does not infringe the right of another, and *sic utari tuo utrem publican non laedas,* enjoy your property in such a way as not to infringe the public's right.[36] The legal provisions on public nuisance should consider medical waste generated by any person by applying point of origin principle for all legal purposes and hence, the polluter becomes liable.

Section 268, IPC defines 'public nuisance', the section contemplates the following essentials for proving the charge:

[34]"Unsafe Disposal of Masks posing a threat to sanitation workers", *available at* https://www.thehindu.com/news/cities/Visakhapatnam/unsafe-disposal-of-masks-posing-a-threat-to-sanitation-workers/article31940360.ece (last accessed on August 15, 2021)

[35]Oxford Reference, "meaning of sic utere tuo ut alienum non laedas" *available at* https://www.oxfordreference.com/view/10.1093/oi/authority.20110803100504563 (last accessed on August 15, 2021)

[36] K. D. GAUR, *TEXTBOOK ON INDIAN PENAL CODE* 385 (UNIVERSAL LAW PUBLISHING, NEW DELHI, 5TH EDITION. 2014).

a. a person must do an act or must be guilty of illegal omission.
b. Such an act must cause
   i. common injury, danger or annoyance to either the public or to the people in general.
   ii. injuries, obstructions, risks or annoyances that might be required to use public right.

An individual can cause public nuisance, even if he has no intention of causing injury or danger to anybody.[37] The fact that it is beneficial or comfortable for the person accused of the offense cannot justify public nuisance.[38] The case concludes that even if some person does not possess a convenient disposal point near him, he does not enjoy liberty to dispose of the medical waste anywhere as he pleases.

Section 278 concerns making the atmosphere noxious to health. The medical waste generated due to over-prescription or under-utilization of drugs or mishandling of products by individuals that comprise medicines and safety gears poses a threat to the overall atmosphere in and around the human residential areas.[39]

Liability under Companies Act, 2013

The manufacturing companies of such medical devices and products should also be brought within the ambit of liability for ensuring the safe

---

[37] K. D. GAUR, *TEXTBOOK ON INDIAN PENAL CODE* 386 (UNIVERSAL LAW PUBLISHING, NEW DELHI, 5TH EDITION. 2014).
[38] *Raghubir vs. Madri*, AIR 1936 Oudh 154.
[39] "Dispose of masks gloves in safe manner", *The Hindu*, June 21, 2020 *available at* https://www.thehindu.com/news/cities/Coimbatore/dispose-of-masks-gloves-in-safe-manner/article31883957.ece (last accessed on August 11, 2021).

disposal of these products. Some provisions already exist under the Companies Act, 2013, such as Section 166 which makes the companies liable for the environmental degradation or any act which may harm the stakeholders or community at large.[40] The directors are held liable for any such conduct that causes environmental degradation and has a potential for causing harm to humans[41] but the implementation of this provision which also has statutory presence is scarce and the stakeholder's theory[42] which promotes this approach to keep the stakeholders interests in mind while conducting the business activities has taken a back seat.[43]

Liability of Civic Bodies

Hospitals and individuals dump their medical waste in Municipal Corporation's garbage and these sites are regularly visited by the waste collectors and rag pickers, which has become a grave issue for the local bodies. The Executive Magistrates are empowered with enormous powers to deal with such issues but rampant corruption and bureaucratic lethargy have not yielded any impact of such powers for the common good.

---

[40] David M. Ong, "The Impact of Environmental Law on Corporate Governance: International and Comparative Perspectives", *European Journal of International Law (2001) Vol. 12 No. 4,* 685-726 *available at* http://ejil.org/pdfs/12/4/1540.pdf (last assessed on June 20, 2021)

[41] *Ibid.*

[42] P.M. Vasudev, "The Stakeholder Principle, Corporate Governance, and Theory: Evidence from the Field and the Path Onward" *Hofstra Law Review, Volume 41 Issue 2* (2012), https://scholarlycommons.law.hofstra.edu/cgi/viewcontent.cgi?article=2698&context=hlr.

[43] Bill et. al, "The Corporate Social Responsibility Report and Effective Stakeholder Engagement" *available at* https://corpgov.law.harvard.edu/2013/12/28/the-corporate-social-responsibility-report-and-effective-stakeholder-engagement/ (2013) (last accessed on August 11, 2021).

The Supreme Court in *M C Mehta Case*[44] upheld the polluter pay principle or generator pay principle which should be invoked by local civic authorities for initiating action against the polluters. However, the ground-level execution of such a judgment from even the apex court of the country is having a negligible effect on the working of civic bodies. The municipal commissioners and the staff employed should be held liable for such dereliction of official duties.

It is worth mentioning that the Ministry of Environment and Forests launched an application named Integrated Waste Management System (IWMS) in 2016 to trace industrial waste and manage it; the program covered more than 43000 industries across India.[45] The same can be done for managing medical waste as well; the municipal authorities can be empowered to manage medical waste 'on purchase-registration through Aadhar based app' to trace the end-use of medicines and related waste.

Liability under Criminal Procedure Code (CrPC), 1973

Under Section 133 and 138, public officials are empowered to remove any disposal or polluting substance from any place within their jurisdiction to prevent public nuisance. The powers extend to the imposition of fines and imprisonment.

---

[44] *M.C. Mehta vs. Union of India* AIR 1980 SC 1622 at pg. 97.

[45] "Government launches app to monitor solid waste management" (2016) *available at* https://www.financialexpress.com/industry/government-launches-app-to-monitor-solid-waste-management/251656/ (last accessed on August 11, 2020).

The executive magistrates have been entrusted with the responsibility of enforcing the provision. Where the magistrate did not question the complainant and the locals about the physical pain or health danger due to the khatal on receiving a complaint about the operation of a khatal, it was held that the order u / s. 133 was illegal in contravention of the specific terms of section 133.[46] It was held that this power could be used by the magistrate to order a municipality to clear a nuisance created by the presence of open drainage, pits, and public excretion by humans for lack of washrooms.[47] The municipality which was erring could be prosecuted u/s. the I.P.C. 188[48]. If an analogy is drawn from the provisions and its interpretation by courts, it shall include the medical waste generated or consumed or used by the individuals as well because there is no strict segregation done of such waste and people generally throw the medical waste which they generate in regular garbage bins which is a grave issue for public health.[49]

When an order is made absolute u/s. 133 or s.138, the person will be called upon to carry it out within a specified time, if he fails to carry it out, he can be prosecuted u/s. 188 of the IPC [s.141(1)][50]. It is open to the magistrate to carry out the order and recover costs from the defaulter [s.

[46] *Chabila Roy vs. State of West Bengal,* 1983 Cr LJ NOC 203 (Cal).
[47] K. D. GAUR, *TEXTBOOK ON INDIAN PENAL CODE* 387 (UNIVERSAL LAW PUBLISHING, NEW DELHI, 5TH EDITION. 2014).
[48] *Municipal Council of Ratlam vs. Verdhichand,* 1980 Cr LJ 1075: AIR 1980 SC 1622. Also see *ibid* at page 390.
[49] Safe management of wastes from health-care activities, WHO Report (2nd edition, 2014) p.no. 31.
[50] *Supra* note 46 at 388.

141(2)].[51] In the event of imminent danger or serious injury to the public, the magistrate concerned may issue an injunction to the person forthwith (S. 142)[52]. The magistrate also has the power to order no one to repeat or continue a public nuisance.[53]

The provision is not invoked against individuals who are negligent or act in any manner that is convenient for them while disposing of the medicines or used medical products; they should also be strictly punished to disseminate deterrence amongst the general public.

Public Sensitivity

The WHO report of 2014 also argues for an effective sensitivity and awareness campaign to the public by the local authorities for the dissemination of information about medical waste management.[54] In the Indian sub-continent, there is little or no information available to the public for the safe disposal of medical waste which is a threat to public safety and well-being. Several statutes in India provide for awareness programs and advocacy initiatives like the Competition Act of 2002[55], Companies Act of 2013[56], and others, such advocacy, and awareness-related provisions must be brought under the Environmental Protection Act as well and its enforcement should be initiated at school level.

[51] *Ibid* at 388.
[52] *Ibid* at 389.
[53] Code of Criminal Procedure, 1973, S. 143.
[54] Safe management of wastes from health-care activities, WHO Report (2nd edition, 2014) p.no. 31.
[55] Competition Act, 2002, S. 49.
[56] Companies Act, 2013, S. 125.

V. JUDICIAL PRONOUNCEMENTS

In India, *B.L. Wadehra v. Union of India*[57]is the first case where the Supreme Court held that, the act of mismanagement of waste was a gross violation of rights guaranteed to citizens under Article 21 and 48A, and 51A(g) but this case focuses squarely on solid waste management in India. In this context, the responsibility to manage wastes lies totally on municipal/local bodies and not on the citizens. The Apex Court in *Almitra H. Patel v. Union of India*[58] observed that the laxity on the part of local bodies can't be tolerated especially when they are constituted especially to provide services to the people. This approach shows how deeply ingrained the doctrine of public trust is, in our administrative and judicial setup. Even when the responsibility has to be fixed on individuals, it is mostly at the level of Director/Medical Superintendent in charge of the hospital premises.[59]

Public Trust Doctrine has been defined in *Kamal Nath case,*[60]
The State is the protector of all environmental assets for public use and recreation. The beneficiaries of the sea, flowing rivers, air, forests, and environmentally sensitive land are widely known. While guardian, the

[57] *Dr. B.L. Wadhera v. Union of India*, (1996) 2 SCC 594
[58] *Almitra H. Patel v. Union of India,* (2000) 8 SCC 19
[59] *Haat Supreme Wastech Pvt. Ltd. v. State of Haryana*, APPEAL NO. 63 OF 2012.
[60] *M.C. Mehta vs. Kamal Nath and Ors,* (1997) 1 SCC 388

State is constitutionally responsible for the conservation of natural resources.[61]

But recently in another case, the court held,[62]

The Doctrine of Public Trust places a duty not only on the State but also on the general public to preserve its natural assets for the next generation in a condition in which it was inherited by them, if not in a better state. The degradation of the environment and ecology of the eco-sensitive area is now a publicly known fact and can be taken judicial notice of by the Tribunal.[63]

Thus, it is evident that the reach of the public trust doctrine has expanded further in India taking within its ambit the general public who owe a duty towards other fellow citizens in the matter of keeping the environment clean to ensure uninterrupted eco-services to all.

Arguably, if the liability has to be imposed on the public, the first and foremost requirement should be to make people aware of the harmful consequences of their actions. This is the reason why the Bombay High Court emphasized awareness creation among the masses in the *Claudio Fernandes case.*[64] The case deals with the abatement of nuisance/pollution caused by the dumping and burning of untreated garbage at the said dumping site at Sonsoddo, Goa. Bombay HC took a

[61] *M.C. Mehta vs. Kamal Nath and Ors,* (1997) 1 SCC 388 para 23-25, 34, 35, 39

[62] *Court on its own Motion Vs. State of Himachal Pradesh & Ors.,* Original Application No. 237 (THC) of 2013.

[63] *Ibid* at para 7.

[64] *Claudio Fernandes and Others v. Margao Municipal Council and Others,* 2003 SCC OnLine Bom 722 para 13-16.

proactive approach and issued certain general and specific directions. The relevant guidelines included making the public aware of applicable laws and the State should make adequate provision for this.[65] Regular workshops and seminars should be conducted to encourage people to segregate waste at the household level.[66] Broadcasting organizations like Doordarshan and All India Radio should display messages on waste segregation.[67] Educational institutions should impart knowledge on the disposal of waste at home and public levels.[68] Further, municipal bodies were also directed to run continuous public awareness programs on the waste collection with the assistance of NGOs for at least six months.[69]

Though the above cases deal with municipal solid waste management, the guidelines are equally relevant in the case of biomedical waste management in India. It also highlights the fact that the importance of awareness was well-recognized by the judiciary though it has not become part of any statute so far. In *Re: Scientific Disposal of Bio-Medical Waste arising out of COVID-19 treatment- Compliance of BMW Rules, 2016*[70], the NGT recommended that the guidelines should cover not only institutions but also households where incinerators are not available and deep burial can have adverse impact on groundwater and, consequently, the health and safety of people.[71] Best available practices should be used

[65] *Ibid.*
[66] *Ibid.*
[67] *Ibid.*
[68] *Ibid.*
[69] *Ibid.*
[70] *Re: Scientific Disposal of Bio-Medical Waste arising out of COVID-19 treatment- Compliance of BMW Rules, 2016* Original Application No. 72/2020 p.no. 14 para 9.
[71] *Ibid* at 14.

in this regard with regular supervision and monitoring.[72] It is also important to create awareness amongst people about the safeguards which are required to be taken. This can be done with the help of Panchayat, Subdivision, District, and State level authorities who would frame a model plan to be implemented at respective levels.[73] There's a need for training sanitation workers and other handlers.[74] This is a landmark judgment in this field as it lays down the foundation of future statutes governing domestic medical waste treatment and disposal in India.

VI. CONCLUSION AND SUGGESTION

The management of biomedical and other healthcare waste is a daunting challenge but the segregation of the same at the household level is a bigger hurdle to confront. Many countries like UK[75] and USA[76] have started filtering these wastes at their origin which can be replicated in India. A relevant example from the non-western world is Japan, where there has been a move towards the 3Rs. The focus has been on policy interventions to create a sound cycle-based society. Promotion of citizen

---

[72] *Ibid* at 15.
[73] *Ibid* at 15.
[74] *Ibid* at 15.
[75] An Introductory Guide to Healthcare Waste Management in England & Wales CIWM p.no. 15 (2014), *available at* https://www.ciwm.co.uk/Custom/BSIDocumentSelector/Pages/DocumentViewer.aspx?id=QoR7FzWBtisamYEcWSfL6SxAJRLAPT9vl3Da9d0xu%252fXTw5Mn4fZYAs61fy8XU42G3dW3Woc%252fgkFfz79Mdq%252bx0PL0ZaeQVXQpjMNCJ6I7%252bAZX5z7moORcwDssj372vi17zLkGZ44Eef3A5QLiIA5GdA%253d%253d (last accessed on August 11, 2021).
[76] National Hazardous Waste Management Plan 2014-2020, Environment Protection Agency, *available at* http://www.epa.ie/pubs/reports/waste/haz/NHWM_Plan.pdf (last accessed on August 11, 2021).

understanding has been done by Waste Reduction Promotion Week, TV campaigns, Tokyo Waste Council with representatives from consumers, businesses and administration, and recycling plazas. Another example is Columbia, where an indigenous reverse vending machine – ECOBOT has been set up in public places which can be used to get discount coupons on giving empty PET bottles. Closer home, a method to mix shredded plastic with hot gravel and adding it to molten asphalt has been developed, and is in preliminary stages of testing on Indian roads. Hospitals in the Philippines have approached healthcare waste management with proper care. They placed a premium of waste reduction at the source by shifting to recyclable packaging from non-biodegradable styrofoam. Not only have techniques of 'reuse' proved beneficial to the environment, but they have financial benefits also. A lot of waste has been found capable of recycling through proper waste segregation. Apart from the generation of awareness among patients and the training of hospital staff, rewarding the people for waste segregation efforts through a profit-sharing scheme of sale of hospital wastes has also helped.[77]

In India, experts have suggested a third or the fourth bin – bin for medical wastes (the other two being, biodegradable and non-biodegradable waste). This suggestion will solve the problem of inter-mixing of domestic waste and medical waste but it will not solve other problems like, who should collect this waste, how it will get disposed of, etc.

[77] Singh, Jayant, "Waste Management Laws in India: Plastic & Biomedical Wastes" (January 1, 2019). *available at* SSRN: https://ssrn.com/abstract=3311161 ((last accessed on August 30, 2021)

In India, municipal bodies are collecting solid wastes from door to door but lately many reports[78] published are highlighting their failures. Hence, complete dependence on them would be a mistake. Instead, now people purchasing medicines and other healthcare equipment should step up and aid these municipal bodies in the collection and safe disposal of this waste. A proper channel has to be developed, for instance, the citizens should be allowed to deposit their medical wastes with nearby chemist shops who will gather the waste generated due to expired drugs and other kinds of medical uses, in this way these chemists will become focal points and once a week, municipal bodies could directly collect waste from here. To ensure better collection, storage, and transport of these wastes from chemist shops, financial incentives could be provided to them, and to make this task mandatory, new licenses should not be issued unless this waste collection requirement is stipulated in them, also the old licenses should get renewed/modified complying with this requirement. This will make collection easier, raise awareness about these semi-hazardous wastes, increase public participation, prevent open discarding of wastes, disposal would become more efficient and it will be a win-win situation for all stakeholders. An annual report on such collection and disposal should be submitted/displayed on the pollution control board's website. A medical cess can also be levied by the government for achieving this purpose or in the alternative, the environmental cess can be utilized.

[78] Report on health-care waste management status in countries of the South-East Asia Region 2017, World Health Organization, p. 30 SEA-EH-593.Study Report on Environmental Audit-Audit reports on waste, Comptroller and Auditor General of India, *available at* https://cag.gov.in/uploads/StudyReports/SR-StudyReports-05de75d63a6d748-25202237.pdf (last assessed on September 10, 2021)

Initially, the government will also have to provide basic training to common people and chemist shop owners as they are new players in this field. For achieving this purpose, aid from primary health care centres and government and private hospitals can be taken.[79] The government should also involve private players in the effective disposal of such waste to improve the reach of such an initiative. In Pallakad (Kerala), *Ecokey India Pvt Ltd* operates a waste treatment plant. It gathers the biomedical waste and passes it over to the authorities via collection kiosks where people can carry their segregated medical waste in red and yellow bags that have been delivered to them. About 1,200 individuals use this service.[80] In another instance, an NGO named *Environment Support Group (ESG)* operating in Bengaluru has sought ward-level audits of all biomedical facilities. It encourages citizen groups in ward committees to inspect and collate data for quick remedial action.[81] Similarly, a prominent NGO named *Sattva Health* collects expired drugs from pharmacies and recycles a part of them using non-burning technologies. Presently it is targeting around 3500 pharmacies.[82]

Recycling of medical wastes is another viable option that has emerged in recent times. It could be developed into a thriving business. Some enterprises are currently working in this area. In Lucknow (Uttar Pradesh), King George's Medical University's hospital is making around

[79] *Supra note* 11.
[80] Sudha Nambudri, "Nobody talks about household medical waste", *Times of India,* January 5, 2018, *available at* <https://timesofindia.indiatimes.com/city/kochi/nobody-talks-about-household-medical-waste/articleshow/62378203.cms (last accessed on August 10, 2021).
[81] *Supra note* 14.
[82] *Supra note* 14.

18 lakh rupees annually through recycling.[83] This model should be replicated at a pan-India level to generate new jobs and manage the medical wastes more efficiently. The persons who default should be strictly dealt with and stringent punishment should be the consequence to ensure large-scale deterrence.

India stands to gain considerably by strictly complying with the rules on medical waste management and by formulating a system for collecting household medical wastes, ensuring that these hazardous elements are handled effectively. Embodied under Article 51A of the Constitution, the government must enforce a duty which, in essence, is our obligation as citizens. The concept of intergenerational equity, to give future generations in general and India in particular, a safe environment is the least we can do to repay for space and resources that we occupy.

We do not have an ecological crisis. The ecosphere has a human crisis.
-William Rees

[83] "'Health Without Harm': Reducing Risk from Healthcare Waste in India", UNDP India, *available at* https://www.in.undp.org/content/india/en/home/climate-and-disaster-reslience/successstories/health-without-harm.html (last accessed on August 10, 2021).

EXPANDING CONTOURS OF ABUSIVE RELATIONSHIPS IN THE EYES OF LAW

Prof (Dr.) Arvind P. Bhanu[1]

ABSTRACT

Women have been accorded equal status to males under the Constitution, yet equality with their male counterparts remains a distant dream. Post-independence, several laws were enacted to meet international obligations toward the betterment of women, but they were largely ineffective due to irrational provisions and poor implementation. Women are vulnerable internally as well as externally in our society. Internal violence or domestic violence is the most heinous kind of crime against women because the perpetrators are those who have been entrusted with the custody of women, and the location of the occurrence is where a woman is supposed to feel safe and protected. It must however be noted that abuse committed within the private walls is not merely limited to the relationship of marriage and also extends to other relationships in the nature of marriage as well as other unions. In this paper, the authors attempt to analyse the laws in India which protect women from sexual and domestic violence in relationships in order to

[1] *Acting Director, Amity Law School Delhi*

Acknowledgment: The author thanks Mr. Adityaraj Patodia and Ms. Niharika Julka, for outstanding research support in preparation of this article.

measure their efficacy. Moreover, the laws must change in order to meet the changing demands of the society. With the courts according to legal recognition to other forms of relationships such as live-in-relationships, this paper attempts to analyze the protection accorded to women from abuse within the walls of such relationships.

***Keywords**: Abuse, Domestic Violence, Indian Penal Code, Live-In Relationships.*

I. INTRODUCTION

Over the last two decades, the Indian society has witnessed numerous protests by women's organizations pressing for changes in the law protecting women from abuse, leading to the state passing the amendment to Section 498A,[2] Section 375[3] and establishing All Women Police Stations, amongst other measures. While there appears to be some progress in the condition of women in modern India compared to the past, the empirical reality seems to be different. In 2018, India was ranked the world's most dangerous country for women.[4] Not only this, as per a survey released by the Thomson Reuters Foundation, India is the most dangerous nation for sexual violence against women, as well as human

---

[2] Indian Penal Code, 1860 (Act 45 of 1860), s. 498A, inserted by Criminal Law (Second Amendment) Act, 1983.

[3] Indian Penal Code, 1860 (Act 45 of 1860), s. 375, amended by Criminal Law (Amendment) Act, 2018.

[4] Statista Research Department, Factors which make India the most dangerous country for women in 2018, *available at:* https://www.statista.com/statistics/909596/india-most-dangerous-country-for-women/ (last visited March 20, 2022).

trafficking for domestic work, forced labor, forced marriage and sexual slavery.[5]

This violence is not merely limited to public settings but may also take the form of abuse in relationships. Herein, such violence occurring in private settings is broadly covered within the scope of Domestic Violence. According to a study, 45% of the women in India are exposed to violence by their husbands.[6] Further, cruelty by husband and relatives accounts for 44% of the total crime committed against women as per the crime statistics in India.[7] The fact that one out of every three women have experienced violence in an intimate relationship at some point in their lives makes this a global concern.[8] The World Health Organisation has rightly called the offense a 'global epidemic',[9] keeping in mind the appalling physical, sexual, emotional, psychological and economic consequences it has on women.[10]

While the United Nations gave women rights the status of human rights much earlier, the recognition of domestic violence as a violation of

---

[5] Angela Dewan, "India the most dangerous country to be a woman, US ranks 10th in survey" *CNN*, June 26, 2018.

[6] Sushma Kapoor, "Domestic violence against women and girls" Innocenti Digest No. 6, *UNICEF Innocenti Research Centre* (2000).

[7] National Crime Records Bureau, Crime in India Year 2012, *available at:* https://ncrb.gov.in/en/crime-india-year-2012 (last visited March 20, 2022).

[8] World Health Organization, "Violence Against Women", WHO Consultation, Geneva (1996).

[9] Rachel Louise Synder, *No Visible Bruises- What we Don't Know Domestic Violence Can Kill Us* (Bloomsbury Publishing, United Kingdom, 2019).

[10] A. Gill & G. Rehman, "Empowerment through Activism: Responding to Domestic Violence in the South Asian Community in London" 12 Gender and Development, Oxfam Journal 75-82 (2004).

human rights is a recent advancement in international law. The Convention of Elimination of Discrimination against Women (CEDAW), formulated in 1979 as an international bill of rights for women, did not explicitly address the issue of Violence against Women. Similarly, the World Plan of Action adopted by the first World Conference on Women in Mexico in 1975 did not expressly refer to violence. It however did draw attention to the need for the family to ensure dignity, equality and security of each of its members. The 1980 Conference in Copenhagen adopted a resolution on "battered women and violence in the family" and addressed in its final report, violence committed at home. It was for the first time in 1986 that an Expert Group Meeting on Violence in the Family was held which adopted recommendations with regard to legal reform, police, prosecutor and health sector training, social and resource support for victims. It also highlighted the fact that domestic violence was a significantly underreported global phenomenon.

Post 1986, the major development towards the recognition of domestic violence as a human right can be attributed to the CEDAW Committee through its General Recommendations 12, 14 and 19. It was the General Recommendation 19 and the Declaration on the Elimination of Violence against Women (DEVAW) that for the first time, provided a comprehensive definition of violence against women in 1992 by recognizing that "*violence against women is a manifestation of historically unequal power relations between men and women, which have led to domination over and discrimination against women by men and to the prevention of the full advancement of women, and that violence*

against women is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men".[11]

II. LAWS AFFORDING PROTECTION FROM ABUSE IN RELATIONSHIPS: A SNAPSHOT INTO THE INDIAN LAWS

As stated previously, violence against women has emerged as one of the most widespread violations of human rights across the globe.[12] Women face this violence not only in public settings but also in private settings such as their homes.[13] That is to say, such violence may not be committed merely by external agencies but may be directed at a person by their significant other. Cutting through the boundaries of caste, religion, class and region, domestic violence is the most common type of violence against women prevalent in India.[14]

Prior to 1983, domestic violence against wives was not punishable in India. However, husbands or in-laws could be charged under the general penal provisions under the Indian Penal Code (IPC)[15] which depending on the crime committed could attract provisions pertaining to murder,[16]

[11] Declaration on Elimination on Violence Against Women, A/RES/48/104, 85th plenary meeting (Dec. 20 1993).
[12] Preetinder Kaur, "Crime, Gender and Society in India" 1 *Higher Education of Social Science* 24-32 (2011).
[13] Deborah M. Golden, "It's not all in my head. The harm of rape and Prison Litigation Reforms Act" 11 *Cardozo Women's Law Journal* 37-60 (2004).
[14] Debarchana Ghosh, "Predicting Vulnerability of Indian Women to Domestic Violence Incidents" 3 *Research and Practice in Social Sciences* 48-72 (2007).
[15] Indian Penal Code, 1860 (Act 45 of 1860), ss. 299 – 377 (offences against body).
[16] Indian Penal Code, 1860 (Act 45 of 1860), s. 302.

abetment to suicide,[17] causing grievous hurt[18] and wrongful confinement[19] amongst others. Similar applicability of these provisions to all accused persons often lead to ignorance of the specifics of the domestic situation of women. This made it extremely difficult for women to prove violence 'beyond reasonable doubt' or produce witnesses to corroborate their story, as required by the law.

This ultimately resulted in intense campaigning and lobbying in the 1980s with the women's rights organizations across India pressurizing the Criminal Law Amendment Committee (1982) to criminalise Domestic violence especially after the much criticised judgement of *Tukaram v. State of Maharashtra*.[20] They urged the government to provide legislative protection to women against domestic violence and dowry. It is safe to say that their efforts did not go in vain and amendments were finally made in the Indian Penal Code, the Indian Evidence Act and the Dowry Prohibition Act, with the object of protecting women from marital violence, abuse and dowry demands. One of the most significant amendments include the incorporation of Section 498-A in the Indian Penal Code (IPC) in 1983, followed by Section 304B in 1986, which particularly deals with the offence of dowry death.

[17] Indian Penal Code, 1860 (Act 45 of 1860), s. 306.
[18] Indian Penal Code, 1860 (Act 45 of 1860), s. 320.
[19] Indian Penal Code, 1860 (Act 45 of 1860), s. 340.
[20] (1979) 2 SCC 143.

It is believed that both these provisions i.e. Section 498-A[21] and Section 304-B[22] were introduced to complement each other since both are directed at curbing domestic violence for dowry. That is to say, while, Section 304-B of the IPC addresses the specific offence of dowry death, Section 498-A of the IPC addresses the violence against married women for dowry. This is also the first time that an attempt was made to consider domestic violence against women bringing it within the ambits of a criminal offence. Thus, the addition of Sec.498-A IPC along with allied provisions was to specifically instil an element of deterrence against dowry deaths in India. However, this only solved a part of the problem.

It was subsequently realised that besides the criminal law amendments, civil law remedies were also required which could ensure the right to reside in the matrimonial home and enable the courts to pass orders to stop the violence. Thus, only a judicious mix of the civil and criminal law could solve to the problem of domestic violence. This resulted in the enactment of the 'Protection of Women from Domestic Violence Act, 2005' almost two decades after the insertion of Section 498-A in the IPC.

In this paper, the authors will now analyse some these laws in detail in an attempt to measure their efficacy in preventing domestic violence in abusive relationships.

A. Safeguards provided under the Indian Penal Code

[21] Indian Penal Code, 1860 (Act 45 of 1860), s. 498A.
[22] Indian Penal Code, 1860 (Act 45 of 1860), s. 304B.

As stated above, while the IPC deals with offences committed against the body of an individual in Chapter XVI,[23] certain specific provisions have been enacted to tackle the issue of domestic violence or violence committed in relationships which are discussed as follows:

1. Cruelty by husband or relative: Section 498A IPC

Inserted by the Criminal Law (Second Amendment) Act on 26th December 1983, this provision protects women from cruelty which may be meted out to them by their husband or a relative. Although the maximum punishment provided is only three years, the offense under this section is a cognizable offense i.e., the police have the power of immediate arrest over the alleged person without any warrant. Additionally, the offense is non-bailable and non-compoundable, meaning that the complaint cannot be withdrawn, once filed. It can only be quashed by the High Court.

It is significant to note that the term cruelty is not defined in any other section or any other statute other than S.498-A of IPC. Thus a large section of the jurisprudence on cruelty is judge made. Its scope has been kept wide open as the type and manner of cruelty changed with time.[24] The definition of cruelty under this section concerns itself with two facets of cruelty:

[23] Indian Penal Code, 1860 (Act 45 of 1860), ss. 299 – 377.
[24] *Krishna Lal v. Union of India*, 1994 Cri LJ 3472.

i. Cruelty for reasons other than dowry demands: This includes any wilful conduct which is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health of such woman.

Cruelty is not restricted to physical injury but also includes within its fold, mental injury. In *State of West Bengal v. Orilal Jaiswal and Anr.*,[25] the deceased was called a woman of evil luck because her father-in-law died shortly after the marriage. Her husband used to also beat her whenever he would come home drunk. In addition to this, she was told at times that items she had brought in dowry were of inferior quality. In this case, the Court held that all these actions amounted to mental cruelty. Thus, Section 498A of the IPC is not merely restricted to dowry harassment and also includes other forms of cruelty as defined under the Section, although one may overlap the other.

Several actions by the husband or relative have been held by the courts to amount to cruelty. For instance, in *Chami v. State of Kerala*,[26] the court ruled that bringing concubine to the house, living with her as husband and wife, and having sexual relation with her in presence of his wife would amount to cruelty under section 498A. Similarly, where the husband used to spend his earnings on gambling and other vices and thereby starved his wife and infant child, it was held to amount to cruelty.[27] In addition to this, the court has also ruled the non-acceptance of baby-girl as cruelty.[28]

[25] AIR 1991 SC 1226.
[26] 2013 Cri LJ 3441.
[27] *State of Karnatka v. Moorthy*, 2002 Cri LJ 1683.
[28] *State of Karnataka v. Balappa*, 1999 Cri LJ 3064.

However, not every action negatively impacting the woman has been classified by the courts as cruelty. For instance, calling wife 'barren woman' was not held to be cruelty by the court in the case of *State of AP v. Kalindidi,*[29] Further in *Pinakin Mahipatray Rawal v. State of Gujrat*,[30] the husband being in an extra-marital relationship was not held to be cruelty within meaning of section 498A of the IPC.

ii. Harassment on account of dowry demand: It must be noted that not every harassment amounts to cruelty within meaning of this section. Here, a link must be established that the harassment or beating was done with a view to coerce the woman to commit suicide or to meet any unlawful demand of dowry. Thus, it is significant to mention that every harassment and cruelty is not covered under this provision. For instance, in the case of *Tapan Pal v. State of WB,*[31] where the wife was compelled to part with her jewellery for the marriage of her sister-in-law, whereby she refused to do so and the matter was not further pressed, it was not held to be cruelty.

The addition of this provision although has been a deterring force to violence against women in relationships, it suffers from certain limitations. Firstly, this provision can only be attracted when the cruelty is meted out by the 'husband' or a 'relative'. In the case of *U.*

[29] 2012 Cri LJ 2302.
[30] (2013) 10 SCC 48.
[31] *Tapan Kumar Mukherjee v. State of West Bengal*, 1995 Cri LJ 1985.

Suvetha v. State and Ors.,[32] the woman was ill-treated and tortured by her husband's aunt, her son-in-law, and her husband's concubine. The Court in the case held that a girlfriend or a concubine could not being connected by blood or marriage and is hence not a 'relative' of the husband within meaning of Section 498A of the IPC. It was held that she could not thus be convicted under section 498A of the IPC. Secondly, the provision only safeguards the rights of a married woman and does not include within its ambit women in other abusive relationships such as live-in-relationships. Thus, there is a need to widen the ambits of the provision.

B. Dowry Death: Section 304B of IPC

Section 304B of the IPC penalises 'dowry deaths' which occurred within seven years of the marriage. The provision, much like section 498A of the IPC, requires that the wife was subjected to cruelty or harassment by her husband or her relative. Moreover, it is not enough that harassment or cruelty was caused to the woman with a demand for dowry at some time, if Section 304B is to invoked it should have happened "soon before her death".[33]

It is significant to note that if no evidence is available for a conviction under Section 304B of the IPC, it is not an impediment for conviction under Section 498A, provided that cruelty is established. That is to say, even if the charge under Section 304B of the IPC is not made out, the conviction under Section 498A of the IPC can be recorded without a

[32] (2009) 6 SCC 757.
[33] *Satvir Singh v. State of Punjab*, (2001) 8 SCC 633.

specific charge being there.[34] This has been reiterated in the case of *State of U.P. v. Santosh Kumar*,[35] where the Apex Court has stated that Section 304B of the IPC and Section 498A of the IPC, although both deal with distinct and separate offences, 'cruelty' is a common essential ingredient in both the offences. However, while under Section 498A of the IPC cruelty by itself amounts to an offence and is punishable,[36] under Section 304B of the IPC, it is the dowry death that is punishable and such death must have occurred within seven years of the marriage. No such time period has been mentioned in Section 498A.

C. Other Provisions

Besides Section 304B of the IPC and Section 498A of the IPC which can be invoked in case of cruelty by husband or relative and dowry death respectively, section 306 of the IPC and Section 406 of the IPC can also be invoked under certain circumstances to protect women from abuse in relationships.

In cases where an individual commits suicide due to any abuse in a relationship, Section 306 of the IPC which penalises Abetment to Suicide can be invoked. Unlike Section 304B and Section 498A, this section is not simply limited to a married woman and thus includes relationships other than marriage within its ambits. It is further gender neutral and can also be invoked by a man against a woman. However, section 306 of IPC

[34] *State of Karnataka v. Balappa*, 1999 Cri LJ 3064.
[35] (2009) 9 SCC 626.
[36] *Arun Garg v. State of Punjab*, 2004 (8) SCC 251.

and 498A are similar to the extent that both require cruelty to constitute an offence. The degree of cruelty to constitute abetment under Section 306 of IPC, however, would be higher than that the degree of harassment and cruelty to constitute an offence under Section 498A of IPC. On the other hand, unlike section 304B IPC, to constitute an offence under section 306 IPC, there is no limitation of seven years after marriage.

Section 406 of the IPC deals with the offence of criminal breach of trust. This section is often invoked along with Section 498A when a woman's stridhan is not returned to her. The following table indicates the punishment that can be awarded under the above stated sections.

IPC Sections	**Description of Offence**	**Maximum Punishment**
S.498-A	Cruelty to Wives	3 Years
S.304-B	Dowry Death	Life Imprisonment
S.306	Abetment to Suicide	10 Years
S.406	Criminal Misappropriation of Trust	3 Years

ISSN 2249-2232 Previously UGC Approved Journal No. 41080

b) Protection of Women From Domestic Violence Act, 2005

As time went on the need for a specific legislation which dealt with Domestic Violence became more and more apparent, thus in 2005 a new Civil Law called 'The Protection of Women from Domestic Violence Act, 2005' (*hereinafter* termed as the "DV Act")[37] was introduced. The DV Act provides for a remedy under the civil law which is intended to protect women from being victims of domestic violence occurring within the family.

The DV Act defines domestic violence as comprising of both classes of cruelty as set out in section 498-A of the IPC.[38] In addition to these it also includes threatening a woman by any conduct as specified in section 498-A of the IPC. It further includes any other injury or harm caused, whether physical or mental. This section classifies abuse amounting to domestic violence into the following categories:

i. Physical abuse
ii. Sexual abuse
iii. verbal and emotional abuse
iv. economic abuse

Under the DV Act, a complaint can be made by the woman who is aggrieved, a person on behalf of the woman or a protection officer[39] and upon receipt of such complaint the magistrate or protection officer has to

[37] The Protection of Women from Domestic Violence Act, 2005 (Act No. 43 of 2005).
[38] The Protection of Women from Domestic Violence Act, 2005 (Act No. 43 of 2005), s. 3.
[39] The Protection of Women from Domestic Violence Act, 2005 (Act No. 43 of 2005), s. 4.

inform the aggrieved person of the rights available to her under the act. These rights include the right to free legal services under the Legal Services Authorities Act, 1987 (LSA Act), the right to file a complaint under Section 498A of the Indian Penal Code, the right to monetary relief and the availability of the services of protection officers.

Additionally, the Domestic Violence Act provides wide ranging remedies to aggrieved women under Sections 18 to 23 which can be granted by the magistrate. Here, section 18 of the DV Act provides for protection order in favour of the aggrieved woman which prohibits the accused from performing a variety of acts including attempts to communicate with the aggrieved person, causing or threatening to cause harm to the aggrieved and alienating bank accounts. Breaching of such prohibiting order may result in imprisonment of up to one year and the accused may be charged under section 498A of the IPC.[40] Whilst Section 20 of the DV Act provides for grant of monetary relief to meet the expenses incurred by the aggrieved women, Section 21 of the Act deals with the power of the magistrate to, during the pendency of the case, grant temporary custody of the children to the aggrieved person. Section 22 of the DV Act, on the other hand deals with compensation and damages to be granted to the aggrieved person for the injuries (including mental torture and emotional distress), caused by the alleged acts of domestic violence. The act also makes provision for interim relief under certain circumstances.[41] It is pertinent to note herein that only a first class magistrate or metropolitan

[40] The Protection of Women from Domestic Violence Act, 2005 (Act No. 43 of 2005), s. 31.
[41] The Protection of Women from Domestic Violence Act, 2005 (Act No. 43 of 2005), s. 23.

court are competent court within meaning of the DV Act to grant a protection order and other orders under the Act.[42] Jurisdiction can be based on place of residence of accused, the aggrieved person or the place where cause of action has arisen.

It is pertinent to note that remedies under the Domestic Violence Act and section 498A, IPC are independent of each other and seeking remedy under either provision does not extinguish the other. The Supreme Court has in this regard stated "*that even before a criminal court where a case under Section 498-A is pending, if allegation is found genuine, it is always open to the appellant to ask for reliefs under Sections 18 to 22 of the Domestic Violence Act and interim relief under Section 23 of the Domestic Violence Act*."[43]

One of the major developments that took place under the Protection of Women from Domestic Violence Act, 2005 is that section 2 (q) was amended to make the Act a gender neutral one. This was done in 2016 in the case of *Hiral P. Harsora and Ors v. Kusum Narottamdas Harsora and Ors*.[44] Earlier, in the case of *Loha v. The District Educational Officer*, *Srivilliputhoor*[45] the Madras High Court, gave a landmark judgement where the court held that even daughter-in-law could be made liable under the act if she caused violence against her mother-in-law or father-

[42] The Protection of Women from Domestic Violence Act, 2005 (Act No. 43 of 2005), s. 27.
[43] *Juveria Abdul Majid Patni v. Atif Iqbal Mansoori*, (2014) 10 SCC 736.
[44] (2016) 10 SCC 165.
[45] W.P. (MD) No. 8646 of 2015.

in-law. Thus, following the amendment of section 2 (q), any person, whether male or female, can invoke the provisions under the Act.[46]

While the provisions of this act have been efficiently formulated to prevent any form of abuse in relationships, there continues to be lack of awareness as to its provisions. It has been often observed that the police officers and the magistrates are not well aware of the provisions of the Act. More so, the lack of sensitization among the enforcing agencies under the DV Act worsens the situation in the sense that women are re victimized at the hands of the machinery.

III. RIGHTS OF WOMEN

A. Domestic Relationships

Domestic Relationships refer to the relations between two persons living in a shared household. This could be in the form of wives, daughters-in-law, sisters-in-law, widows or blood relations liked mothers, sisters or daughters or through adoption, live-in relationships, and women in bigamous or invalid marriages. The definition of domestic relationship is exhaustive as per the DV Act.[47]

Marriage is the primary form of a domestic relationship, but there are various other relationships that may have similar attributes like bigamous,

[46] *Mohd. Zakir v. Shabana*, Crl. Petition No. 2351 of 2017.
[47] The Protection of Women from Domestic Violence Act, 2005 (43 of 2005), s. 2(*f*).

adulterous, live-in or any combination thereof. The Domestic Violence Act[48] recognises a "relationship in the nature of marriage" as a domestic relationship and provides for the protection of women from domestic violence. However, the DV Act has nowhere defined a relationship in the nature of marriage. It is open for interpretation and up to the courts to decide which relationships will come under the provision.

In 2010, the Apex Court defined a "relationship in the nature of marriage".[49] Certain requirements for a couple to be considered as married were appropriate age, otherwise qualified, unmarried before entering marriage, must voluntarily cohabit and hold themselves out to society as being akin to spouses. Along with these requirements, it was held that parties must have cohabited in a "shared household"[50]. Relations purely for sexual purposes or where a man is financially maintaining a woman would not be a relationship in the nature of marriage. Also, sexual relationship outside marriage was regarded as taboo.

This definition was deeply flawed as it narrowed the category to marriage *stricto sensu*. It should have been wider to include more situations which cannot meet the requirements laid down by the Court. A relationship in the nature of marriage is not marriage; hence the requirements of marriage should not be expected to be fulfilled. Another condition was that person should be unmarried, so if a man's first marriage is proved, his second relationship towards marriage can never come under this

[48] The Protection of Women from Domestic Violence Act, 2005 (43 of 2005), s. 2(*f*).
[49] *D. Velusamy v. D. Patchaiammal*, (2010) 10 SCC 469.
[50] The Protection of Women from Domestic Violence Act, 2005 (43 of 2005), s. 2(*s*).

definition, leaving the woman from the second relationship vulnerable as she won't be able to exercise the Domestic Violence Act. This will reduce the burden on the man, thereby increasing concubinage.

In 2013, the op Court created an exception while applying this definition. In this case, the woman had started living with a man whose first marriage was valid and wife was living, however, she did not have knowledge of the same. Hence, the court held that even though the man does not meet the requirement of being unmarried for a live-in relationship to be considered as a relationship in the nature of marriage, in this case it will be treated as a domestic relationship. This was the first case to create an exception and called for legislative action to protect women who contribute in a joint household.[51]

B. Shared Households

A shared household[52] is where the aggrieved person or woman lives in a domestic relationship, either alone or with the man against whom the complaint is lodged. It could also refer to a household where a woman has resided in a domestic partnership but has been evicted. This may include a variety of situations, regardless of whether the respondent owns the home or rents it. It also consists of a house owned jointly by the aggrieved person and the respondent, and any rights, titles, or interests held by both.

[51] *Indra Sarma v. VKV Sarma*, (2013) 15 SCC 755.
[52] The Protection of Women from Domestic Violence Act, 2005 (43 of 2005), s. 2(*s*).

Despite a legitimate marriage, a woman may not live or might have lived for a single day in the "shared household". A restricted interpretation of "domestic relationship" and "shared household" would leave many women in distress and without any remedy. Hence, the correct interpretation would be to include both scenarios under the purview of the right to live, i.e., "live" and "have at any point of time lived".[53] At the same time, living of a woman in the household should reflect some permanency as opposed to mere fleeting or casual living.[54]

In *Batra v Batra*[55], a two-judge bench of the Supreme Court had held that a wife was entitled to claim residence in a shared household, and a shared household would only mean the house which belongs to or is taken on rent by the husband/joint family of which husband is a member. After thirteen years, this case was overruled by a three-judge bench of the same Court. Now, the judges believe that the wife can claim the right to residence in a shared household belonging to not just her husband but also to his relatives. In case the house belongs to a relative with whom the woman was in a domestic relationship, like a father-in-law etc., then the said house will become a "shared household".[56] However, if the wife has never lived in her husband's relative's house then it won't be considered as a shared household.[57]

---

[53] *Vandhana v. T Srikanth*, 2007 SCC OnLine Mad 553.
[54] *Satish Chander Ahuja v. Sneha Ahuja*, (2021) 1 SCC 414.
[55] *SR Batra v. Taruna Batra*, (2007) 3 SCC 169.
[56] *Satish Chander Ahuja v. Sneha Ahuja*, (2021) 1 SCC 414.
[57] *Vibhuti Wadhwa Sharma v. Krishna Sharma*, 2021 SCC OnLine Del 2104.

These judgments may suggest that the owners of shared households may not be able to sell their property if the wife feels vulnerable and approaches the court seeking protection. In contrast, the Delhi High Court recently passed an order stating that the right of residence in a shared household is not an indefeasible right and will not create an embargo on the owner to claim eviction against the aggrieved woman (daughter-in-law). The appropriate remedy would be making provision for alternative accommodation for the woman.[58]

C. Live-In relationships

A live-in relationship is an understanding between partners to live together in a relationship similar to marriage but without the status and obligations that come with it. It is like a trial marriage to examine the compatibility between themselves.[59] This arrangement between unmarried homosexual or heterosexual partners could be for a short period or maybe lifelong. The primary reason people opt for such an arrangement is due to the incommodious family laws which compromise their liberty and equity in the relationship. Traditional societies prioritise social order and personal morality, thus proscribing non-marital coitus.

The common belief is that a live-in relationship may not fit in the prevalent legal framework, however, in today's modern era, it has

[58] *Ravneet Kaur v. Prithpal Singh Dhingra*, 2022 SCC OnLine Del 594.
[59] P. Roger Hillerstrom and Karlyn Hillerstrom, *The Intimacy Cover-Up: Uncovering the Difference Between Love and Sex* 51 (Kregel Publications, Grand Rapids, Michigan, 2004).

become a behavioural norm for courtship before marriage, especially in developing countries.[60] The Delhi High court had earlier stated that there is no scope for alleging infidelity, extra-marital affair or immorality by a live-in partner.[61] Over a period of time this relationship will gain socio-legal importance because the rate of childbirth to unmarried parents is rising worldwide.[62]

In India, certain men used to maintain concubines apart from their formally wedded wives for the sole purpose of entertainment and relaxation. Post-independence, bigamy was criminalised in consonance with the secular family laws, except for Islamic men, as the Muslim Personal Law[63] permits polygamy for a male. Currently, India does not have any particular laws for dealing with the intricate matters of a live-in relationship.[64] There are no express statutory laws to regulate disputes arising in live-in relationships like matters related to property, rearing children etc. Comparatively it is the woman who is more aggrieved in a live-relationship.[65] In case such an arrangement does not work out, it is the female who has to stumble blocks for maintenance, children's rights etc. Even the children born out of such relationships are more likely to go

---

[60] Judith A. Seltzer, "Cohabitation in the United States and Britain: Demography, Kinship and the Future" 66 *Journal of Marriage and Family* 921 (2004).

[61] *Alok Kumar v. State*, 2010 SCC OnLine Del 2645.

[62] N. Hudson, and Keith Warrington, "Cohabitation and the Church" 13 *Journal of the European Pentecostal Theological Association* 63 (1994).

[63] The Muslim Personal Law (*Shariat*) Application Act, 1937 (26 of 1937), s. 2.

[64] *Indra Sarma v. VKV Sarma*, (2013) 15 SCC 755.

[65] Éva Beaujouan and Máire Ní Bhrolcháin, "Cohabitation and marriage in Britain since the 1970s", 145 *Population Trends* 31 (2011); Olga Stavrova, Detlef Fetchenhauer and Thomas Schlösser, "Cohabitation, Gender, and Happiness: A Cross-Cultural Study in Thirty Countries", 43(7) *Journal of Cross-Cultural Psychology* 1063 (2012).

through anxiety, depression and get neglected, this only adds to the issues faced by the mother, especially if she changes her partner. A girl child may even face sexual abuse by her mother's new partner leading to disturbed health of the child and her mother, as well as kinship relations in a society.

The scope of a few provisions like Section 125 of the Code of Criminal Procedure, 1973 (CrPC) and Section 2(f) of the Protection of Women from Domestic Violence Act, 2005 have been expanded to entitle aggrieved persons, especially females, with maintenance and provide legal protection against atrocities within live-in relationships.[66] The need to include "relationships in nature of marriage" was recognised in the Report of the Parliamentary Standing Committee on the Protection from Domestic Violence Bill, 2002.[67] In *Sarma v. Sarma*[68], the Supreme Court recognised domestic cohabitation between two unmarried individuals and highlighted the need to amend Section 2(f) of the DV Act. A concubine's long-standing relationship is not in the nature of marriage, but she also deserves protection, hence, an amendment is required in the DV Act to bring live-in relationships within its purview. Recently, the Delhi High Court held that a live-in relationship is in the nature of marriage and protection such as payment of maintenance is available to the aggrieved partner under the DV Act.[69]

[66] *Ajay Bhardwaj v. Jyotsna*, (2017) 1 RCR (Cri) 1.
[67] Department-Related Parliamentary Standing Committee on Human Resource Development on the Protection from Domestic Violence Bill, 2002 (Report No. 124).
[68] *Indra Sarma v. VKV Sarma*, (2013) 15 SCC 755.
[69] *Parveen Tandon v. Tanika Tandon*, (2021) 281 DLT 520.

Due to a lacuna in the law, courts have not depicted uniformity in passing orders. The Kerala High Court placed reliance on specific Supreme Court decisions wherein a man could not be prosecuted under Section 498A, IPC unless he had undergone a proper ceremony in the nature of marriage.[70] Hence, the Court did not recognise the live-in relationship and cruelty charges were dropped against the husband, as they had not undergone any ceremony towards marriage.[71] However, the Madras High Court[72], opined that the Hindu Marriage Act does not permit bigamy[73] but if a couple is in a live-in relationship, it will be valid and over time, the woman will acquire the status of "wife". Also, adultery has been decriminalised[74] and there is no provision in the DV Act which proscribes a married person from having a live-in relationship. Hence, in this case it was decided that the second wife had attained the status of lawfully wedded "wife" post the demise of the first wife.

The Malimath Committee had suggested broadening the scope of Section 125, CrPC to include cohabiting partner under the definition of "wife".[75] Albeit, the judiciary has recognised long term live-in relationships as marriage but have not expanded the definition of "wife" beyond the

---

[70] *Koppisetti Subharao @ Subrahmaniam v. State of Andhra Pradesh*, (2009) 12 SCC 331; *Shivcharan Lal Verma v. State of MP*, (2007) 15 SCC 369; *U. Suvetha v. State by Inspector of Police*, (2009) 6 SCC 757; *Suprabha v. State of Kerala*, 2013 (3) KLT 514.
[71] *Unnikrishnan @ Chandu v. State of Kerala*, (2017) 3 KLJ 918.
[72] *Malarkodi v. Chief Internal Audit Officer, Board Office Audit Branch, TANGEDCO*, 2021 SCC OnLine Mad 2198.
[73] Hindu Marriage Act, 1955 (25 of 1955), s. 17.
[74] *Joseph Shine v. UOI*, (2019) 3 SCC 39.
[75] Malimath Committee Report, Committee on Reforms of Criminal Justice System (March, 2003), at p. 189.

lawfully wedded one. Thus, these females do not enjoy the benefits of a wife except in certain maintenance cases.[76] The contemporary laws worldwide are criticised and outdated to address cohabitation and family laws.

D. Defining Respondents Under the Domestic Violence Act

A woman can press charges against anyone from whom she is aggrieved under the DV Act.[77] Till 2016, only adult males could be prosecuted by aggrieved women as per the erstwhile definition of "respondent". In *Harsora's case*[78] the Supreme Court changed this definition by deleting the term "adult male" as it was going against the spirit of the Act and was not in harmony with Article 14[79]. Consequently, the proviso to the section also stood abrogated as it only provided to carve out an exception to a situation of "respondent" not being an adult male.

The Court held that violence is gender neutral, and it was clear that economic abuse, emotional abuse, verbal abuse, physical abuse and even sexual abuse can be inflicted by females on other females as well.[80] The term acted as a loophole for male persons as they could evict or exclude the aggrieved woman from the shared household by putting forward the female persons and not standing in the forefront.

[76] *Narinder Pal Kaur Chawla v. Manjeet Singh Chawla*, (2004) 9 SCC 617; *Narinder Pal Kaur Chawla v. Manjeet Singh Chawla*, (2008) 1 DMC 529.
[77] The Protection of Women from Domestic Violence Act, 2005 (43 of 2005), s. 2(*q*).
[78] *Hiral P. Harsora v. Kusum Narottamdas Harsora*, (2016) 10 SCC 165.
[79] The Constitution of India, art. 14.
[80] *Rajnesh v. Neha*, (2021) 2 SCC 324; *Hiral P. Harsora v. Kusum Narottamdas Harsora*, (2016) 10 SCC 165.

The term "adult" could also easily defeat the Act's object. As per the Court, it is not impossible to convince a minor to aid or abet the commission of violence, evicting or excluding the aggrieved woman from a shared household.

IV. THE GAP BETWEEN LAW AND PROCEDURE

The domestic violence legislation was introduced in India as a response against dowry deaths. This law was wide enough to cover acts of violence other than dowry-related violence, but its ambit was restricted to violence against married women by their husbands and his male relatives. This neglected other victims and their cases of violence.[81] This law has been criticised since its inception due to many reasons, such as its alleged abuse, unclear definition of cruelty and poor execution by law enforcement agencies.[82]

The Law Commission and judiciary have also opined that there are numerous complaints regarding misuse of domestic violence law by females, but there is no reliable data based on an empirical study to show the actual figures.[83] This absence of data makes it onerous to act upon the allegations.[84] However if such issues are left unsolved, it might affect the

---

[81] Jayna Kothari, "Criminal Law on Domestic Violence : Promises and Limits" 40 (46) Economic and Political Weekly 4843, 4844 (2005).

[82] *Ibid.*; Flavia Agnes, "What Survivors of Domestic Violence Need from Their New Government" 54 (17) Economic and Political Weekly (2019).

[83] Law Commission of India, 243rd Report on S. 498A of Indian Penal Code ¶ 1.3 (August, 2012).

[84] *Ibid.*

credibility of the complaint in genuine cases and increase the scope of harassment through false counter-allegations.

The gap between this law and its effectuation procedures has occurred due to poor implementation. Even today, the awareness about the DV Act and related institutional actors, service provisions, types of relief and legal rights and remedies are appallingly low. Many promises of the DV Act seem very far-fetched even after seventeen years of its coming into force. As per S.12[85], a magistrate is required to hear the matter within three days from the date of receipt of the application and try to dispose of the same within sixty days.[86] Given India's vast population, there is an excess burden on the authorities due to which it becomes impossible to deliver within the specified periods.

Another provision of the Act states that Protection Officers (***POs***) need to be appointed by the Government, preferably females, to carry out the duties conferred by the Act.[87] However, the State explicitly lacks the necessary resources to train and appoint the desired number of such officers. Many POs serve as PO only as an additional charge or a secondary duty. Since the Act is silent about the qualifications required by them to acquire the post, they may be unskilled or may not have complete knowledge of domestic violence issues. In a Public Interest Litigation[88] (***PIL***), Justice Pardiwala had stated that,

[85] The Protection of Women from Domestic Violence Act, 2005 (43 of 2005), s. 12(4).
[86] The Protection of Women from Domestic Violence Act, 2005 (43 of 2005), s. 12(5).
[87] The Protection of Women from Domestic Violence Act, 2005 (43 of 2005), s. 8.
[88] *Suo Motu v. State of Gujarat*, (2013) 2 GLR 1047.

"*in busy districts, one Protection Officer is simply not enough…a* ***mockery*** *of the Act*" (emphasis added)

One of the essential characteristics of the Act is to address the immediate concerns of victims by linking them to enlisted service providers.[89] Albeit, many states have not notified service providers, and even if they have, it is without augmenting their capacities. In terms of immediate need, shelter homes appear to be the only option available. Women who come to these shelter homes frequently require more than simply a roof over their heads. They may seek medical attention, trauma counselling, clothing, and cash, all of which are unavailable in shelter homes. Also, a woman's immediate relief may be impeded by her location; if she lives in a remote area, there may be no shelter homes nearby.

A case was filed in 2021 in the Supreme Court[90] by a Non-Governmental Organisation (***NGO***) "We the Women of India" seeking to plug these massive gaps in the implementation of the Act. Some of the noteworthy arguments put forward by the Petitioner are that "*about 86% of the women victims of domestic violence never seek help, which means only 14% scout for help and a meagre 7% of them reach out to the relevant authorities under the DV Act*". The petition calls for immediate

[89] The Protection of Women from Domestic Violence Act, 2005 (43 of 2005), ss. 5,6,7,9,10.
[90] *We the Women of India v. Union of India*, WP(C) No. 1156/2021; 'We the Women' move Supreme Court seeking infrastructure for abused women- *available at*: https://timesofindia.indiatimes.com/india/we-the-women-move-supreme-court-seeking-infrastructure-for-abused-women/articleshow/87576284.cms (last visited on Mar 31, 2022).

appointment of POs, service providers, and shelter homes to meet the shortage and protect women.

Considering the dearth of service providers and their qualifications, it is common for them to confuse counselling with settling the dispute irrespective of amicability. Section 14[91] does provide for counselling for either party involved, mostly for the preservation of "a family unit".[92] Such single-minded focus on maintaining marriage through counselling by untrained officers can be detrimental as it may lead the victim to accommodate herself with the on-going abuse. The intent of speedy disposal also gets defeated as there will be a gap for any time up to a period of two months between hearings to effectuate the counselling sessions.[93]

V. EMERGING SPACE FOR ABUSIVE RELATIONSHIPS

In 1891, the Age of Consent Act (repealed) was passed, which raised the age of consent of sexual intercourse from 10 years to 12 years. However, this Act was silent about the legal age of marriage. The age of marriage was decided in the Sarda Act, or Child Marriage Restraint Act, 1929 (repealed), wherein the marriageable age for girls was fixed at 14 years

[91] The Protection of Women from Domestic Violence Act, 2005 (43 of 2005), s. 14(1).
[92] *Puspendu Biswas v. The State of West Bengal*, (2014) 141 AIC 569.
[93] The Protection of Women from Domestic Violence Act, 2005 (43 of 2005), s. 14(2).

and boys at 18 years.[94] Today, the minimum marriageable age is 18 years for girls and 21 years for boys and is governed by the Prohibition of Child Marriage Act, 2006 (***PCMA***).[95] This minimum age for females may soon change to 21 years same as of males.[96]

The government's goal in raising the marriageable age for women is to reduce maternal mortality and improve nutrition among Indian women.[97] Furthermore, raising the marriageable age for women is being portrayed as a step towards gender equality, with special emphasis on health and demographic well-being.

Currently, child marriages are voidable even after attaining majority at the option of either party. This can be done within two years of the party attaining the age of majority, i.e., a female can file a petition to annul the marriage up to 21 years of age, and males can do the same up to the age of 23 years. It is strange how the Act prohibits and criminalises child marriages, yet it has not declared them void.[98] With the recently proposed amendment, the age of majority will be 21 years for both males and

[94] Abhijit Das, Does India Need a New Law That Revises the Age at Which Women Are Married? *Available at:* https://thewire.in/women/india-new-law-age-at-marriage-women (last visited on Mar 31, 2022).
[95] The Prohibition of Child Marriage Act, 2006 (6 of 2007), s. 2(*a*).
[96] The Prohibition of Child Marriage (Amendment) Bill, 2021 (163 of 2021), s. 3(*i*)(*a*).
[97] Shireen J. Jejeebhoy, Raising the Minimum Legal Age of Marriage for Women to 21 Years is Neither Feasible Nor Promising *available at*: https://scroll.in/article/971605/raising-the-minimum legal-age-of-marriage-for-women-to-21-years-is-neither-feasible-nor-promising (last visited on Mar 31, 2022).
[98] *Independent Thought v. Union of India*, (2017) 10 SCC 800.

females[99], and the window for filing for annulment will increase up to five years post majority[100], i.e., 26 years of age.

The option to annul the marriage after reaching the age of majority creates scope for abuse of the relationship. Considering the conventional ideologies of the Indian society, especially in rural areas, it might be easy for males to get married again after breaking up with their first wife, but that is not the case for females. Females have to try and endure their marriage, which puts them in a vulnerable spot till the limitation period for filing of annulment is over. The current provision gives husbands 2 years and the proposed amendment will provide them with 5 years to file for an annulment after attaining majority. Moreover, the PCMA's maintenance and residence reliefs for juvenile girls are paltry and unsatisfactory, with reports of a high rate of sexual assault in shelter homes.[101] This makes leaving the marriage even more unfeasible.

Recently, one Aisha Kumari filed a case in the Delhi High Court to declare all child marriages void-ab-initio.[102] This is fortified by arguments that child marriages being voidable and not void goes against the spirit of Article 21[103]. Consent given by a minor child under 18 years of age to marriage cannot be considered valid. Reliance has also been

---

[99] The Prohibition of Child Marriage (Amendment) Bill, 2021 (163 of 2021), s. 3(*i*)(*a*).

[100] The Prohibition of Child Marriage (Amendment) Bill, 2021 (163 of 2021), s. 4.

[101] Aarti Dhar, Juvenile homes are hellholes, says report on child rape *available at:* https://www.thehindu.com/news/national//article60465518.ece (last visited on Mar 31, 2022).

[102] *Aisha Kumari v. State of NCT of Delhi*, WP(C) 10945/2020.

[103] The Constitution of India, art. 21.

placed on the state of Karnataka[104], which declared all child marriages as void ab initio based on the S. Patil Committee Report[105]. Even the Apex Court in Independent Thought's case[106], appreciated this status in Karnataka and noted that similar law should be adopted throughout the country. The doctrine of parens patriae was also put forth which allows the State to intervene proactively and come forward to protect girl children getting married against their consent.

In addition to making child marriages void, it is emphasised that the validity, maintenance, and custody of the minor, especially females, need to be ensured. These rights are outlined in Sections 4, 5, and 6 of the PCMA. However, these rights apply only to child marriages that are generally rendered voidable under Section 3 and do not apply to marriages that are made void under Section 12. According to the 205th Law Commission Report[107], these restrictions should be extended to all forms of child marriage. Another critical reform that it proposes is mandatory marriage registration as a means of preventing child marriages. In *Seema v. Ashwani Kumar*[108], the Supreme Court also made the same observation.

---

[104] The Prohibition of Child Marriage (Karnataka Amendment) Act, 2016 (26 of 2017).
[105] Justice Shivraj V. Patil Core Committee, Report on Prevention of Child Marriages in the State of Karnataka (June, 2011).
[106] *Independent Thought v. Union of India*, (2017) 10 SCC 800.
[107] Law Commission of India, 205th Report on Proposal to Amend the Prohibition of Child Marriage Act, 2006 and other Allied Laws (February, 2008).
[108] *Seema (Smt) v. Ashwani Kumar*, (2006) 2 SCC 578.

Even while legal intricacies are debated, the key to combat child marriages remains addressing socio-economic elements, such as state education, health care, nutritional support etc.

VI. CONCLUSION

Law and society are inextricably linked and have an ever-changing impact on one another. With shifting trends in perception and awareness of sexuality as a social construct, there is a concurrent need for the law to reflect the change. Gender has played an essential influence in the criminal justice system. Its presence is also noticeable in the formulation of laws. Gendered crimes exist in which only a man can be an offender and only a woman can be a victim.

The preceding analysis attempts to answer the arguments against gender neutrality in laws dealing with sexual assault and domestic abuse. Arguments such as dilution of the unique nature of violence, conceptions of masculinity, and potential abuse of the law, among others, have been decisively addressed. The goal of arguing for gender neutrality has not been to deny or suppress the struggles and vulnerabilities that women face. Instead, the appeal for gender neutrality is to bring accused persons of all genders, including females to justice.

Undoubtedly, in a society that appears to take women's welfare issues casually, some rigorous measures are required to monitor the unscrupulous and uncontrolled males. However, this needs to be

accomplished by properly enforcing the existing legal framework and not by adding ill-advised legislation to the statute book.

These women protection laws will be ineffective until civil society takes measures to demonstrate that the public-private dichotomy has no validity in terms of violence. Violence, whether in the public or private spheres, is just unacceptable. Apart from that, society must fend off a discriminatory attitude toward women in the form of female foeticide, dowry killings, etc., because domestic violence cannot be detached from numerous other social issues. The reason behind unequal power relation between men and women, is due to the patriarchal mind-set which must be dealt with for signification outcomes.

The government has fulfilled its international requirement by implementing the DV Act, PCMA, etc. but a local obligation remains, and that is to change people's mindsets so that those who enforce these Acts are fully aware of their responsibilities. Civil society, the media, and NGOs must all work together to strengthen women's position in the community so that the law is understood and used by the women who need it the most.

CONTOURS OF PRESIDENTIAL POWER ACROSS CONSTITUTIONAL SYSTEMS

Avinash Singh[1]

ABSTRACT

In the contemporary study of presidential power, various high-risk constitutional stakes have emerged that needed an observance with the regime shift towards power centric presidential power, leading to the unilateralism scheme of governance stagnating the fair democratic consolidation. The paper is an outlook over the transference and development in the presidential system of the countries mainly focusing on the USA as it observes a standardized presidential system, hence, exploring the possibilities of its power exercise in changing world order and finally finding the elemental contributors to said exercise of power in all situations. Paper acquaintances for readers regarding power dynamics of presidential actions from its jurisprudential aspects and further move to study the dimension of such presidential power by incising to the various authoritative elements that count on with the president's office. Various 'power tools' were explored during the said analysis of dimensions of presidential power based upon various methodological tools referenced to study such effect. The societal impact of presidential power has differed with the constitutional regime and its implementation. Several state-wide

[1] *Assistant Professor of Law, SOA National Institute of Law, SOA University, Bhubaneshwar, Orissa.*

analyses were fostered to explain such consequential metamorphosis of power variation among the presidential actions around the world; however, it left few key constitutional areas that could be an area of potential research later. The paper thus concludes with several suggestive remarks that nurture the necessity of statistical methodology adopted while reviewing presidential power and guiding about societal coherence learning from the line of experiences in the historical and cross-cultural perspective in the present world.

Keywords: *Constitution, Jurisprudence, Presidential power, Society, State*

I. PRESIDENTIAL POWERS: DIMENSIONS OF CONSTITUTIONAL SCHEME

President or head of state is a very imperative element in the constitutional scheme as it adheres to the power management in a country and plays a role in the systematic balancing of domestic and international policies. Institution of the presidency and president (as they both are two different concepts imbedded in one string of constitutional phraseology) itself are two major elements of the same piece of democratic structure that simulates the study towards defining the natural precincts of origin and power they embrace bequeathed under constitutional or any other regime of ruling in a country often an outcome of demagoguery. “Presidentialism” is itself a broad area of research, with the change in

the institutional design varying across the state, that heeds towards exploring the impact of such diversity on regime performance[2].

Constitutional engineering of choosing the presidential, parliamentary or hybrid system of governance regime is merely a decision of executive power exercising authority in the country[3]. So far as the constitution is the reference letter of the political motivations, institutional structures and constitutional meanings and the normative restraint of the presidential power continues to be in place[4]. Howsoever, presidential prerogative in policy-making through executive orders is recognised as practices of which example on can take as in case of US policy allowing the federal funding for stem cell research. Still, a deep concern of oversight of the office of president over the regulatory authorities is framed as an institutional barrier over forming any policy towards matters that need intrinsic scientific inputs, and hence, are affected by the political intervention[5]. In the Indian context, visibility of policy-making institutes and regulatory authorities are subjected to the stringent governmental oversight that affects the efficiency of the said institution. The model approach towards the presidential power that overlaps the jurisdiction of Presidents' stems in the British model of the constitutional scheme that believes in the mix aspects of power-sharing organs, i.e.

[2] Crisp, B.F., Desposato, S.W. & Kanthak, K. 2011, "Legislative Pivots, Presidential Powers, and Policy Stability", *Journal of Law, Economics, & Organization,* vol. 27, no. 2, pp. 426-452(447).

[3] Hicken, A. & Stoll, H. 2013, "Are All Presidents Created Equal? Presidential Powers and the Shadow of Presidential Elections", *Comparative Political Studies,* vol. 46, no. 3, pp. 291-319(292).

[4] *Infra* n. 48 at pp. 1557.

[5] Wagner, W.E. 2015, "A Place For Agency Expertise: Reconciling Agency Expertise With Presidential Power", *Columbia Law Review,* vol. 115, no. 7, pp. 2019-2069(2022).

judiciary, executive and legislature, and however no model framework is evidenced as structured while creating the position of president as said, the position was dwelled with a multifaceted proposition to deal into[6].

In the current paper, several impediments abstain from analysing the Indian perspective of the presidential power effectuation in-country, as India being the parliamentary democracy, and comparing it within the framework of presidential form of governance that could be *prima-facie* perilous to the analytical dimensions that the paper is stretched hereinafter. However, Indian situational scrutiny is only given observance (or would be only referred) when it will be deemed appropriate while going through such inference upon such elemental exactitude towards presidential power play.

It is considering the USA, to which greater reliance is given throughout the paper, as and when it shows relative presidential functions, for the reason that it is in the hand of the president to pronounce new law without the congressional authority in the name and manner of an executive order, national security directive and proclamation. In such situations, such national security directives are non-mandated of publication or revealed at all,[7] whereas in India, doing so is possible in the manner of the ordinance making power of the president. However, such power making is dissimilar as found in the Indian context; specifically, the procedural structure of exercising such unilateral power to the extent of the

[6] Sofaer, A.D. 2007, "Presidential Power and National Security", *Presidential Studies Quarterly,* vol. 37, no. 1, pp. 101-123(102).

[7] Moe, T.M. & Howell, W.G. 1999, "The Presidential Power of Unilateral Action", *Journal of Law, Economics, & Organization,* vol. 15, no. 1, pp. 132-179.

substantive limit of such power is very likely to be perceived as a standardised practice of power play in India.

II. POWER DYNAMISM OF PRESIDENT: JURISPRUDENTIAL ASPECTS

It is accepting the notion that the "presidential power is the power to persuade" and while referring said statement, it is observed that the power of president is decisive of the individual temperament, skill and experience of the person holding the position of president.[8] In the Indian scenario, the ministerial term of leaders like Indira Gandhi is remembered for the overreach of power in strategic decision making that was encountered with a balancing judicial intervention reaching a position of damage control.

Primarily, the presidential power is widely categorised as inherent wherein control beyond the limit of legal boundaries are counted (that formulates the reasoning of the presidential prerogative) and are stated as a persuasive dialect in political controversy[9] by courts. In contrast, the implied powers are the second in line that specifies the power explicit in constitutional literature such as command-in-chief of the army[10] or such equivalent posts. Though, a widely accepted criterion for calculation of the inherent strengths of president assumes significance when Justice

---

[8] *Id.* at pp. 156.

[9] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 647 (1952).

[10] Kinkopf, N. 2007, "Inherent Presidential Power and Constitutional Structure", *Presidential Studies Quarterly,* vol. 37, no. 1, pp. 37-48(37).

Jackson defines such power as: 'Power of President is consequential to constitutional mandate minus the congressional power that is implicit in the constitution and henceforth perception of inherent illimitable power is subjective of implicit constitutional literature of country'[11]. When it comes to legislative over-toning of upon presidential power, as in the case of US where the presidential form of government exists, it is based upon the vote-centred and agenda centred strategies leading as strong value to congressional polity[12] which is far divergent from the view that speaks of the widespread unilateral impact of the presidential regime. However, idiosyncratic trait or personal influence is recently seen to be attached with the institutional incentive to office president[13] and resonances with a substantial presidential role in legislative progression. There have been many instances in the US President Donald Trump regime where such personal projections have preoccupied the public policy decisions. Power dynamics of the president is devised by the influence of the president over the pubic and can expand the scope of the presidency[14] as in the context of the American constitution that inspired and determined that the legislative authority predominates necessarily in a republic[15]. Presidential power has a reductive effect to parliamentary party system as it shares proximity with weight on the elective number of presidential candidates

[11] *Id.* at pp. 41.
[12] Beckmann, M.N. & Kumar, V. 2011, "How presidents push, when presidents win: A model of positive presidential power in US lawmaking", *Journal of Theoretical Politics,* vol. 23, no. 1, pp. 3-20(16).
[13] *Id.* at pp. 17.
[14] Reeves, A. & Rogowski, J.C. 2015, "Public Opinion Toward Presidential Power", Presidential Studies Quarterly, vol. 45, no. 4, pp. 742-759.
[15] Hamilton, A., Madison, J. & Jay, J. 2003, *The Federalist : With Letters of Brutus,* Cambridge University Press, Cambridge,pp.253.

and indirect presidential election contesting states. Though, studies have shown that varied factors must be taken into consideration while reducing such conclusion[16]. Presidential powers oversight by law seems to be an irrefutable correct proposition,[17] but on the occasion of the vacuum in the regular legal administrative machinery, the situation arises to warrant a presidential action. While in such state of affairs, the history of the US presidential tenure dictates the effective and prominent actions that were acted when the scope of judicial review has paled,[18] wherein it is often seen that presidential powers have been unitarily used while president acting as exclusive administrator of the substance subsiding within instrumentalities of the executive branch[19].

Keeping in mind that the judicial interventions mostly circumvents the conformation of presidential power and individual rights[20], it becomes necessary to utilize such an office appropriately and the institutional design of judicial intervention is backed by constitutional directive all the time. Unilateral actions are the facets of the presidential authority in the countries like the US, that does have a significant and far-reaching impact

[16] Elgie, R., Bucur, C., Dolez, B. & Laurent, A. 2014, "Proximity, Candidates, and Presidential Power: How Directly Elected Presidents Shape the Legislative Party System", *Political Research Quarterly,* vol. 67, no. 3, pp. 467-477.

[17] Fallon, R.H. 2009, "Constitutional Constraints", *California Law Review,* vol. 97, no. 4, pp. 975-1037.

[18] Bradley, C.A. & Morrison, T.W. 2013, "Presidential Power, Historical Practice, And Legal Constraint", *Columbia Law Review,* vol. 113, no. 4, pp. 1097-1161.

[19] Skowronek, S. 2009, "The Conservative Insurgency and Presidential Power: A Developmental Perspective on the Unitary Executive", *Harvard Law Review,* vol. 122, no. 8, pp. 2070-2103(2075).

[20] Frank, T.M. 2007, "Hamdan v. Rumsfeld: presidential power in wartime", *International Journal of Constitutional Law,* vol. 5, no. 2, pp. 380-388(381).

on democratic accountability, challenging the congressional and judicial opposition[21] but such power must not be overstated[22] and outreached. Undercutting the presidential incentives resulting in legislative gridlock due to agenda-setting effects the unilateral actions of the president, moreover, directional constraints undermine the presidential leverage[23] that must not be the. The presidential regime has to be seen using (as Cooper defines it, "power tools"[24] like signing authority or executive orders, however improper they are[25]) to bargain their veto power and are mostly efficacious if overall congressional agenda is not compromised[26]. Presidentialism balances breakdown situations of democratic aspirations in the event of institutional designing, thus it inflates presidential powers and/or grossly emasculating their accountability towards the legislative setup[27]. In the context of democracies like India, such an elusive search for presidential power is infrequently possible citing the dynamic "check and balance" in the constitutional scheme of functionality relating to the interdependence of governmental organs.

---

[21] Chiou, F. & Rothenberg, L.S. 2014, "The Elusive Search for Presidential Power", *American Journal of Political Science,* vol. 58, no. 3, pp. 653-668(654).
[22] *Id.* at 666.
[23] Chiou, F. & Rothenberg, L.S. 2016, "Presidential unilateral action: partisan influence and presidential power", *Public Choice,* vol. 167, no. 1, pp. 145-171.
[24] Cooper, P. J. (2002). *By order of the president: The use and abuse of executive direct action.* Lawrence: University of Kansas Press, pp. 239.
[25] Cronin, TE 2003, 'By Order of the President: The Use and Abuse of Executive Direct Actions. By Phillip J.Cooper. (Lawrence : University Press of Kansas, 2002. Pp. 320. $39.95 cloth, $16.95 paper.)', *Journal Of Politics*, 65, 2, pp. 600-602(601).
[26] Kelley, C.S. & Marshall, B.W. 2009;2008;, "Assessing Presidential Power: Signing Statements and Veto Threats as Coordinated Strategies", *American Politics Research,* vol. 37, no. 3, pp. 508-533(528).
[27] Singh, S.P. & Carlin, R.E. 2015, "Happy Medium, Happy Citizens: Presidential Power and Democratic Regime Support", *Political Research Quarterly,* vol. 68, no. 1, pp. 3-17.

Policy responsiveness in a state is very likely to be pretentious of the presidential regime diversity[28] (as we have already considered the personal attitudes of president directing the policy flow in a state) and hence the presidential power and leverage on policy-making are subjective of the respective constitutional literature of that state. However, a strong presidential regime perceives to commit a critical policy and reform coordination on the positive side of its advancement[29]. Well, it is not that in every case the presidential power, flexible of subjective constitutional alteration, overrides the constitutional mandate like in case of the USA where President in the United States is although authorised for the veto power but it could be overridden by congressional interference and such congressional hostility challenging veto power of the president is more likely in case of the pre-emptive and disjunctive presidential regime[30].

III. POWER DYNAMISM OF PRESIDENT: PRACTICAL EXPERIENCES

Power of the president is very much dictated by the practise based oscillations in the situation of the happening of such intrinsic events be it like international policy commitment based decisions or war-related aspects in the domain of presidency among others.[31] Presidential actions (precisely in emergency specific situations) often disturbs legal pieces of

[28] *Supra* n. 1 at pp. 428.
[29] Holmes, S. (1993), 'The Postcommunist Presidency', *East European Constitutional Review*,Vol. 2, pp. 36-39.
[30] Bridge, D. 2014, "Presidential Power Denied: A New Model of Veto Overrides Using Political Time", *Congress & the Presidency,* vol. 41, no. 2, pp. 149-166(160).
[31] *Supra* n. 17 at pp. 1098.

machinery and thus create difficulties with a diminished scope of judicial review, and also, a thin membrane as to stand with the subsistence of legal actions taken by president vis-à-vis appreciating the fact that the morality issue thus generated have instigated in part from the legality and vice versa[32]. Presidential power is warranted to be exercised in cases like that of climate change if and when the legislative framework in the country is redundant forwarding towards positive action.[33] This explains the multidimensional approachability of the executive action and its constitutional validity. Presidential unilateralism was practised from very early times and is still in practice, with several technical modifications, that are either evident in the face of constitutional text or hidden in constitutional threads of power delegation mechanism that imbibes power to the constitutional authorities (presidential office in the present case).

Theodore Roosevelt has framed a "stewardship theory" that shown his self-justifiable inclination towards the unilateralism exercise of presidential power that is otherwise not explicitly restrained by the constitution and hence takes charge of law-making of policies where constitutional vacuum persist[34]. Although such unilateral power-wielding tendency was mostly seen along in the leadership of the former Indian Prime Minister Lt. Mrs Indira Gandhi who extravagantly dealt with the issues of the foreign policy. One such case scenario was presented before Indian polity, as it then was when the Bangladeshi migrants were

[32] Hart, H.L.A. 2012, *The concept of law*, 3rd edn, OUP, Oxford.
[33] *Infra* n. 50 at pp. 6.
[34] *Supra* n. 6 at pp. 157.

stemming on the Indian terrain and even supported the war-level control and solution to the issue[35].

As appointment power is foundational to the presidential regime, and during the recess of the senate, the power to appointment significant positions by the president that is known as recess appointment power and thus lines within the unilateral approach to the presidential power[36]. Presidential unilateral power has seen an inter-branch political combatting where congressional authority is warranted to check the executive power, as was seen in case of Bush Administration in America, where the recess appointments to several major policy-making authorities have witnessed congressional interference. However, such interference was unnecessary if the head of the single ruling party has a majority over its members irrespective of the members of the minority side in the senate.[37] It is perceived that the institutional advantages of presidency realm shift vigorously in the matter of the foreign affairs, comparing it with that of the domestic matters, as congressional authority often overturns domestic decision and thus highly influencing foreign policy issues through the presidential authority[38] that consequently assumes the relevancy in the two presidencies thesis.[39] The reason for placing

[35] Raghavan, S. 2013, *1971 : A Global History of the Creation of Bangladesh,* Harvard University Press, Cambridge(179).

[36] Corley, P.C. 2006, "Avoiding Advice and Consent: Recess Appointments and Presidential Power", *Presidential Studies Quarterly,* vol. 36, no. 4, pp. 670-680(671).

[37] Black, R.C., Lynch, M.S., Madonna, A.J. & Owens, R.J. 2011, "Assessing Congressional Responses to Growing Presidential Powers: The Case of Recess Appointments", *Presidential Studies Quarterly,* vol. 41, no. 3, pp. 570-589(587).

[38] Canes-Wrone, B., Howell, W.G. & Lewis, D.E. 2008, "Toward a Broader Understanding of Presidential Power: A Reevaluation of the Two Presidencies Thesis", *The Journal of Politics,* vol. 70, no. 1, pp. 1-16(6).

[39] Wildavsky, A. 1998, "The two presidencies", *Society,* vol. 35, no. 2, pp. 23-31.

abundant power in the hand of president in matters relating international policy was the dynamics of changing world political order, and hence, a country in the presidential leadership could adapt to the swift change in the international realm. On the contrary, when it comes to the implication of those international matters on the domestic matters, presidential authority seems to encounter a tussle with the mutual congressional endorsement on said policy, that otherwise could also be seen as the balancing element of presidential power.[40]

Also, one of such presidential power, that lies within the executive head of most of the federalist states, is traced as “pardon” or “clemency” that spurs from the constitutional authority in most of the regimes around world wherein presidential authority to pardon is based on the “act of grace” or “public welfare” of which adaptation was seen blending politics and justice, thus, pardoning for politically motivated reasons benefiting non-eligible stakeholders to it[41]. Hence a modern regime of the president taking advantage of the political situation for signing in pardon in controversial manner alarms needed reformist action to be instigated[42]. Power of impoundment is another such power initiated by President George Washington and later practised by subsequent Presidents. President Nixon has over-utilised the said power of impoundment both

[40] Nielson, A. 2007, "An Indirect Argument For Limiting Presidential Power", *Harvard Journal of Law and Public Policy,* vol. 30, no. 2, pp. 727(730).
[41] Crouch, J. 2008, "The Law: Presidential Misuse of the Pardon Power", *Presidential Studies Quarterly,* vol. 38, no. 4, pp. 722-734.
[42] Ruckman, P.S. 2010, "A Review of “The Presidential Pardon Power”: Crouch, Jeffrey. Lawrence, KS: University of Kansas Press, 2009. 224 pages. $34.95", *Congress & the Presidency,* vol. 37, no. 1, pp. 97-99(98).

qualitatively and quantitatively in response to which congressional strata has effectuated a legislative document to control and appropriate such funds generated in consequence of such impoundment[43]. 'Signing statements' have been classified as a source of unilateral power and remained a protective tool for presidential prerogative. These presidential orders also affect the implementation of the policy or legislation laid down and are used in a situation of the gridlock of congressional approval especially when a state of affairs are dealt with advanced policy or political stake[44].

IV. NATIONS EXPERIENCES TOWARDS PRESIDENTIAL POWER

Going along with the national experiences, presidential terms could be codified as the parliamentary system where, though the president is elected by the citizens, parliament has upper hand in deciding the executive action as is the case with the Presidential regime in Ireland. Whereas in otherwise case of the country of France that could be classified as semi-presidential or median presidency where the popularly elected president and parliament both have power over adherence to executive actions in the country whereas the USA appears as nonetheless a true example of presidential system regime[45]. An extravagant and

[43] RICE, L.L. 2010, "Statements of Power: Presidential Use of Statements of Administration Policy and Signing Statements in the Legislative Process", *Presidential Studies Quarterly,* vol. 40, no. 4, pp. 686-707(689).
[44] Kelley, C.S. & Marshall, B.W. 2008, "The Last Word: Presidential Power and the Role of Signing Statements", *Presidential Studies Quarterly,* vol. 38, no. 2, pp. 248-267(256).
[45] *Supra* n. 2 at pp. 300.

unrealistic interpretation to the presidential power and beneficence in any regime will result in the disastrous impact over the constitutional democracy and therefore such practices have been cast off by distinctive presidencies around the globe.

In the History of America, such recent presidential power usage detrimental to democratic aspirations was demonstrated when the congress gave powers to the president for taking action in response to the September 11, 2001 attack, talking authority to which, then-President Jorge W. Bush took steps that certainly cannot be called democratic at all. Actions of US in Bush presidency included invading the country of Afghanistan, setting prison camps and arresting the terror suspects of whom the trial was made before the military commission, mass surveillance of citizens of USA and thus many among whom continued for a time. Legitimised by congressional support, some of the unfettered presidential powers must be restrained of its usage in the normalised environment and thus a scenario building must be avoided where the judicial review of such cases is not conceivable[46]. It didn't restricted and even continued in the administration of President Obama who largely inclined towards intensifying the usage of the drone strikes and even declaring war against Libya without congressional authorisation of which repercussive response was seen as resulting in criticism of his presidency moving towards greater imperialism than the Bush ever did[47]. However, both Bush and Obama were inextricably involved using in presidential

[46] Crocker, T.P. 2011, "Presidential power and constitutional responsibility", *Boston College Law Review,* vol. 52, no. 5, pp. 1551(1552).
[47] Scharf, M.P. & Pizor, B. 2012, "Foreword: Presidential Power And Foreign Affairs", *Case Western Reserve Journal of International Law,* vol. 45, no. 1/2, pp. 1(2).

power and few instances like one in Mr Bush was recalled as "Hamiltonian" (one of which example shreds of evidence for referring Guantanamo as "world beyond the law" that instituted presidential abuse[48]) whereas in another event Obama was called in "Progressive"[49]. Even the very current regime of the Trump administration was seen deviating from their previous stand of calling back troops from Afghanistan, thereby citing the reasons of danger that persist around the sudden vacuum conception that would be filled in by terrorist organisation and ISIS militants[50].

Though Barack Obama had several other areas to focus wherein such executive power was urged to be acted upon, one of such being climate change issues, that faces feeble congressional support and hence, presidential power like treaty-making authority, directing national agencies etc. can constructively play its role to bring down the one among the biggest contemporary issue in control and display USA's efforts internationally[51]. However the war on terror has explicitly given rise to the application of executive power in place but it is determined that in case of absence of such ominous event, the executive power still has been inflated differently transpiring to result in a less robust way independent

---

[48] Hirsch, S.F. 2010, "Guantánamo and the Abuse of Presidential Power by Joseph Margulies", *PoLAR: Political and Legal Anthropology Review,* vol. 33, pp. 122-125(122).
[49] Conley, R.S. 2014, "A Review of "The Presidency and Political Science: Paradigms of Presidential Power from the Founding to the Present: Tatalovich, Raymond, and Steven E. Schier, 2ndEd. Armonk, NY: M. E. Sharpe, 2013. 336 pages. $74.95 (hardcover); $32.95 (softcover)", *Congress & the Presidency,* vol. 41, no. 3, pp. 400-402(401).
[50] Tilak Devsher, "Trump Guns for Pakistan", India Today, 4 September, 2017, pp. 6-7.
[51] Wold, C. 2012, "Climate change, presidential power, and leadership: "we can't wait"", *Case Western Reserve Journal of International Law,* vol. 45, no. 1-2, pp. 303-359.

of the act of terror thus aggrandising presidency and creating unfathomable vice-presidency[52].

Latin American democracies have shown responsive belief in a democratically structured regime based on the presidential powers, especially when president reflect attributes like self-confidence, although a higher autonomy of presidential power depends on greater regime support by citizens and the level of higher trust on that particular presidential term[53].

Another power extrication is possibly seen in different presidential regimes over the world like in case of similar election and veto power of the president in Polish and Romanian country, however on the restraining procedural side, both the Polish and the Romanian country wherein the power to restrain the veto of the president requires a majority of two-thirds in the Polish parliamentarians, unlike the Romanian law that requires a simple majority of the members of the house[54]. It is no less than complex conditions in the country of Ecuador where "judicial over-toning" of politics strategises political arrangements that have initiated a presidential interest in the institution of justice like transfer and appointment of judges. This mooted a controversial aspect of inference to the presidential regime therein,[55] and therefore, it may be proper to state that the ideological shift in judicial decision making is the outcome

---

[52] Goldstein, J.K. 2010, "Cheney, vice presidential power, and the war on terror", *Presidential Studies Quarterly,* vol. 40, no. 1, pp. 102-139(134).

[53] *Supra* n. 26 at pp. 12.

[54] Metcalf, L.K. 2000, "Measuring Presidential Power", *Comparative Political Studies,* vol. 33, no. 5, pp. 660-685(666).

[55] Basabe-Serrano, S. 2012, "Presidential Power and the Judicialization of Politics as Determinants of Institutional Change in the Judiciary: The Supreme Court of Ecuador (1979-2009)", *Politics & Policy,* vol. 40, no. 2, pp. 339-361.

of the new appointments[56] and if power lays in the hand of the president of doing so, makes the condition much favourable for such an assumption.

African countries are also tackling the situation of democratic rundown due to presidential power leading to the illiberal and declining libertarian regime[57]. Another situational analysis was observed in the case of the Moldovan governance regime that initiated direct election for president in 1991[58] while going through political disturbances in the previous year, that in later period with rising policy concerns and ill-synchronisation among Presidential and congressional or parliamentarian regime, resulted in shifting in the consensus towards the reinstatement of the parliamentarian system. Hence, the shift from semi-presidential to the Parliamentarism setup was countersigned; however, factual impact on the Presidential power has been seen rising in influence with a strong political hold in the parliamentarian majority[59].

Moldovan experience has concluded with the dynamism of power-sharing irrespective of the charter scheming of the constitutional machinery, hence focusing on an institutional combination of the governance structure that results in anticipated or unsolicited effect[60].

---

[56] Whitmeyer, J.M. 2006, "Presidential Power over Supreme Court Decisions", *Public Choice,* vol. 127, no. 1/2, pp. 97-121(98).

[57] van Cranenburgh, O. 2008, "'Big Men' Rule: Presidential Power, Regime Type and Democracy in 30 African Countries", *Democratization,* vol. 15, no. 5, pp. 952-973(966).

[58] Roper, S.D. 2008, "From semi-presidentialism to parliamentarism: Regime change and presidential power in Moldova", *Europe-Asia Studies,* vol. 60, no. 1, pp. 113-126(116).

[59] *Id.* at pp.122.

[60] Mainwaring, S. 1993, "Presidentialism, multipartism, and democracy: The difficult combination",
Comparative Political Studies, Vol.*26*, issue 2, 198-228.

V. CONCLUSION

It is genuinely indicated by the Corwin when he criticises the historians like Schlesinger and Commager who advocated presidential power as "royal prerogative in field of international relations"[61] , and so they denied any such inherent, plenary or exclusive power-play around the presidential position. Although, in the later studies of Schlesinger and Commager, both of them refuted to their earlier version of the survey over presidential power and accepted the constitutional adherence for everyone including the check and balance system inherited therein[62]. It is predominantly evidenced that the present presidential terms in several democracies have stabilised towards their legislative actions; hence the people of the republics have been much satisfied when the president enjoys a medium legislative structuring power[63]. Presidential power has to be seen in consensus with the constitutional responsibilities and commitment. When at any point of time, presidential powers are needed to be executed, concern and due regard must be given to its appropriateness and necessity.[64] In the absence of such reasonability check over presidential decisions, the constitutional literature may be interpreted as 'synod of Bishops' (Synod of bishops are unofficial and provisional recommendation provided by Church Bishops to the Pope that shows the weakness of the document) scripture rendering in accord

[61] Fisher, L. 2014, "The Law Connecting Presidential Power to Public Law: Connecting Presidential Power to Public Law", *Presidential Studies Quarterly,* vol. 44, no. 1, pp. 157-172(160).
[62] *Id.* at pp. 161.
[63] *Supra* n. 26 at pp. 13.
[64] *Supra* n. 48 at pp. 1561.

with the temporal interest of dominant sect (author believes that presidency is a collective bargain of individuals selecting a single face among themselves to govern while keeping shared-authority over the Office of President) of presidency in action[65]. However, original intent has to be prefaced while deciding upon the power of the Presidential regime. If framers of the constitution haven't sanctioned any such authority over the presidential position[66], then actions taken in misguidance of same must be scrapped as unconstitutional.

Presidential assurances to the congressional polity like the functioning of the executive action and instrumentalities are reflected in the shared purposes, consistent data and best managerial exercises,[67] and hence, accordingly, be meticulously performed considering such elements.

Over and above, along with the theoretical study over the presidential power structuring, it is also essential to measure the empirical study outcomes of presidential power in proximity to variables measuring presidential power wherein independent component related to presidential power will help clearly to grasps enrooted dimensions of presidential power; while some separate indices were to be used separately in models of empirical research based upon the relevancy[68]. This overall elemental study will more clearly be differentiating the

[65] John Taylor, Construction Construed and Constitutions Vindicated 23 (Lawbook Exch. 1998) (1820).

[66] Adler, D.G. 2010, "The Law: Presidential Power and Foreign Affairs in the Bush Administration: The Use and Abuse of Alexander Hamilton", *Presidential Studies Quarterly,* vol. 40, no. 3, pp. 531-544(536).

[67] *Supra* n. 18 at pp. 2091.

[68] Fortin, J. 2013, "Measuring presidential powers: Some pitfalls of aggregate measurement", *International Political Science Review / Revue internationale de science politique,* vol. 34, no. 1, pp. 91-112(97).

presidential, semi-presidential or parliamentary institutional arrangement unlike other researchers those who have placed reliance on finding the theoretical validity of individual indicators and spec ifics.[69]

The formal powers are chosen to determine the method of deciding presidential authority. Still, the proposition to inductee study on informal powers learning the presidential skill is unlikely soon and the contemporary world as in Central and East European states[70]. However, these formal power or common traits are helpful, creating an equivalent denominator of coherence during the comparative study of various regimes of the world[71]. Moreover, selective study methodology must be focussed towards theorising the powers specific traits of the presidency rather than evaluating actions of every single chief of executive historically till date.[72] This helps in due course to determine the risk factors associated with the presidency as a whole and could be saved from any harmful effect upon them in future. Study towards regime shift in direction of the semi presidency is imperative for determining the impact of that semi presidency that bequeaths towards acquiring some positive traits of the presidential authority and potential to diminish some presidential authority defect[73]. Presidential actions at the time of

---

[69] Carey JM and Shugart MS (eds) (1998) *Executive Decree Authority*. Cambridge: Cambridge University Press.

[70] *Supra* n. 56 at pp. 683.

[71] Fortin, J. 2013, "Measuring presidential powers: Some pitfalls of aggregate measurement", *International Political Science Review / Revue internationale de science politique,* vol. 34, no. 1, pp. 91-112(104).

[72] Yalof, D. 2015, "A Review of "Fisher, Louis.The Law of the Executive Branch: Presidential Power.": New York, NY: Oxford University Press, 2014. 480 pages. $150.00 (hardcover)", *Congress & the Presidency,* vol. 42, no. 1, pp. 97-99(98).

[73] Sartori, Giovanni. (1997). *Comparative constitutional engineering: An inquiry into structures, incentives and outcomes* (2nd ed.). New York: New York University Press.

emergency or for national security issue have been perceived as one of the most complex subjects that result in spurring debates among the classrooms[74] and public, vis-à-vis exploring the formal sources of such presidential power that elucidate rules and principles to effectuate such control[75]. Annotations to "practical legitimacy" of the presidential actions are studied to explore the idea of major executive powers over parameters of standard restriction, based upon the preface of equity (howsoever that equity be illegitimate *per se*) in the event of their execution. Therefore, presidential actions justify the 'practical legitimacy' that seems to be part of the legal structure of the settled constitutional regime and thus a framework to gauge such executive response of practical legitimacy is warranted[76].

President shouldn't be just a micro-manager rather be open to the critic. Negative feedback towards his policy-making like one such practise during the period of American President Carter who initiated and participated in inner circle debates regarding the diplomatic recognition of China, that was though opposed by few, and thus the advisory system proved significant roleplaying in Carters' presidential regime[77]. The

[74] Relyea, H.C. 2014, "A Review of "Emergency Presidential Power: From the Drafting of the Constitution to the War on Terror: Edelson, Chris. Madison, WI: University of Wisconsin Press, 2013. 376 pages. $26.95 (hardcover)", *Congress & the Presidency,* vol. 41, no. 3, pp. 398-400(399).

[75] Whittington, K.E. 2014, "The Law of the Executive Branch: Presidential Power. By Louis Fisher. New York: Oxford University Press, 2014. 458 pp: Book Reviews", *Presidential Studies Quarterly,* vol. 44, no. 3, pp. 561-562(561).

[76] White, E.A. 2009, "Examining Presidential Power through the Rubric of Equity", *Michigan Law Review,* vol. 108, no. 1, pp. 113-151.

[77] Burke, J.P. 2010, "John P. Burke essay review of: Presidential Command: Power, Leadership, and the Making of Foreign Policy from Richard Nixon to George W. Bush Difficult Transitions: Foreign Policy Troubles at the Outset of Presidential Power An Outsider in the

desirability of the presidential system is much contended be useful in the heterogeneous society. Still, with analyses perilously defining otherwise effects of the presidential administration on democratic consolidation,[78] however, the general conception of anti-presidential argument is mirrored with scepticism.[79] Therefore, no uniformity on presidential power is appreciated to be established even in the regimes that have encountered a rich historical experience with a pure form of presidential governance. However, it would just conclude that the perceived annotation and practical implications of the power dynamics of the presidential regime make it very significant to observe and satisfy the democratic aspirations and therefore must be wisely honoured in every democratic system of governance around the world.

White Hous: BOOK REVIEW ESSAY", *Presidential Studies Quarterly,* vol. 40, no. 4, pp. 794-797(797).

[78] Power, T.,&Gasiorowski, M. J. 1997, "Institutional design and democratic consolidation in the
third world", *Comparative Political Studies*, Vol. *29*, pp.147-166. ; Stepan, A., & Skach, S. 1993, "Constitutional frameworks and democratic consolidation? Parliamentarism versus Presidentialism", *World Politics*, Vol.46. Issue 1, pp. 1-22.

[79] Beliaev, M.V. 2006, "Presidential Powers and Consolidation of New Postcommunist Democracies", *Comparative Political Studies,* vol. 39, no. 3, pp. 375-398(379).

INDIAN LEGAL HEALTH CARE REGIME AND PANDEMIC- THE ARCHAIC SAGA

Shabda Mishra[1]
Salil Kumar Tripathy[2]

ABSTRACT

The Epidemic Diseases (Amendment) Ordinance, 2020 was promulgated on April 22, 2020. The Ordinance amended the Epidemic Diseases Act, 1897. The archaic Act provides for the prevention of the spread of dangerous epidemic diseases. After June 8, many Indian states announced respective lockdowns under the Epidemics Act, 1897. The paper discusses federalism and constitutional provisions when there's a conflict between the policies of the Centre & State. Also, the guidelines for migrants & the need for uniformity in laws to safeguard the vulnerable and indigenous people. The paper would deliberate upon the evolution of the concept of lockdown, and eventually attaining the legal backing. Further, the paper profoundly delves into the pertinent Indian statutes that can be pragmatic to tackle the catastrophic effects of the COVID-19 Pandemic. Moreover, the paper compares and analyses the Indian regulations with foreign legislations to carve out a way forward in health care policies.

[1] *Deputy Manager, National Stock Exchange, Mumbai*
[2] *Advocate at Bar Council of Delhi*

Further, empirical research is conducted through a survey with a sample size of 100 from diverse professions to understand the health care issues faced by people during the lockdown. It would help reach the core of such difficulties that have emanated from either no/lack of policies or archaic policies or conflicting policies. Subsequently, another survey was conducted with the same sample size to understand the cause of the spike in cases of mental disorders during the lockdown, and the paper provides suggestions that might help in tackling the most critical and neglected health issue of our times that has taken a monstrous size due to lack of legislative intervention. The article would also suggest a future course of action to safeguard the vulnerable society of people.

Keywords: *Health Care Law, COVID-19, Lockdown, Migrants, Mental health*

'COVID-19 has affected the world at large, but this has also given us a glimpse of the good that exists'- Amit Gupta, Yulu.

I. INTRODUCTION- THE ISSUE UNVEILED

Public Health is "the science and art of preventing disease, prolonging life and promoting health through the organised efforts and informed choices of society, organisations, public and private, communities and individuals"[3] . And Public Health Law is "the study of the legal powers

[3] Winslow, Charles-Edward Amory, "The Untilled Fields of Public Health", Science 51 (1306): 23-33, (1920 Jan 9)

and duties of the state, in collaboration with its partners, to ensure the conditions for the people to be healthy, and of the limitations on the power of the state to constrain for the common good the autonomy, privacy, liberty, proprietary, and other legally protected interests of individuals".[4]

As propounded by Roscoe B Pound, a lawyer is a social engineer and health care law is also based upon a social model. Hence, the social engineer must set up an ecosystem wherein the human body like machines that comes for repair can avail it, and the experts that are doctors can provide their services fearlessly in the garage of human devices better known as hospitals.

The Declaration of Alma Ata is such a unique International legal instrument that provides broader recognition of health as not a defect, disorder, or illness in isolation but as holistic well-being of a human which incorporates mental, physical and social health.[5]

The instrument classifies health as a fundamental right, and hence, the highest level of health must be achieved. However, the hindrance that slows down India's effort in adopting the global perception adequately is inaction in transforming our archaic legal health care regime that may

---

[4] Lawrence O Gostin, Public Health Law: Power, Duty, Constraint 4 (University of California Press, 2nd edb., 2008)

[5] G. Gargioni, M. Raviglione, "The principles of primary health care and social justice"7 J Med Pers 103 (2009), https://doi.org/10.1007/s12682-009-0016-z.

cater to the needs of the socio-economic disparity and other prevailing conditions.

II. PUBLIC HEALTH AND THE INDIAN STATUTES- THE UNTOLD STORY

There have been numerous enactments in India that are introduced with the objective that it would efficiently manage, prevent and control the spread of highly infectious and deadly diseases which have the potential or have become epidemic. To name a few, the Live-Stock Importation Act[6] was introduced with the focus on regulating the importation of livestock and livestock products since these categories of imports could lead to possible infections and disorders which may be highly contagious. Hence, it gives the State Government the power to enact requisite rules to inspect, detention and even disinfection for imported livestock provided by Section 4 of the said legislation.[7]

The infectious virus may become contagious while handling vessels at the ports. Hence, the Indian Ports Act[8] under Section 6 enables the Government to formulate policies for averting the risk of transmission of such infectious diseases. Since there is a fair likelihood of an infection arriving through a vessel and further spreading at the time in multimodal

[6]The Live-Stock Importation Act, 1898 (No. 10 of 1898), s.4, https://www.indiacode.nic.in/bitstream/123456789/2330/1/a1898-09.pdf.

[7] A. Khan and F.S. Bidabadi, “Livestock revolution in India: Its impact and policy response”, 24(2) South Asia Research 99 (2004).

[8]The Indian Ports Act, 1908 (No. 15 of 1908), s.6, www.indiacode.nic.in/handle/123456789/2344?view_type=browse&sam_handle=123456789/1362.

transportation and hence, this statute is instrumental in breaking the chain of transmission in a sailing point.[9]

Further, the Central Government under section 26B of the Drugs and Cosmetics Act[10] is competent to either regulate or even restrict the process of manufacturing drugs in the best interest and well-being of the public at large.[11]

However, certain essentials have to be fulfilled. Then the Central Government may invoke this provision such as if a drug becomes utterly necessary to address an emergency emerging out of an epidemic or any such natural calamity then by notification in the Official Gazette the Government may enforce vital regulations and restrictions upon either the manufacture or sale and even distribution of such drug.

An Integrated Disease Surveillance Project[12] (IDSP) was launched by the Ministry of Health & Family Safety of the Government of India way back in 2004 for a duration ranging up to 2010. The same was decided to be sustained further with some reforms that were then incorporated. A Central Surveillance Unit was instituted in Delhi according to the scheme beside Surveillance Units in every State were established. Furthermore, similar Units were also set up in every district in the country to institute

[9] M. Kakkar, Hazarika, et.al., "Influenza pandemic preparedness and response: A review of legal frameworks in India", 54(1) Indian J. of Public Health 11 (2010).
[10] The Drugs and Cosmetics Act, 1940 (No. 23 of 1940), s.26-B, http://legislative.gov.in/sites/default/files/A1940-23.pdf.
[11] Id. at s. 7.
[12] About IDSP available at: https://idsp.nic.in/index4.php?lang=1&level=0&linkid=313&lid=1592. (last visited on Jan. 03 2020).

a robust decentralised laboratory based IT enabled disease surveillance system. These systems were utilised for examining the trends, creating an early response to epidemic outbreaks and controlling it in the initial phases of diseases that may eventually become an epidemic through a trained Rapid Response Team.

IDSP relied heavily on capacity building, data management and surveillance system to apply Information and Communication Technology as its USP.[13] However, the enactments are devoid of another socio-economic status prevalent in India and the concerns that emanate from a pandemic. Further, the legislation has provisions dispersed, which need to be integrated, and its inclusion under one umbrella of public health is necessary to fight against an extraordinary outbreak, the COVID-19 Pandemic.

III. ARCHAIC LAWS FOR NOVEL VIRUS- THE TRAGIC INTERVAL

Bombay's bubonic plague of the 19th Century in a province of then British India was accounted for causing widespread human lives loss. Hence, for the havoc it wrecked, it was better known as the Bombay Plague Epidemic.

It emanated from the Mandvi area of Bombay but eventually spread across the city affecting a significant chunk of its population within days to weeks. Hence, to safeguard the lives of citizens and to tackle the

[13] Ibid.

epidemic. The legislation came to be in such a severe health crisis, presently known as the Epidemic Diseases Act.[14]

A. The Epidemics Act, 1897

India has been hit severely by various infectious outbreaks over the years that have left the nation's human resources crippled for long such as H1N1 Influenza, H5N1 Influenza, Cholera O139, Japanese Encephalitis, Crimean-Congo Haemorrhagic fever. However, during all the unfortunate occurrences, the common element that remained analogous was the Act of 1897 being imposed locally by states wherever the epidemic was prominent in the region.

The statute helped in exercising the powers of State and Central Government alike in implementing and enforcing adequate preventive measures to control and reduce the aftermath of any such outbreak. The discretionary powers have been bestowed over the State and Central governments to promote those temporary, yet instrumental policies.[15] This section assists in laying down steps for strict compliance of the code of conduct to foster social behaviour in public settings to reduce the widespread outbreak.

---

14 R. Peckham, “Critical Mass: Colonial Crowds and Contagious Panics in 1890s Hong Kong and Bombay” *in* Anxieties, Fear and Panic in Colonial Settings 369-391 (Palgrave Macmillan, 2016).

15 The Epidemics Act, 1897 (Act 03 of 1897), s. 2.

There had been a significant amendment in the Act which was introduced way back a century ago in 1920.[16] This section empowers the Central Government to stipulate relevant measures and regulations uniformly when the entire nation fightbacks to the infectious threat like that of an epidemic. Section 3 provides teeth to the provisions and mandates the administration to take any legal action against any violator under Section 188 of IPC as a punishable offence prescribed therein.[17]

Public Health is enumerated under the Constitution of India under the VII Schedule[18] and finds a place under State List. Hence, the ambit and powers provided to the State Government are wide with regards to enacting and enforcing suitable provision concerning with the matters of the public health at large. However, the only impediment that the State Governments generally tend to counter is the limited financial resources for espousing effective measure in a time-bound manner for optimum results. The State Government and the machinery must equally equip to ensure several eventualities that may occur which is the direct consequence of imposing such restrictions, for instance, the availability of essential commodities, safety and security of migrants, medical needs of other patients etc.

There are plenty of these provisions, but none of them seems to help India's plan of reducing the COVID graph in a downward trend. Moreover, other mixes of administerial issues have emerged like

[16] Id. at s.2A.
[17] Id. at s.3.
[18] The Constitution of India, sch. 7.

discontentment among health care workers, technological barrier in imparting education to all, and the neglected mental health, among others. The need of the hour is to renew the public health laws in the modern era where global trade, travel and commerce have become a compulsion, and the risk of COVID-19 Pandemic is still imminent. In the ambitious pursuit of reducing the infection rate in a densely populated country like India, the laws must overcome the challenges. The roadblocks that deter the path viz. the internal movement of migrants from & to various nooks and corners of the country, international air travel, intra-state movement of migrant workers, public distribution system, scarcity of employment and even pollution that increases the virulent nature of the Pandemic.[19]

The restriction on free movement in lockdown and forceful closure of the commercial establishment, dubbed as the shutdown, was unprecedented in India's Public Health sector. Therefore, the Epidemic Diseases Act tried to provide a regulatory framework but was inefficient in tackling a pandemic that too like COVID-19, which requires legislation in various domain of public life and health.

This Act alone has emphasised the epidemic and has failed to define dangerous, contagious or infectious diseases. This Act has been unable to provide the procedure to be followed by centre or state government to

[19] A. Adhikari, N. Goregaonkar, et al. "Manufactured Maladies: Lives and Livelihoods of Migrant Workers During COVID-19 Lockdown in India", Ind. J. Labour Econ. (2020). https://doi.org/10.1007/s41027-020-00282-x.

reach a benchmark to decide and declare such infectious or disease should be proclaimed as an epidemic.[20]

Besides, the law is also silent on the quarantine, and other necessary measures need to be undertaken during an epidemic and proper dissemination of drugs and vaccines to the population. Thirdly, the law failed to undertake human rights principles that need to be observed while imposing it.[21]

Over the years, there are no standard rules or regulation which can be substituted by this law. The law mainly includes the travel restriction on the people and examination of the infected or suspected person and quarantine them in the hospitals or temporary accommodation, and also ships or vessel arriving at the port are subject to a statutory health inspection.

The Act also lays down the consequence resulting from a violation of the provision of this Act. It shall be penalised under section 188 of Indian Penal Code for the violating the order of the Government. The punishment specified under section 3 of the Act shall be read with section 188 of IPC and has to be changed as the section prescribes for the fine of Rs 200 and imprisonment for one month for violating the order of public servant.

[20] B.K. Patro, J.P. Tripathy, et al., "Epidemic diseases act 1897, India: Whether sufficient to address the current challenges?" 18(2) J. of Mahatma Gandhi Inst. of Medical Sci. 109 (2013).
[21] Ibid.

India has several legislations that can be imposed during public health emergencies such as Indian port Act, Aircraft rules and Drug Cosmetic Act, Livestock importation act. In India, there is a need for a harmonised law.[22]

B. DISASTER MANAGEMENT ACT, 2005

Furthermore, the Disaster Management Act was brought in to "provide for the effective management of disasters". The central Government imposed the lockdown by invoking section 6(2) (i) under this Act. Further, the Government has the power on the requisition of resource, provision or vehicle which is under the authority of any person or premises under the authority of any person can be acquired by Government and all the expenses can be borne by the power requisitioning the services.[23] The State or central Government by acquiring any public or private premises and can convert into a COVID-19 health care centre.

The subject of health is a matter of State. Many states-imposed lockdowns by applying the Epidemic Diseases Act 1897. The union government has used the innovative tool for imposing nationwide lockdown under disaster management act 2005. By using this central

[22] Manish Tewari, "The legal hole in battling Covid-19" Mar. 19, 2020, https://www.hindustantimes.com/analysis/the-legal-hole-in-battling-covid-19/story-s0VFHssIu68N01oHs5LgDI.html.

[23] Disaster Management Act, 2005 (Act 53 of 2005), s.65.

Government has shut down many transportation, commercial and industrial activity.[24]

This Act permits the union government to frame policies and procedure to be followed by the State and also provide support to them. Nothing is being provided under this Act to take over the State's power and suspend the fundamental rights. By imposing the lockdown for 21 days, their fundamental rights are suspended for 21 days as the people are left with no opportunity to approach the court for legal recourse. Second is the executive can anytime take action and deprive a person of their liberty. Unlike emergency provision in the Constitution, there is no time limit prescribed. The time limit needs to be in place.[25]

C. EPIDEMIC DESEASE ORDINANCE ACT 2020

In the Pandemic, the ministry of health and family welfare has visualised the violence against the healthcare workers and professional and the property undertaken for health care services. The health services personnel and clinical establishments (prohibition of violence and damage to property) bill, 2019. This bill aims at protecting the healthcare service personnel, including doctors, nurses, paramedical workers against the violence committed against them and also aims at preserving the

[24] Id. at s.6(2)(i).

[25] Shoaib Daniyal, Can the Centre bypass the states and declare a lockdown? available at: https://scroll.in/article/957239/can-the-union-government-bypass-the-states-and-declare-a-lockdown.

establishment such as hospitals, clinics, and property defines under clinical establishment and (registration and regulation) act, 2010. The bill proposes that the assault on healthcare service personnel, including doctors, nurses, and paramedical workers are considered as non-bailable offence and are subject to imprisonment for a term to 10 years. Still, the bill did not mature into law.

In the COVID-19 Pandemic, we have seen a sharp rise of violence against healthcare service personnel, and violation of section 4 of the Epidemic Disease Ordinance act 1897 and section 188, 269, 270, 271 of Indian penal code, 1860. To put a brake on such violent deeds, the president under Article 123 of the Constitution has brought an ordinance called Epidemic Diseases (Amendment) Ordinance, 2020. Through this Ordinance, the power of the central Government is amplified.

The Central Government can prohibit travel activities, an act of violence against healthcare service personnel and control all means of transportation. The Government has now declared an act of violence against health care personnel as cognisable and non-bailable. It also aims to provide compensation to the healthcare personally who has suffered injury and property damage either based on market value or as decided by the court. The definitional clause has defined the Act of violence under section, health care,[26] and service personnel.[27] The Ordinance has also made the investigation and the speedy trial. It has to be completed within

[26] The Epidemic Diseases (Amendment) Ordinance, 2020 (Act 34 of 2020), s.1(aa).
[27] Id. at s.1(ab).

30 days from the date of registration of First Information report and shall be concluded within one year extendable to six months.

This COVID-19 -19 pandemic served as an opportunity for the Government to bring a reform in the health sector, but it has gone in vain. The Ordinance is seen to be in line with 123 old epidemic disease act 1897. The Government has taken more of a criminal approach than a civil approach to address health care and equity. [28]

IV. COVID-19 AND STATE LEVEL REGULATION- A CONFUSING STORYLINE

There have been a handful of state legislations in India aimed to endorse public health. The State government under section 81 of The Madras Public Health Act is endowed with the authority to formulate any such provision that may be necessitated for averting the spread of an epidemic and take adequate steps to in that direction for offering the treatment to such persons who may be affected by the health crisis. Apart from that, Section 61 accommodates a clause to prevent contagious diseases transmissible through livestock.[29]

[28] Md. Zafar Mahfooz Nomani, Rehana Parveen, "Legal Dimensions of Public Health with Special Reference to COVID-19 Pandemic in India" 11(7) Sys Rev Pharm 131 (2020), https://www.bibliomed.org/mnsfulltext/196/196-1596599928.pdf?1608894357.

[29] P.S. Rakesh, "The epidemic diseases act of 1897: public health relevance in the current scenario" Indian J. Med. Ethics 1 (2016).

In Kerala, the Cochin Public Health Act, [30] the Government declares any provision as it may seem suitable to treat those persons affected with infectious diseases or contracted any epidemic. On the other hand, The Goa, Daman and Diu Public Health Act[31] provide similar relief and powers to the state Government.[32]

Whereas the Indian states with regards to COVID-19 have preferred those regulations that are in line with the Epidemic Diseases Act and hence, the states have nothing much to differentiate at the policy level. Thus, many states mandated all Government and private hospitals to ensure that there must be a special screening of suspected COVID-19 cases for those patients who come with influenza and flu-like symptoms and so did the West Bengal Epidemic Disease COVID 19 Regulations mandate.[33]

Social distancing has been a safeguard measure that was both effective and extensively imposed by the Government to minimise the risk of COVID-19. Further, there are specific areas which were declared as containment zones by restricting any movement in those locations assisting in minimising the spread of the deadly virus. Hence, similar regulations were adopted by various states, for instance, Maharashtra which endowed the District Collector with specific obligations to counter

---

[30] The Travancore Cochin Public Health Act, 1955 (Act 16 of 1955), s.86.

[31] The Goa, Daman and Diu Public Health Act, 1985 (Act 25 of 1985), http://www.goaprintingpress.gov.in/uploads/Public%20Health%20Act%20and%20Rules.pdf.

[32] N. Jaswal and P.S. Jaswal, "Public Health, Human Rights and AIDS: Socio-Legal and Environment Aspect" (2015).

[33] Government of West Bengal, Notification No. H&FW/118/20 available at: http://purbamedinipur.gov.in/downloads/Epidemic_Disease_Regulation_covid19.pdf.

the ill effects of COVID-19 alongside the State Integrated Disease Surveillance Unit (under IDSP) under Maharashtra Regulations for Prevention and Containment of Coronavirus Disease.[34] Moving a step further Maharashtra even permitted the Municipal Commissioner as a competent authority to implement similar containment measures wherever required in the State.

Further, the surveillance personnel's entry to any premise to detect COVID-19 is granted under the Delhi Coronavirus Regulations as lawful and just.[35] Additionally, COVID-19 has been notified as a disaster by the Indian Government under the Disaster Management Act.[36]

India used to be mostly dependent on China for its pharmaceutical needs, and the imports[37] touched an all-time high of 80% in raw materials. However, India then became self-dependent in producing an indigenous testing kit[38] for COVID-19, which was also being imported initially.

---

[34]Government of Maharashtra, Notification No. Corona-2020/CR-58/Aarogya-5 available at:https://arogya.maharashtra.gov.in/pdf/30.pdf.

[35] F. No. 212/MISC/PF/2020/SCA(G), Supreme Court of India, https://main.sci.gov.in/pdf/cir/covid19_14032020.pdf

[36] Order, No.1-29/2020-PP (Pt.II), The National Disaster Management Authority, (India). https://www.mha.gov.in/sites/default/files/ndma%20order%20copy.pdf

[37] Deepika Khurana and Dr Sobuhi Iqbal, Why India depends heavily on China for drug raw materials? available at: https://www.ha-asia.com/why-india-still-depends-on-apis-imported-from-china/.

[38] Pune-based Mylabs develops India's first indigenous coronavirus-testing that can bring down costs; ICMR grants approval available at: https://www.firstpost.com/india/pune-based-mylabs-develops-indias-first-indigenous-coronavirus-testing-that-can-bring-down-costs-icmr-grants-approval-8184931.html.

There are various loopholes in the policies that need to be identified and mended at the earliest by bringing reforms in health care law. It is also pertinent taking into consideration international legal instruments while endeavouring to introduce a holistic healthcare law for better mitigation of any pandemic like a situation that may emerge in future. It would also help to reduce and tackle the post-COVID-19 effects like the side effects that may result due to vaccination or any other long term health care needs.

The most prominent areas that need reforms and synchronisation are the rights of the medical and paramedical workers as they are at the frontline and need to have cared financially-motivational stimulus for them to perform their duties without any interruptions. Since a pandemic is just not a challenge for the society but each individual deal with it at a different level. Hence, the Government must provide incentives as it works as an impetus in these unprecedented times. Further, it is also imperative for the Government to invite the much-needed investment in the health care sector to boost medical research.

There is also a need to disperse financial resources and set them aside well in advance for any health crisis that may arise during a pandemic crisis. Further, the laws must be enacted to ease the movement of indigenous and migrant workers amidst restrictions in travel and move in an emergency. The health care provisions during COVID-19 must seek to compliment fundamental rights even during a pandemic. In no case, the citizens are deprived of it without providing essential remedies in such circumstances. All such regulations are indispensable for controlling

the ill effects of a pandemic. Still, the touchstones stipulated in Article 19 and Article 21 of The Constitution of India are to be conformed mandatorily.

The Constitution of India[39] places an obligation on the State for the protection of health to all person without any discrimination and it also urges the State under the directive principle of state policy to provide vital healthcare services to all person.[40] Independent India has legislated various laws for the protection of the health of all. But the novel Coronavirus has forced the Indian Government to refine their public health laws.

V. THE PANDEMIC, CONSTITUTION AND THE MIGRANTS- THE HORROR RETURNS

The virus does not discriminate and nor should the policy or action of the Government be. The response and policy of the Government to combat the covid-19 virus has a profound impact on the livelihood, health and on the national and the state social-economic policy. The trudged migrant worker and the indigenous people face the same vulnerability of contracting the virus as the host population.

[39] The Constitution of India, arts. 14, 15, 21.23 and 24.

[40]Approach Paper on Public Health Act Task Force on Public Health Act available at: http://nhsrcindia.org/sites/default/files/Task%20Force%20on%20Public%20Health%20Act_2012_approach%20paper.pdf.

Article 21 of the Indian Constitution provides for the Right to life of each individual in the country. It the fundamental Right and also provided in the directive principle of the state policy. Indian Constitution mandates that it is the responsibility of the State to provide to its citizens which includes both men and women, right to provide adequate means for livelihood, equal pay for equal work, food, water, sanitation, Right to live in a clean, safe and hygienic environment, protection of their health, and to secure facilities and opportunity for children to develop them in a healthy manner and under the condition of freedom and dignity.

Millions of people, including the migrant worker, are denied such rights under the COVID-19 Pandemic. Such people are forced to live and work in an overcrowded workplace which hardly permits social distancing. Such a situation exposes the migrant and millions of people to the vulnerability of the virus. It also hampers the state or local authorities to effectively test, diagnose and take proper and adequate health measures. They are also exposed to the risk of income loss or wages. The covid-19 Pandemic severely affects their income and employment. Many migrant workers are working in the informal sector, and some of them are a daily wage earner, and such industry lacks safety net in case of loss of job and illness.[41]

The lockdown has negatively affected the temporary worker or the daily wage worker who has lost their income, social protection, and economic hardship due to the containment zones. The discriminatory treatment of

[41] Adhikari *et al. supra note 17, at 6.*

the Government to the migrant and subjecting them to brutal beating and isolation has violated their constitutional Right to live with dignity.[42] The social policy of the Government has also violated the fundamental Right to equality.[43] The action by the Government to bring the stranded Indian abroad through Vande Bharat mission but it failed to extend similar support to the internal migrant workers on time.[44] Thus, this unequal treatment in violation of the Right to equality. The specific attention needs to be paid while framing a particular policy for the protection of migrant workers.

VI. PANDEMIC POLICY- THE INTERNATIONAL STATE OF AFFAIRS- A THRILLER

In Canada to handle the situation like a pandemic, it has Emergency Act 1988 and Emergency management act 2007. In Canada, most of the provinces have their health care laws. Still, in most cases, the federal Government plays a leading role in handling the health emergency. Both

42 Vikas Pandey, Coronavirus lockdown: The Indian migrants dying to get home available at: https://www.bbc.com/news/world-asia-india-52672764.
43 The Constitution of India, art. 14.
44 Abhinav Sahay, “Vande Bharat Mission: Over 87 percent of stranded Indians brought back till now”, The Hindustan Times, July 09, 2020, https://www.hindustantimes.com/india-news/vande-bharat-mission-over-87-percent-of-stranded-indians-brought-back-till-now/story-f2NjnmsCtbIRMIHlt4oiyN.html.

the government central and State work in coordination to oversee the health emergency.

In Australia, to handle the health emergency, there is a National Health Security Act, 2007, which they need to work with designated agencies and their provinces also have their laws.

In England to handle and deal with a health emergency, there is public health control of diseases Act, 1984, which divide the responsibility to a primary, secondary and tertiary responders through a hierarchical chain.

In the USA, to handle and control the health emergency, a Public health service Act, 1944. This Act has a robust administrative framework, and it was last amended in the year 2019 by former President Donald Trump. To battle covid-19, he has also imposed the Defense Production Act, 1950.[45]

VII. CONCLUSION AND SUGGESTIONS- THE HUNT FOR A HAPPY CLIMAX

The State should make a sincere attempt to provide medical treatment, essential medicines without prejudicing any citizens' Right to access to primary health care services during COVID-19. An inability on the part of Government can result in widespread loss of life and undue suffering

[45] Prachi Patel, Are our laws are strong enough to catch the thief - COVID-19? available at: https://kartavyasadhana.in/view-article/strengthen-legal-framework-to-prevent-and-control-the-communicable-diseases-writes-prachi-patil.

to many mentally and physically. The State machinery in sync with policies must endeavour to provide access to necessities of life like a nutritious diet, shelter and access to clean and safe drinking water to its people as its primary obligation which cannot be overlooked in a welfare state even during a crisis like Pandemic.

The lockdown has resulted in discriminatory treatment with indigent people. The migrated labourers were forced to confine themselves to a specific rented accommodation for a definite period with limited or no access to food and water due to unemployment. Further, there was no prior warning rendered to them, which perhaps led to the violation of their fundamental Right to life and dignity. Employment retention policy should have been on the priority list of the Government, and it should have incentivised the employer to maintain their workforce. This was efficaciously carried out in China by deduction in their corporate social contribution or providing subsidies in their employment which has also been adopted in Korea.

These policies, when implemented, must look to cover all the eventualities like internal displacement of migrant workers and widespread unemployment. The strategies must consider all the possibilities. After that must evolve a policy through the consultation with the state and local government, continuous dialogue and decentralisation can help access the beleaguered local, migrant and indigenous population.

The migrant workers who are returning to their home states should be provided with MNREGA jobs. The minimum number of guaranteed days of work shall be increased from 100 to 200 days.[46] The State should set up the local and regional board to register the skilled or the unskilled positions which shall provide information regarding job opportunities and various welfare schemes of the Government.

The critical analysis of public health legislation reveals that the Government has failed to discharge its constitutional obligation in COVID-19 Pandemic. It has been unable to enact public health laws suitable in the emergency preparedness situation like COVID-19. There is a need for strong legislation. The ministry of health and family welfare has drafted a public health (prevention, control and management of epidemics, bio-terrorism and disasters) bill, 2017 to counter any emergency in the country. This bill will repeal 123 old epidemic diseases acted in 1897. In the current scenario, all the public health legislation is insufficient and cannot address the deplorable status quo that emerged during the emergency.

This bill lacks the framework concerning ethics and protection of human rights. To realise and incorporate the same, an authority can be set up for regulating the public health, e.g., Food and safety legal authority of India. This authority can further propose, revise and review the legislation on a periodical basis. It can make recommendations and lay down priorities

---

[46] G. Vasudevan, S. Singh, et al. "MGNREGA in the Times of COVID-19 and Beyond: Can India do More with Less?". 63 Ind. J. Labour Econ. 799 (2020), https://doi.org/10.1007/s41027-020-00247-0.

for the health of the public, strategic planning with the health systems and collaborate with them, provide technical support and scientific advice to frame state rules, help in streamlining the procedure, uniform implementation of laws, and act as coordinating body which carries overall responsibility for the effective functioning and working of the authority.[47]

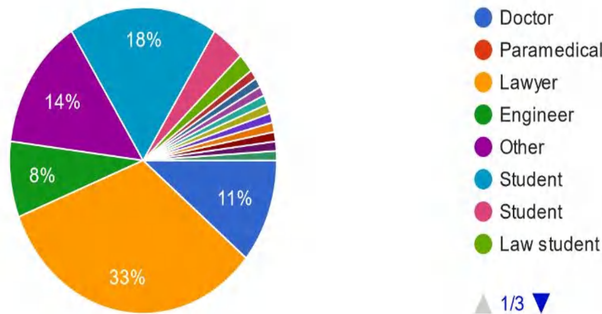
Therefore, we need comprehensive legislation to combat all public health emergencies in the country. Hence, ensuring stability in the country by integration from the national level to the local groups. India has several laws that can be applied during a public health emergency but not even one which could be fully-proof to counter all possible eventualities during a health crisis. The need of the hour is for these provisions to be harmonised into single overarching legislation and also by realising the constitutional principles enshrined in our Constitution.

VIII. SURVEYS- A ENRICHING DOCUMENTARY

A. Survey I Pandemic and Law- Understanding Public Opinion

[47] Supra note 22.

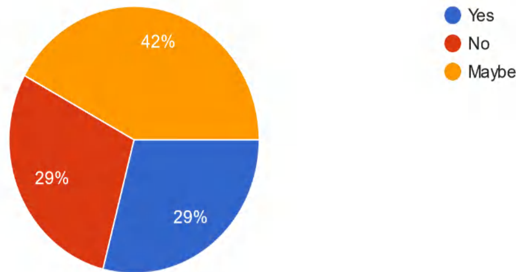
The survey featured professionals from various fields and had an equal



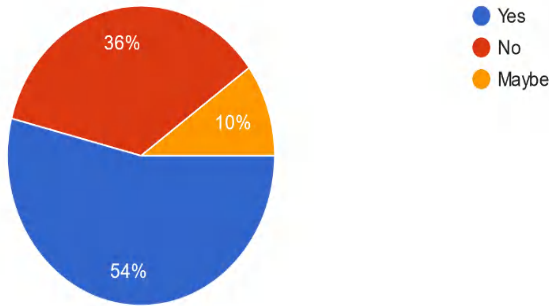
say of people from all the sections of society. It's worthy to note that 11% of the respondents were doctors. The significant chunks of the respondents were lawyers which sum up to a whopping 33%. Hence, the major stakeholders that played a crucial role in policymaking and health during the COVID-19 Pandemic are lawyers and doctors who were given a fair share of representation.

However, the Pandemic had an equally adverse effect on people cutting across the professions and so it is essential to mention that rest of the respondents belonged to occupations like Engineer (8%), Other (18%), Students and law students (25%), Company Secretary, Researcher, Academicians and Teachers among the rest.

The survey tried to bring in respondents from various life paths to portray a better and clearer picture regarding the Pandemic and provide them with a platform to offer their honest opinions.



The respondents seemed to be unsure as to if law and policies can have a profound effect in averting a Pandemic. Since they have not so far experienced the positive effects of it due to the archaic nature of statutes prevailing. Interestingly the same percentage of yes and no's shows the lack of confidence respondents have in the utility of laws and the apprehensions surrounding the execution of policies in such challenging times.

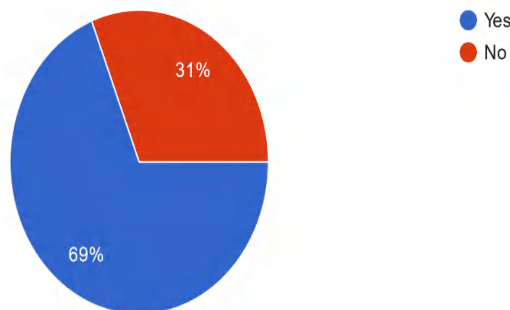


The disappointment in India's approach to handling the Pandemic is evident because 43% of the respondents were not satisfied. However, the dissatisfied section of people is not overwhelming, as 30% felt they were happy. Hence, the unpredictable and unprecedented nature of the COVID-19 virus left many confused. As 27% opted 'maybe', they were not sure if preparedness by the State was possible and if robust policies in place could have helped any better.

The respondents felt there were lacunae in policymaking and implementation with regards to imposing restrictions on movement. Since the prior notice was not provided to citizens, adequate time was not offered. Hence, it created undue hardships for citizens as 54% of the

citizens resonated with it when their fundamental Right was curtailed hastily.

Undoubtedly, the unprecedented times required unprecedented steps to be taken. However, there was no harmonisation between the laws and policies of the Government which led to anguish and anxiety among citizens who were away from their homes with no governmental assistance at their disposal. The stranded citizens, even after initial restrictions were lifted, felt difficulties in obtaining diverse permits for inter-state movements as the requirements were distinct from State to State. There was no uniformity regarding these policies leading to increasing citizens' woes and a toll on their mental health.



There seems to be an overwhelming response in affirmation to inadequacy and incompetence of our persisting archaic laws in the healthcare regime. A whopping 69% of the respondents felt that our

present laws deterred the possibility of a Comprehensive health care system.

The dream of a universal health care system like that of Canada is still distant, but the policies must make healthcare services affordable for the general public. India's per capita income is 1,35,000 per annum or Rs 11,254 per month[48], but initially, the RT-PCR Test for COVID-19 was Rs. 4,500.[49] The question of affordability emerges and can the majority even think of diagnosis, let alone treatment, also, since economic disparity in India has widened during Pandemic. The per capita income doesn't show the real picture as citizen's income could be further less due to un-employability and job loss.[50]

The respondents have shared the deplorable State of affairs in Government facilities where hospitals lacked proper drinking water and sanitisation in Agra. Some have shared the fact that private testing centres didn't follow the price capping norm. The health care system failed to provide post-COVID medication and care for the complications that

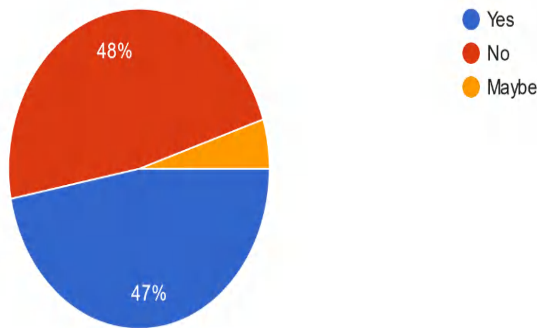
---

48 "India's per-capita income rises 6.8% to Rs 11,254 a month in FY20", The Business Standard, Jan. 07, 2020, https://www.business-standard.com/article/economy-policy/india-s-per-capita-income-rises-6-8-to-rs-11-254-a-month-in-fy20-120010701269_1.html.

49 **"**ICMR removes price cap of Rs 4,500 for coronavirus tests, Health world", The Economic Times**,** https://health.economictimes.indiatimes.com/news/policy/icmr-removes-price-cap-of-rs-4500-for-coronavirus-tests/76021330.

50 A. Ghosh, S. Nundy, et al., "How India is dealing with COVID-19 pandemic" 1 Sensors International 121 (2020).

followed for many. The aspect of mental health during these distressing times was primarily ignored, which is a critical facet of human health.

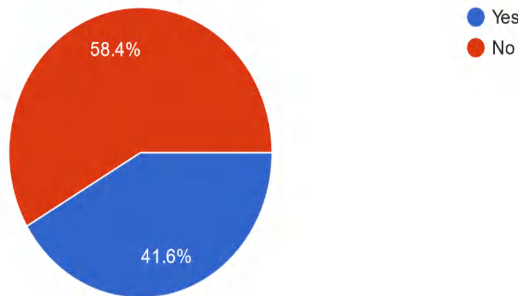


The answer depicts the fact that a large portion that is 47% of the respondents had to seek medical assistance other than COVID-19 for them or their family members during these challenging times. Though COVID-19 had an overwhelming burden on our healthcare system, adequate health care facilities have to be established for the other diseases/disorders/illness as our population size is mammoth and its health care needs are varied.

The need of the hour is to develop a gigantic workforce of well-trained medical staff and doctors with better infrastructure to tackle all medical issues throughout the country. It becomes pertinent when India looks to administer the vaccination to its citizens and would require proficient people to do so. However, we can't as a nation afford to compromise with

our health care system by allowing semi-skilled people to take over due to desperate situations.[51]

This question made it amply clear that 58.4% who sought healthcare assistance were not happy with the service they received during these



times. It does not indicate the failure of the individuals who have relentlessly worked on the frontline to save lives. Still, people's discontent is with the deficiency in laws and the working of our health care system.

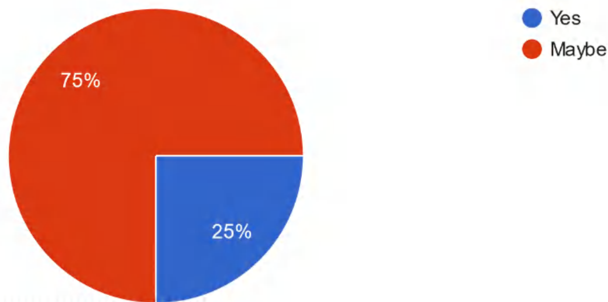
The next question was subjective and invited suggestions. Forty-four respondents answered it, and majorly the view was that the Government

---

[51] "Permitting Ayurveda doctors to conduct surgery a compromise with health: Indian Medical Association", The Times of India, Dec. 11, 2020, https://timesofindia.indiatimes.com/india/permitting-ayurveda-doctors-to-conduct-surgery-a-compromise-with-health-ima/articleshow/79679088.cms.

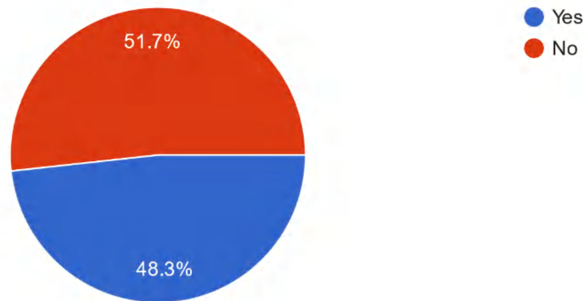
must focus upon sustained investment in the Health Care sector for any such eventuality in future. The administration and execution of law and policies need to be enriched. All necessary efforts must be taken to synchronise these laws to make quality health care services available to the last person in the remotest of the areas. The respondents feel that public consultations and opinions should be more often taken when bringing drastic changes. It is also supposed that the administration and monitoring of the rules and regulations must be stringent. The Healthcare drive must be started as a mission across the country to overcome the health crisis. The health care workers and doctors have worked relentlessly to save thousands of lives, but the policies must work in tandem while mitigating this acute health crisis.

B. Survey II- COVID-19 AND MENTAL HEALTH



The survey showed that one out every four respondents had some mental health issue. On the line of WHO report which had back then in 2019 predicted that it would be 20%,[52] but the lockdown and the Pandemic seem to have made it worse. Furthermore, considering the plight of the migrant workers, the numbers may further swell to indicate something more severe and critical, a mental health pandemic shortly.

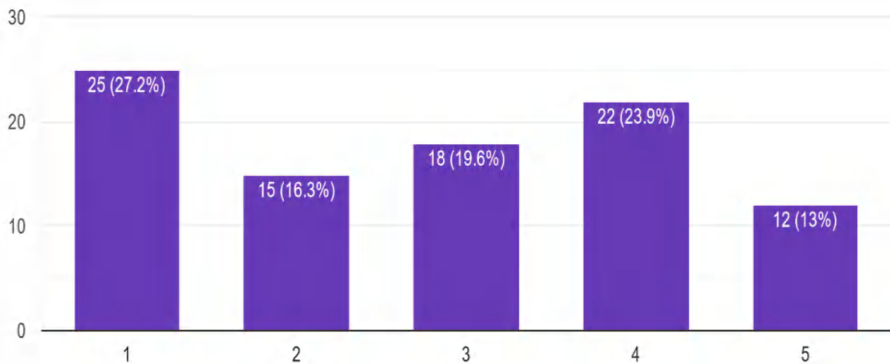
(Note- The options were only Yes/Maybe since few may not feel comfortable answering or are uncertain. Hence, only the respondents who were very sure of mental health issues have indicated in an affirmation)



Those with mental health issues felt the Pandemic, and eventually, lockdown made it worse as all sources of rejuvenation and entertainment outside were to forcefully shutdown. The future suddenly seemed to be

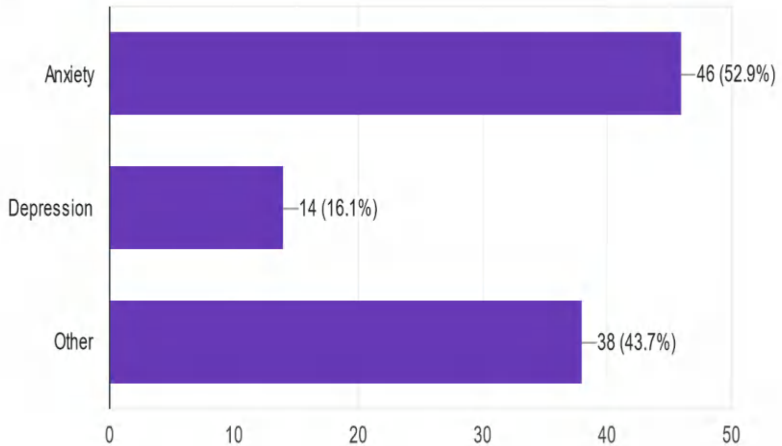
[52] World Mental Health Day 2020: In Numbers, The Burden Of Mental Disorders In India available at: https://swachhindia.ndtv.com/world-mental-health-day-2020-in-numbers-the-burden-of-mental-disorders-in-india-51627/.

uncertain, unemployment, excessive thinking about health, and adversely contributed to the anxiety. People were forced to sit within the four walls of their houses, and it increased cases of chronic depression. As people lost interest in day-to-day activities and the fear of Coronavirus seemed overwhelmingly humongous. All these factors cumulatively affected mental health in people adversely.



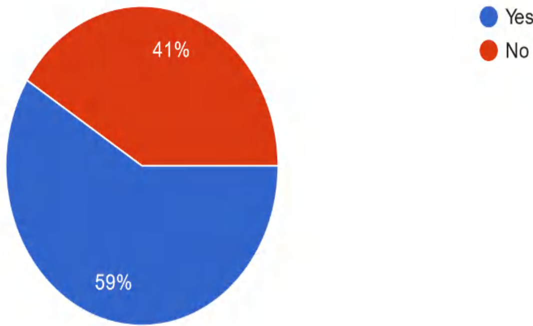
Some people seemed to have remained unaffected by the mental health issues triggered by the lockdown. This sums up to 40%, but on the other hand, there are 52% who feel that lockdown has substantially contributed adversely to their mental health. This majorly shows the widening gap, which is much concerning for the health of the country.

The policies should be uniform, unambiguous and must allow people to adapt smoothly within a reasonable time in their hands. These are unprecedented times, but policies can help reduce the uncertainty attached to laws and policies for improved mental health.



The respondents showed higher numbers (52.9%) of anxiety disorder which directly reflects the uncertainty that adds to their mental health woes. Apart from that, depression follows behind at 16.1 % of respondents. The lack of hope and a sense of nothingness has increased the number of people identifying with other types of mental health issues.

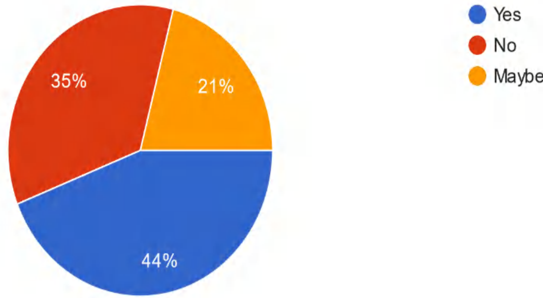
Do you think laws and policies have a role in tackling mental health issues during the Pandemic?
100 responses



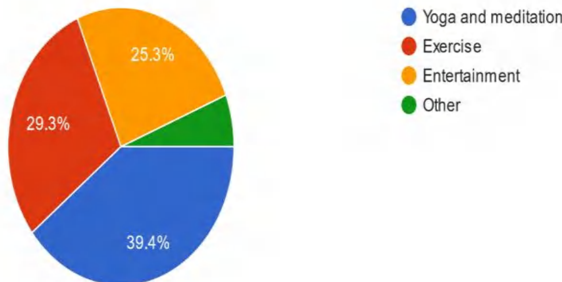
Also, few respondents have picked a combination of two or three mental issues that they face which is alarming for the State and existing policies, fail to cater to this issue.

The majority of the respondents that is 59% of those who took the survey firmly believe that the laws and policies play a critical role in handling the mental health issues of the citizens. There require a few elements in law that help reduce anxiety and depression such as uniformity, laws that are devoid of any confusion and the timing. These can break or make mental health when the times are as distressing as that of COVID-19.

Job security, food security and med-care facilities are something that are of utmost interest to the public during these times, and this must be taken into consideration by the Government while framing policies. It is pertinent to impose restrictions but at the same regulate access to places of rejuvenating and entertainment must be open for people to rejoice in their life.



Due to the societal and family structures in India, it is quite evident that forced lockdown caused conflicts. It was so affirmed categorically by the 44% of the respondents who participated. Other 21% opted not to answer this question by choosing a maybe. Hence, it undeniably household conflicts due to work from home and forced lockdown, causing distress. Moreover, this could also be a leading reason for mental health issues.



There is a different array of activities the respondents prefer Yoga and mediation, exercising, and entertainment, among others. But the most prominent and famous one being Yoga and meditation as outdoor activities were curtailed and social distancing, the mask is a compulsion. The policies must include these activities from local to the central level for mental health for children, youth or the elderly who suffer the ordeal of COVID-19 Pandemic.

RIGHT TO INTERNET: A LOOK AT THE PRESENT WITH THE LENS OF THE FUTURE

Vidya Menon[1]

"Internet is not a luxury; it is a necessity."

—Barack Obama

I. INTRODUCTION

Internet has become an indispensable tool in our everyday life and has opened a new world of opportunities for people across the globe. From e-learning to e-commerce to e-governance to e- health, Internet has influenced almost all aspects of human life. Internet frees us from the geographical fetters and facilitates in setting up a universally accessible platform that enables individuals to enjoy an enhanced quality of life. Digital connectivity also plays a vital role in the economic development of the country and in the enjoyment of a wide range of human rights. In a world that is rapidly transforming itself under the impetus of technological advancements and digitization, the need to adapt to digital platforms has become quintessential to stay in the race. Today, internet is no longer a luxury but more of a necessity and in view of the same many countries have acknowledged the internet as an enabler of various human rights.

In India, the initiatives to provide Internet connectivity to the citizens can be witnessed through the flagship program known as the Digital India,

[1] *Faculty of Law, SRM Institute of Science and Technology, Kattankulathar, TN.*

launched by the Government of India in 2015[2]. With a vision to transform the nation into a digitally empowered society by providing for appropriate infrastructure, literacy and delivery of services, Digital India has initiated various schemes and programmes such as Public Internet Access Programme, Universal Access to Phones, Broadband highways, The National Mission on Education through Information and Communication Technology (NMEICT), Aadhaar Enabled Payment System (AEPS), *Digidhan Abhiyaan,* MyGov, PayGov India, *Pradhan Mantri Gramin Digital Saksharta Abhiyaan* (PMGDISHA), *Sugamya Bharat Abhiyaan* or Accessible India Campaign etc[3]. These governmental initiatives have increased the internet penetration rate in India and from a mere 4% in 2007 it has gone up to 50% in 2020[4]. Presently, India is ranked second globally in terms of active internet users and it is estimated that by 2025, there shall be approximately 974 million internet users in the country[5].

The current outbreak of a global pandemic (COVID-19) and the government measures to curb it by imposing travel restrictions, encouraging people to maintain social distancing, etc has prompted billions of people in making use of the available digital tools and living their lives online. Apart from enabling people (though in a limited manner) to move on with their lives, the internet connectivity has also

---

[2] Digital India, Common Service Centres Schemes (CSC), Ministry of Electronics and Information Technology, Government of India, available at https://csc.gov.in/digitalIndia, (last visited on October 21, 2021)

[3] How Digital India will be realized: Pillars of Digital India, available at https://digitalindia.gov.in/content/programme-pillars, (last visited on April 20, 2021)

[4] Sandhya Keelery, Internet usage in India - Statistics & Facts, available at https://www.statista.com/topics/2157/internet-usage-in india/#:~:text=It%20was%20estimated%20that%20by,access%20to%20internet%20that%20 year (last visited on October 14, 2021)

[5] Ibid

helped people in staying informed, safe, and connected during this global healthcare crisis. This has also resulted in the countries to focus on improvising their internet infrastructure so as to provide internet access to all its citizens. The scientific and technological advancement brings about a change in the manner in which fundamental rights are enjoyed by the people. Law being a social phenomenon that reflects the social changes is ought to be interpreted so as to accommodate these varying needs of the society.

II. Right to Internet under the International Human Rights Law

Human rights are universal rights that all human beings are entitled to, regardless of sex, colour, race, ethnicity, religion, language, nationality or any other status. These are basic rights that guarantee the individuals with minimum standards, essential for them to live with dignity, equality and freedom. Various international instruments such as treaties, conventions, declarations etc. spell out these rights which the countries upon ratification are required to uphold as well as incorporate into their municipal laws.

Right to Internet has not been explicitly recognized as a human right under any of the International instruments. However, emphasizing the need to promote and protect the enjoyment of human rights on the internet and further condemn the imposition of arbitrary Internet shutdowns by the States, a resolution was passed by the United Nations Human Rights Council in 2016[6]. It calls upon the Member States to work towards

[6] UN Human Rights Council, The promotion, protection and enjoyment of human rights on the Internet: resolution / adopted by the Human Rights Council (18 July 2016, A/HRC/RES/32/13), available at: https://www.refworld.org/docid/57e916464.html, (last visited on October 16, 2021)

framing internet policies that aim at bridging the digital divide ensuring access and opportunity to all. Keeping in view the significant role of internet in our everyday lives, an analysis is made as to how the existing human rights can be interpreted to be inclusive of this right

1. Freedom of opinion and expression

According to the Universal Declaration of Human Rights (UDHR) 1948, "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[7]." Nowadays the Social media platforms such as Facebook, Twitter, YouTube etc. have become the vital tools of communication and hence the expression "any media" can be interpreted to include the medium of Internet as well, through which individuals can enjoy their freedom of opinion and expression. This right has also been recognized under the International Covenant on Civil and Political Rights (ICCPR) 1966; however subject to certain restrictions namely; for respect of the rights or reputations of others and for the protection of national security or of public order or of public health or morals[8]. The 'Report of the Special Rapporteurs on the promotion and protection of the right to freedom of opinion and expression[9]' also confirms that Article 19 was drafted with a foresight to accommodate the future technological

[7] The Universal Declaration of Human Rights, 1948, art. 19.

[8] The International Covenant on Civil and Political Rights (ICCPR) 1966, art. 19

[9] UN Human Rights Council, Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression: Addendum, Communications to and from Governments, 16 May 2011, A/HRC/17/27, available at: https://www.refworld.org/docid/50f3db632.html, last visited on March 3, 2021

developments and focuses on the responsibility of the States to facilitate the enjoyment of this right.

2. **Right to participate in the cultural life**

The UDHR holds that "Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits[10]". Likewise, the International Covenant on Economic, Social and Cultural Rights (ICESCR) 1966, recognizes the "right to enjoy the benefits of scientific progress and its applications[11]" and "to respect the freedom indispensable for scientific research and creative activity[12]". Here the terminology "benefit" shall be interpreted as material benefits which every person shall be entitled to enjoy in their everyday life. Both scientific and technological advancements are mutually inclusive and have positively changed the way we communicate, work and interact in society, making our lives much easier. Nowadays, Internet has also become a vital sophisticated multidisciplinary tool for research and creative activities. In guaranteeing the right of the citizens to participate in the cultural life, the States are thus under a positive obligation to share such benefit accruing from any scientific research and its application with the society as a whole within the international community.

3. **Right to Education**

[10] The Universal Declaration of Human Rights, 1948, art. 27
[11] The International Covenant on Economic, Social and Cultural Rights, 1966, art. 15(1) b
[12] The International Covenant on Economic, Social and Cultural Rights, 1966, art. 15(3)

The International instruments such as UDHR[13] and ICESCR[14] recognizes the right of everyone to education. Acknowledging that education enables individuals to participate actively in a free society, it emphasizes the State parties to provide for free and compulsory education at least in the elementary and fundamental stages. Nowadays, in addition to the traditional system of education, online education is also being promoted on a large scale. Internet has provided unbounded possibilities for learning and encourages interactive, collaborative and self-paced learning. The smartphones have also eased our access to dictionaries, encyclopaedias, digital libraries, news and the like such that today any information is just a touch away. In the backdrop of the present global healthcare crisis, many educational institutions have also embraced e-learning so that learning is not disrupted. Thus, the State parties shall be committed to incorporate the new learning strategies and take adequate measures for the realization of this right in today's times.

4. Right to adequate standard of living

The UDHR[15] and ICESCR[16] recognizes the right of everyone to an adequate standard of living for oneself and their family, including adequate food, clothing, housing, medical care, necessary social services and to the continuous improvement of living conditions. The essential aspect is that everyone shall be able to enjoy their basic needs in conditions of dignity without unreasonable obstacles. 'Adequacy' to a

[13] The Universal Declaration of Human Rights,1948, art. 26
[14] The International Covenant on Economic, Social and Cultural Rights, 1966, art. 13
[15] The Universal Declaration of Human Rights,1948, art. 25
[16] The International Covenant on Economic, Social and Cultural Rights, 1966, art. 11

large extent is determined by the social, economic, cultural, climatic, ecological and other conditions[17]. Today internet is increasingly being relied on to promote social well-being with implications for poverty alleviation, education and conditions of care whenever necessary. The technological advancements enhance human capabilities and enable people to participate more actively in their life eventually resulting in improved standard of living. The significant role of the internet in ensuring the right of individuals to adequate standard of living is undeniable and the States shall be obligated towards guaranteeing its citizens the means to realize this right as well.

5. Right to desirable work

"Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment[18]". The right to desirable work is also recognized by the ICESCR which focuses on the State's obligation to take appropriate steps to safeguard this right[19]. Thus, by virtue of this specific right, the State parties are under an obligation to respect, protect and fulfil each person's access to work to earn one's living and additionally to guarantee that this work can be freely chosen or accepted. With the advances in technology, the countries have encouraged the concept of e-business and e-commerce platforms, creating a wide range of employment opportunities. In the emerging global economy, internet as a medium to work and earn a living

[17] UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 12: The Right to Adequate Food (art. 11 of the Covenant), 12 May 1999, available at: https://www.refworld.org/docid/4538838c11.html, (last visited on November 9, 2021)
[18] The Universal Declaration of Human Rights, 1948, art. 23(1)
[19] The International Covenant on Economic, Social and Cultural Rights, 1966, art. 6

is gaining prominence and in the interest of the general public it is important to recognize and safeguard the same.

6. Right to equality

Equality and non-discrimination are core principles in International Human Rights law and all members of the United Nations are under an obligation to promote and protect these principles. The UDHR stipulates that "All are equal before the law and are entitled without any discrimination to equal protection of the law[20]". Similarly, the right to equality has also been set forth under the ICCPR[21] and ICESCR[22], both of which requires the respective State parties to guarantee the enjoyment of this right without discrimination of any kind. Internet with its potential role in the overall development of a country, must be viewed as an enabler of several other human rights. If the internet facility is not provided to citizens at an affordable price, it is likely to create a "digital divide" among the people who are in position to access the internet and others. This situation shall pave way for disparity, consequently negating the principle of equality. To achieve the full realization of the right to equality, the States must therefore develop an inclusive internet infrastructure that focuses on bridging the digital divide, providing access to one and all.

III. Judicial Approach on Internet as a Fundamental Right in India

With the increasing instances where the government has resorted to internet shutdown on account of security reasons, it has become a matter

---

[20] The Universal Declaration of Human Rights, 1948, art. 7

[21] The International Covenant on Civil and Political Rights, 1966, art. 23(4)

[22] The International Covenant on Economic, Social and Cultural Rights, 1966, art. 3

of debate whether such restrictions in a democratic country tantamount to violation of the fundamental rights. Though the Constitution of India does not mention *expressis verbis* the right of citizens to access the internet, an attempt has been made by way of judicial pronouncements to envisage it as a derived right within other recognized fundamental rights. The landmark cases wherein the right to internet as a fundamental right was deliberated upon are discussed below.

1. ***Faheema Shirin R.K* v. *State of Kerala*[23]**

The Kerala High Court in *Faheema Shirin R.K* v. *State of Kerala* declared that right to access the internet is a fundamental right and forms part of right to privacy as well as right to education recognized under Article 21 of the Constitution. In the instant case, a writ petition was filed by Ms. Faheema Shirin, a 2nd year B.A student, wherein she challenged the imposition of new rules implemented by the college hostel authorities which restricted the inmates on the use of mobile phones between 6 p.m. and 10 p.m. The college authorities contested that the rules were framed only with a view to enforce discipline among the students and that too at the behest of the parents. However, the petitioner contested that the restrictions imposed as well as her expulsion from the hostel on account of her reluctance to comply with these restrictions were illegal and that it was in contravention of the fundamental rights namely right to freedom of speech and expression, right to education and right to privacy. Further, it was brought to the courts notice that these restrictions were imposed

[23] WP(C). No.19716 of 2019(L)

only on the female residents thereby putting them at serious disadvantage in comparison to their male counterparts.

Ruling in favour of the petitioners, Justice P.V. Asha stated that "*the enforcement of discipline shall not be by blocking the ways and means of the students to acquire knowledge.*[24] *No student shall be compelled either to use mobile phone or not to use mobile phone*[25]". Pointing out the fact that almost all students staying in the hostel have attained majority, it was also mentioned as to how it should be left to the students to choose the time for using mobile phones. Besides, citing the Puttaswamy judgement, [26]it was held that "*a total restriction on its use and the direction to surrender it during the study hours is absolutely unwarranted*[27]". Further, emphasizing on the significance of internet in online education it was declared that "*the rules and regulations require reforms to cope up with the advancement of technology and the importance of modern technology in day-to-day life*[28]*.*" In the age of digital interdependence, this is one of the laudable, progressive and the first of the judgements in India to have recognized the internet as a fundamental right.

2. *Anuradha Bhasin* v. *Union of India*[29]

The Supreme Court in *Anuradha Bhasin* v. *Union of India* reiterated that the freedom of speech and expression as well as the freedom to practice any profession or carry on any trade, business or occupation over the

[24] Id. at para 24
[25] Id. at para 20
[26] (2017) 10 SCC 1
[27] Id at para 18
[28] Id at para 24
[29] 2020 SCC Online SC 25, 2020 3 SCC 637

medium of internet has gained contemporary relevance and enjoys constitutional protection under Article 19(1) (a) and Article 19(1) (g) respectively. On August 4, 2019, a day prior to the issuance of the Constitution (Application to Jammu and Kashmir) Order, 2019, scrapping Jammu and Kashmir of its special status, apprehending breach of peace and tranquillity, orders were issued suspending mobile phone networks, internet services and landline connectivity in the region. Against this, a writ petition under Article 32 was filed by Anuradha Bhasin, the editor and publisher of the newspaper Kashmir Times, challenging the legality of internet shutdowns and movement restrictions within the State. She contested that the restrictions limited her capacity as a journalist to travel and publish the news, thereby forcing the print media as such to come to a "grinding halt", which is in violation of the fundamental rights guaranteed under Article 19 of the Constitution. It was also argued that restrictions, supposedly temporary in nature, had lasted for over 100 days and were unreasonable and disproportionate to the aims it pursued. On the similar grounds, a petition was also filed by Gulam Nabi Azad[30], a Member of Parliament stating that the internet restrictions affected a wide variety of fundamental rights and how the prevailing circumstances did not qualify as a state of 'emergency' so as to impose such grave restrictions akin to declaration of emergency. Though this petition was later withdrawn it was able to draw the attention as to how the restrictions were arbitrary in nature and had resulted in causing greater harm to even the law-abiding citizens of the country. The counsels for the respondents however stated that contemplating the background of

[30] W.P(C) No. 1164 of 2019

terrorism in the State of Jammu & Kashmir, the restrictions on the use of internet was reasonable as it was a preventive step to ensure that fake news, images or messages especially through social media are not circulated to spread violence.

The court declared that the rights under Article 19(1) (a) and Article 19 (1) (g) over the medium of internet enjoy constitutional protection and that any restriction upon these rights therefore must be in consonance with Article 19(2) and Article 19(6) of the Constitution. Further, it was held that under the Temporary Suspension of Telecom Services (Public Emergency or Public Service) Rules, every order passed by the competent authority ought to be a reasoned order and such suspension of internet services indefinitely was impermissible. Relying on the principles of proportionality, it was also stated that a broad suspension of telecom services was to be considered only if it was absolutely necessary and while passing orders to that effect the State should have assessed the possibility of an alternate remedy which was less intrusive in nature[31]. Consequently, directions were given to the State to review its orders under which such internet services were suspended and, in this regard, constitute a review committee to conduct periodic review on the proportionality of the orders and its compliance to the provisions of the Rules[32]. The States were also directed to consider restoration of internet services allowing for limited e-banking facilities, hospital services and other essential services[33].

[31] Supra note 23 at 129
[32] Id. at 128
[33] Ibid.

3. *Foundation for Media Professionals* v. *Union Territory of Jammu and Kashmir & Anr.*[34]

The case relates to a petition filed in the Supreme Court by the Foundation for Media Professionals, an NGO, challenging the orders restricting the data speed in mobiles to 2G and further seeking appropriate directions in restoring 3G/4G services in the Union Territory of Jammu & Kashmir. The petitioners contended that the withdrawal of 3G/4G services amidst the ongoing global pandemic crisis, deprived the citizens of access to critical information, negating them of their right to health, right to education, right to business and right of freedom to speech and expression. It was also argued that the existing restrictions were in violation of the directions laid down in *Aruradha Bhasin* case (which required any such limitation to be based on the principles of proportionality) as well as the Temporary Suspension of Telecom Services (Public Emergency or Public Safety) Rules, 2017. However, citing the continued insurgency in the Union Territory, the respondents submitted that in the larger public interest, national security should be prioritized against the fundamental rights of the citizens. Further the respondents also stated that the people were not cut out from any vital information as it was made available/ could be accessed via government websites (that required only 2G speed) and additionally through medium other than the internet such as radio channels, local cable network etc.

Though the Supreme Court agreed to the fact that modern terrorism relies heavily on the internet, it also noted that the orders imposing restrictions

[34] 2020 SCC 453.

in all the districts of Jammu & Kashmir were not in consonance with the principles of proportionality and that there was a failure on the part of the government in abiding to the ruling in *Aruradha Bhasin* case. Nonetheless, holding that there was nothing in the impugned order to be unconstitutional, the Court disposed of the petition directing the constitution of a special committee to review the restrictions and also examine the possibility of restoration of 4G services within the Union Territory of Jammu & Kashmir.

IV. The Challenges Ahead in Recognizing Internet as a Fundamental Right

Internet has become an integral part of our lives and Covid-19 pandemic has re-established the fact as to how digital technology with its wide range of use is essential for contemporary living. Internet plays a vital role in realizing most of the fundamental rights today, such that it becomes necessary to not only construe the existing provisions so as to be inclusive of this right but also explicitly recognize it as an enabler of other rights. Our Constitution provides for equality of status and opportunity to all its citizens[35]. Acknowledging the fact that the internet facilitates individuals with better opportunities to work, learn and explore, it is important that access to digital connectivity is made available to all citizens so that everyone is placed at an equal footing. Though, over the years a lot of initiatives have been taken, ‘Internet for All’ remains a distant dream.

[35] The Constitution of India, *Preamble*

While things have changed radically in the past decade with respect to development of digital infrastructure and internet penetration rate, it is to be noted that nearly half the population still do not have access to the internet. The biggest challenge towards guaranteeing the internet as a fundamental right would be to provide adequate facilities for its access by the citizens at affordable prices. With a vision to empower the citizens digitally, the government of India in 2011 launched an ambitious project, BharatNet, proposing to connect 2.5 lakh gram panchayats within a term of two years. However, due to many reasons, the originally planned deadlines were pushed several times on account of which the project is yet to be completed. Recently, on the occasion of Independence Day, the Prime Minister announced that the government proposes to connect over 6 lakh villages with optic fibre by May, 2023. Though it is viewed as the world's largest connectivity project, going by the time span taken in connecting 1.42 lakh gram panchayats, it is estimated that it should take another four to five years for the project to be completed[36]. Additionally, the State authorities shall also ensure that internet services are available to the citizens at affordable prices so that access is not limited among certain categories of users within the society. The recognition of the internet as a fundamental right or rather an enabler of rights is irrelevant if the majority of the population do not have access to it and hence the first step towards it shall be to ensure adequate infrastructural facilities.

Prolonged internet shutdowns or indefinite suspension of the internet in the name of public order is another impediment in recognizing the

[36]Editorial, "Modi's promise on high-speed rural connectivity still a mirage" The Federal, Aug. 16, 2020, available at https://thefederal.com/analysis/pm-modis-promise-on-high-speed-rural-connectivity-still-a-mirage/, (last visited on November 21, 2021)

internet as a fundamental right. As per the reports, in the year 2020, the number of times India witnessed instances of internet shutdowns was close to 130, which accounts for about 70% of the internet shutdowns that happened globally[37]. The frequency of such shutdowns has also remained high in 2019 and in 2018, where the figures were above 100[38]. Recently, in January 2021, following the farmers' protest on agricultural reforms, internet connections were disrupted in several states of Haryana and Delhi which lasted for more than 24 hours. Cutting off the internet access has emerged as a widespread practice adopted by the government in curbing any form of protest. Apart from the instances wherein internet shutdowns were imposed to maintain the public order and security of the nation, suspension of internet services was also found to have been imposed to curb cheating in State public service examinations of Arunachal Pradesh[39] and in view of the agitations by the Gujjar community over reservations to backward class in the State of Rajasthan[40]. All these instances highlight how internet suspension has on several occasions been disproportionate and grossly unreasonable. The dependency on the internet has increased because of which internet shutdowns are viewed as restrictions to various essential services as well. In these circumstances, the biggest challenge would be to draw a fair

[37] Internet shutdowns, available at https://internetshutdowns.in/, (last visited on October 21, 2021)
[38] Ibid.
[39] Eben Moglen, Internet shutdowns don't just hinder some apps – they undermine the very idea of democracy (July 2, 2021), available at https://scroll.in/article/985688/internet-shutdowns-dont-just-hinder-some-apps-they-undermine-the-very-idea-of-democracy, (last visited on October 16, 2021)
[40] Ibid.

balance between the security of the State and the individual interest of the citizens.

V. Conclusion

The evolution of technologies has revealed the need to recognize newer dimensions of established fundamental rights. During this global health crisis, the internet has helped citizens to stay informed, avail online health services, rely on remote work technologies, explore and adopt online modes of teaching and learning as well as make use of the online platform to stay connected and entertain ourselves. Since access to the internet has become a lifeline to individuals from all walks of life; it is important that we recognize this as a fundamental right and consider arbitrary internet shutdowns as outrageous and unconstitutional. Countries such as Finland, Greece, France, Peru, Spain, Estonia, Ecuador etc. have recognized internet access as a basic right and thereby limiting the government from imposing unreasonable restrictions on an individual's access to the internet. India has also made remarkable progress towards recognizing the right to internet as a basic right which can be witnessed in the pertinent cases that came before the Apex Court and the High Court of Kerala. While the Apex Court declared internet as an enabler of other rights, the Kerala High Court was seen to have gone one step ahead by declaring access to internet as a fundamental right with the State government vouching to provide internet connectivity to all households within the State. Recently, the Central government also enacted the Temporary Suspension of Telecom Services (Amendment) Rules, 2020 which stated that orders issued by competent authorities in relation to

suspension of telecom/ internet services shall not extend beyond 15 days. With these positive initiatives, India is slowly but steadily working towards realizing the bigger dream of guaranteeing to every citizen the right to the internet.

CROSS BORDER INSOLVENCY UNDER THE INDIAN REGIME: NECESSITY OF AMENDING THE LEGISLATION POST COVID-19 PANDEMIC

Shrabani Kar[1] *& Pratik Dash*[2]

ABSTRACT

This paper begins with the impact of COVID-19 on Cross border Insolvency proceedings. The Model Law and its core principles are discussed with the adoption by the developing nations. By virtue of Sections 234 and 235 of the Insolvency and Bankruptcy Code, 2016, India has a cross-border insolvency procedure. The said provisions are considered as a haste inclusion with no steps being taken for bilateral arrangements with countries and failure to imbibe the core principle of Model in the said provision. The paper further delves into the delayed approach of framing Cross border Insolvency report to consider the problems caused by the existing provisions and making recommendations for a draft provision after a span of two years after commencement of the code. The judicial proactiveness in implementing certain flexibilities towards the claim of foreign creditors is discussed at length with the analysis of the Group Companies and mega corporations like Jet Airways & Videocon. The amendments made to the existing code, particularly, the Pre-packaged Insolvency Model for the MSMEs , wherein foreign creditors and resolution of foreign assets of a

[1] *Assistant Professor of Law at Lingaya's Vidyapeeth, Faridabad, HR.*
[2] *Advocate at High Court of Orissa.*

debtor find no place. The FDI influx vis-à-vis ranking made to the ease of doing business during the COVID-19 pandemic, which can be contributory factors for the achieving the prime objectives of maximizing asset value and effectuating time-bound resolution. In view of these existing circumstances, the author advocates for the necessity of implementing the long-pending Model Law framework for Cross Border Insolvency to attain its legislative objectives .

Keywords: *Uncitral Model Law, Ease of doing business, Bilateral agreement, Letter of credit, Covid-19*

I. INTRODUCTION

The world economy has shattered after the onset of the COVID-19 pandemic. It has wrecked the distribution systems and GDP across several jurisdictions making it difficult for the small, micro and medium scale businesses. To add further, it has even halted large corporations and Multinationals. This has resulted in creation of huge debts in the market and subsequently has rendered the recovery and realization of assets to mitigate those debts improbable. . Cross-border insolvency is a method of realizing the assets of debtors in different jurisdictions. It also refers to maximization of recovery of debts incurred at the behest of investors/creditors hailing from different countries.

India has been one of the worst affected countries in this pandemic and the Insolvency Code, although being a regime enacted in 2016 is not a

legislation piece that has been discussed till late. The ideologies behind the code have been discussed and presented through certain published reports and framed committees such as Eradi[3], Bankruptcy Law Reforms[4] etc. Whilst, the Model Law[5] had been enacted in the year 1997 to address the issue of Cross border insolvency but, the Indian law makers have taken the decision to adhere with it in recent times with the notification of two dead pieces of Cross border insolvency provisions into IBC, under Section 234 and 235. The problems faced in Cross border resolution still remains unaddressed as the Indian Government has failed to create and enforce bilateral agreement viz reciprocal arrangements. Further, it has failed to create a balance between the enforcement of the insolvency order/ awards and prioritization of domestic proceedings and creditors. The NCLT, NCLAT and Supreme Court of India have made several observations thereto in the proceedings concerning major corporates such Videocon and Jet Airways.

However, it is pertinent to raise a question as to how long the Indian Legislation would do away with the implementation and enforcement of enacted provisions post the COVID-19 pandemic, when the economy revives and bad debts need cautious resolutions.

II. THE MODEL LAW OF CROSS BORDER INSOLVENCY

[3]Eradi Committee Report relating to insolvency and winding up of companies dated 31.07.2000.
[4]Bankruptcy Law Reforms Committee (BLRC) reports published in 2015
[5]Model Law in Cross border Insolvency, 1997

The framing of the Model Law was done keeping in mind four factors which are also referred to as principle that would give access, recognition, relief to a debtor of one country and further would be extended with Cooperation and efficient coordination to resolve the debts in those jurisdictions. These principles were the watermarks for the legislations across the globe to create a domestic framework that would facilitate a time bound resolution of debts accrued in international trade practices. The Model Law even provides for flexibility[6] and creates a consistency with national insolvency laws. These recommendations were ratified by 44 countries instantly which include major developed countries such as the United States, United Kingdom, Singapore etc. The Model Law was framed in an era which was devoid of technology and digitalization, it had encompassed meticulous aspects that would have been difficult to for-see in the future, as it could have been a primary tool in this era where trade and businesses have become virtual. It recognized both foreign and domestic insolvency proceedings inter alia public policy exceptions[7] and flexibility to include and vary provisions to suit domestic needs. Perhaps, these were the features which attracted the Western developed nations wherein the conglomerates and technological giants were evolving and had implemented the four elements of the Model unhesitatingly.

[6]Article 6 of the UNCITRAL Model Law of Insolvency, 2018

[7]Article 6, Part One. UNCITRAL Model Law on Cross-Border Insolvency, Chapter I. General provisions, UN publications, UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation.

Countries have implemented exclusions that are far broader than those anticipated by the Model Law. The Model Law does not demand reciprocity, nor does it stipulate that a foreign representative wanting to use its services must have been appointed or foreign proceedings begun under the law of a State that has adopted it.[8]

III. INDIA'S APPROACH TOWARDS CROSS BORDER INSOLVENCY: TILL TODAY

A. Section 234 and 235: A Haste Inclusion devoid of Model Law principles:

Section 234 and Section 235 of the Insolvency and Bankruptcy Code, 2016 have been adopted in India. These provisions, however, have not yet been announced. By virtue of Section 234, subsection (1), the Central Government would enter into bilateral agreements with foreign countries for the aim of enforcing the IBC-mandated Corporate Insolvency Resolution Process. By notification in the Official Gazette, the Central Government would direct the application of the Code's provisions in relation to the assets/property of Corporate or debtor, or guarantors who have incurred personal liability to the debtors in countries with whom India has reciprocal arrangements. However, it has failed to address the issues of reviving the assets of fugitives Like Vijay Mallya, Mehul Choksee, Nirav Modi etc. who still have assets spread in multiple jurisdictions. Section 235 of the Code deals with letter of request

[8] A Case to Cross the Border Beyond the UNCITRAL by Sudhaker Shukla and Kokila Jayaram

to foreign courts by the NCLT and NCLAT for implementation of its orders over the assets of a Corporate Debtor whose insolvency resolution has been admitted in India.

These provisions are devoid of analysis and implications by the Draftsmen showcasing the major lacunae of the Code. The ambiguities range over many aspects majorly in implementation of orders passed by the Adjudicating Authorities in foreign courts, cooperation ascertained to the letter of requests, reciprocal arrangements so far as the application of the Code to assets in different countries. The recent notification of India's adoption of the New York Convention for the Enforcement of Arbitral Awards, 1958, sheds light on the country's approach to reciprocity. Therefore, the Indian Legislators needed to understand that the enforcement of bankruptcy order has far reaching consequences considering the multiple number of stakeholders involved and more particularly, the need to adhere to a time bound resolution of assets.

B. Draft Report by the Central Government in 2018: a delayed approach to implement Model Law

After rendering the difficult attributes by its own procrastinated approach to framing the law, the Central Government has given appropriate respect to the complexity of Cross Border Insolvency after a period of two years since the implementation of the Code. F ollowing is an excerpt from

the preface to the Ministry of Cross Border Insolvency's 2018[9] Cross Border Insolvency Report:

"Given the complexity of the subject matter and the requirement of in-depth research to adapt the UNCITRAL Model Law for India, the Committee decided to submit its recommendations on cross-border insolvency separately. Accordingly, this Report provides recommendations of the Committee on adoption of the UNCITRAL Model Law and the modifications necessary in the Indian context".[10]

The Draft Committee has appreciated the necessities of complete features of the Model Law even its flexibility, public policy exceptions, mandatory and non-mandatory relief inter alia other such dynamic and progressive approach enlisted therein. Furthermore, the Draft Provisions have left a lot of detail to the Central Government and IBBI's subordinate law. To avoid confusion in the resolution of cross border insolvency cases, such revisions and promulgations of rules and regulations must align with the Model Law's goal and be implemented promptly.[11]

The Committee has even appreciated the major aspect that implementation of the Model Law would allow recognition of foreign proceedings and substantive relief. The notion of the Centre of Primary Interests (COMI), which states that if domestic courts conclude that the

---

[9] Draft Part Z, Insolvency Law Committee Report, http://www.mca.gov.in/Ministry/pdf/CrossBorderInsolvencyReport_22102018.pdf

[10] Ibid.

[11] Article in the April 2020 edn of Nishith Desai and Associates,https://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research_Papers/Introduction-to-Cross-Border-Insolvency.pdf.

debtor's COMI is in a foreign nation, those foreign proceedings will be recognised as the main proceedings, was widely regarded as a necessity. As a result of this recognition, some automatic benefits will be granted, such as giving foreign representatives greater authority over the debtor's estate[12].

The draft goes on to introduce an additional mechanism of joint hearing for concurrent proceedings operating at different jurisdictions, which would be a greater sign of cooperation of principles of Model Law and would prevent creation of inconsistent judgments on the resolution process and would ensure coherence amongst the creditor's stake. It is difficult to understand as to why these provisions have not received the sanction of law yet although India has roaring cases of debts and debtors mushrooming in different countries, much before the COVID-19 pandemic.

IV. JUDICIAL ACTIVISM: INDIAN JUDICIARY'S PROACTIVE APPROACH FOR FAIR TREATMENT

India judiciary being a watchdog of rule of law has expanded its horizon beyond the black letter interpretation of law. The Supreme Court of India and its sub ordinate forums have extended the shield of judicial activism since time immemorial. One such instance of judicial activism is palpably

[12]Roshni Sinha, Report Summary of Insolvency Law Committee on Cross Border Insolvency (PRS Legislative Research), https://prsindia.org/policy/report-summaries/insolvency-law-committee-cross-border-insolvency.

visible in Cross border insolvency issues that have appeared before them. Resolution of Jet Airways in NCLAT which is an example set apart. The NCLAT was hearing an appeal from orders passed by NCLT Mumbai and had partly set aside the impugned order which was challenged before it, so far it related to the decline of request relating to ousting of jurisdiction of Dutch Court in having a parallel insolvency proceeding.[13] The appellate Tribunal further went ahead to injunct the creditors of the committee in discriminating the Dutch creditor. The Resolution Plan asked to enter into a Cross Insolvency Protocol with the Dutch Trustee Administrator. Participating rights were also granted in the Committee of Creditors (COC) meetings. This set an extraordinary example to all the Insolvency courts across the globe and had received widespread appreciation. As it had become important to address the stake holders of a mega corporation which had a liability to the tune of 36,000 crores.

The Dutch Supreme Court extended the principle of "Cooperation" which is a core idea of the UNCITRAL Model in *Yukos Finance* v. *Liquidator, OAO Yukos Oil Company*[14], The arbitral award in this case has granted the foreign administrator the permission to exercise its powers without depriving the legitimate claims of secured creditors in the Netherlands, on the condition that the exercise of these powers is in accordance with

[13]Company Appeal (AT) (Insolvency) No. 707 of 2019

[14] Manish Arora and Raushan Kumar, India's tryst with cross-border insolvency law: How series of judicial pronouncements pave the way**?(** SCC Online Blog), April 16, 2021**,**https://www.scconline.com/blog/?p=247207.

the law of the jurisdiction where the insolvency proceedings were initiated[15].

Videocon Industries was another such company to have entered into multiple insolvency proceedings. Consolidation of a group of companies was made for the first time in an insolvency proceeding. In the case of Videocon Industries with four foreign-based corporations, the NCLT Mumbai bench decided in February 2020. The Tribunal ordered the oil and gas businesses in the ongoing insolvency proceedings to be consolidated, calling into question the IBC's extraterritoriality and the procedure involved in collating foreign subsidiaries assets with those in India, in response to a motion filed by the managing director of the Videocon Group for an extension of the moratorium period. This case has once again demonstrated the need for similar regulations. assets with those in India[16].

In the matter of *SBI v. SEL Mfg. Co. Ltd.*[17], NCLT, Chandigarh was granted recognition of foreign main proceedings by the Bankruptcy Code. As India was treated as the centre of main interest by U.S. creditors in an application by foreign debtor.

[15]https://www.italaw.com/sites/default/files/case-documents/italaw3279.pdf
[16]State Bank of India v. Videocon Industries Ltd., MA 2385/2019 in C.P.(IB)-02/MB/2018.
[17]26 CP (IB) No. 114/Chd/Pb/2017.

The Supreme Court has enunciated the ambits of cross border insolvency by delving much ahead of the existing regime and implementing the principles under the UNCITRAL Model.

A. Amendments to the Insolvency Code amidst the global pandemic:

Apart from the major suspension of the application sections by way of ordinance. The major reform brought about by the Government of India has tried to infuse a package for the Micro, Medium and Small-Scale enterprises in the form of P re-P ackaged I nsolvency P rocess (PPIR). This was done by major amendment on 04th April, 2021. |It provided for collaborating of the debtors and creditors in an informal agreement before moving for resolution. It has put forward 90 days of resolution unlike the convention CIRP. The code was also interpreted by the Supreme Court of India in such a way that Part III of the code was made applicable to the debtors' personal guarantors. The resolution plan approval even doesn’t discharge ipso facto the liability of the personal guarantors to the debtors in respect of the agreement entered by them[18] The personal guarantors to Corporate Debtor are not essentially the domestic ones. There are several foreign guarantors who have rendered their liabilities to the Corporate Debtor whose resolution process is carried out in India. However, due to uncertainty in the implementation of Model UNCITRAL Law, no such mechanism could be adopted to extradite or resolve the assets of a personal guarantor located in a foreign jurisdiction. The cooperation aspect has not come into picture so far as

[18]Lalit Kumar Jain v. Union of India, 2021 SCC Online SC 396.

the respective countries are concerned. The reason being the non-implementation of the Model Law. The Legislation should have taken a proactive approach in framing the entire law in totality as MSME's have creditors engaged in inter country and inter -continental trade practices. The modus operandi being Letters of credit and Bank Guarantee executed at banks across both domestic and foreign jurisdiction. However, the most affected small-scale promoters in this COVID-19 pandemic are engaged in MSME businesses, who have not been able to get restructured debt. More particularly, when the game becomes resolution of debts across borders, it becomes a mammoth task for these creditors. The Micro, and Small enterprises Facilitation Council (MSEFC) has although given a lucrative statutory interest and conciliation mechanism, however it has remained functionless in this global pandemic. Neither, cross border debts could be addressed effectively by the council.

V. FOREIGN CREDITOR'S DEBT: YET UNADDRESSED AND UNRESOLVED POST COVID-19

The procrastinated method resorted by the Government in not coming up with the frame work law on cross border insolvency has still made the room dark for the foreign creditors who are yet in the verge of resorting to arbitration and mediation mechanisms. However, the said aspects are proven to be delayed mechanisms and have fail to address the interdisciplinary linkage addressed by the Insolvency and Bankruptcy Code through moratorium under Section 14 and a non obstante clause under Section 238. With the implementation of the Code, the issue of suspected tainted money under the Prevention of Money Laundering Act

of 2002, as well as asset freezing under the aforementioned act, has suffered a significant setback. This aspect of Foreign Exchange transactions is important as it involves creditors in multiple jurisdictions who have failed to realise the debts on account of these money laundering proceedings. However, the benefits are to be reaped only in case the law is at hand as a tool.

Banking and Financial Institutions which are designated as Foreign Banks have no option even in the form of SARFAESI or RDF Act at their disposal. In greater measure, the chaos by the COVID-19 pandemic has made the objects of IBC, viz. maximisation of assets, unfruitful. Therefore, the options for foreign creditors are negligible post the pandemic, unless a new frame work comes into picture. Resolution professionals and Liquidators would face tough times to address the claims and valuations in the current scenario in realising the assets of the debtor in multiple countries. More important concern being the foreign creditors are not given a chance yet to participate and vote in a COC meeting. Therefore, every major resolution seems ineffective and minimised revival post the pandemic unless the UNCITRAL Model Law is carved in as Law.

The out of court settlement mechanism initiated as Pre pack mechanism would also preclude the foreign creditors in being part of the agreement entered with debtors. As the major mandate of public notice for such won’t reach across the glove under such circumstances.

VI. POSSIBLE IMPACT ON FDI AND EASE OF DOING BUSINESS IN INDIA POST COVID-19

India has been constantly advocating for creating an environment which causes influx of Foreign Investment and Ease of Doing Business. India has been proactive in mapping out IBC as one of the catalysts to achieve these objectives. In the World Bank's "Doing Business" 2020 Report, India has improved its ranking. India has climbed 14 places to 63rd rank, up from 77th place last year. According to the latest Report on Resolving Insolvency Index, India rose 56 positions to 52 in 2019 from 108 in 2018, a 1.6-year jump.[19] Nevertheless, the positions are chaotic for all the countries for the next two years when the world is reeling under this pandemic and India being faced with second and third phases to rot out with discrepancy in vaccine rolls. Cross border regime is warranted under such circumstances which would otherwise not give good gains in the position of resolution and Ease of Doing business post the pandemic.

The FDI inflow has been a good reason to boast for India with the investments being made to the digital sector while the global foreign equity flow has come to a record law by 42 per cent to an estimated USD 859 billion from USD 1.5 trillion in 2019.[20] The FDI flow has risen by 13 percent. Cross-border mergers and acquisitions, such as Facebook's acquisition of a 9.9% share in Reliance Jio platforms through a new business, Jaadhu Holdings LLC, have added icing to the cake. Infrastructure M&A valuations in India were also boosted by deals in

[19] PIB Delhi, Creation of Institution of Robust Insolvency and Bankruptcy framework15th Dec 2019 , https://ibbi.gov.in/uploads/press/5273557a75add5e7aa620e3129741f92.pdf
[20] https://www.business-standard.com/article/economy-policy/fdi-in-india-rose-by-13-in-2020-as-inflows-declined-in-major-economies-un-121012500309_1.html

the energy industry[21]. The progressive aspect of FDI can be materialised to a greater extent upon the cooperation extended by countries. In order to create a business environment, the legislation needs to buckle up the framework of addressing the creditors across borders. As faith of creditors for finding an ease of business would also rely on the ease of resolving and restructuring an accrued debt

VII. CONCLUSION

Therefore, it is utmost important to present the draft bill for Cross B order Insolvency in India before both the Houses of Parliament and give it a Presidential assent without any hesitation as the UNCITRAL model Law has addressed the needs of many nations in providing a robust framework for Insolvency courts to restructure the debts. Further, the business environment in India is getting a pragmatic progressive change which would further accelerate post the pandemic and needs time bound resolution with removal of all the anomalies which would hinder in realising the objects of the Indian regime of Insolvency. Following the pandemic, a precise framework in cross-border insolvency based on model law's core principles is an immediate necessity.

[21]Ibid

WOMEN ENTERPRENEURS' ECONOMIC AND TRADE RIGHTS IN INDIA

Bhavana Rao[1*]

ABSTRACT

As women constitute half of the population, no development can be complete if gender parity is not taken care of by nations. At current rates of progress, it may take another two hundred and seventeen years to normalise the gender gap globally in economic field.[1] *Although many countries are ideally poised to maximize women's economic potential, they are currently failing to reap the returns from their investment in female education. In the Indian context, there is a need to look at provisions under the CEDAW and the mechanism of WTO and other Trade related documents including UNCTAD that focus on facilitation of participation of women in International Trade. Also, there is a need to look into the laws specific to women entrepreneurs in India.*

Keywords: *Entrepreneurs, Trade Rights, CEDAW, Domestic Laws, WTO*

I. INTRODUCTION

[1*] *Assistant Professor (Selection Grade), University of Petroleum and Energy Studies, Dehradun.*

[1]World Economic Forum, "Project on Shaping the Future of Education, Gender and Work System Initiative", *available at:* https://www.weforum.org/projects/closing-the-gender-gap-gender-parity-task-forces (last visited on June 22, 2018).

Entrepreneurs are women as well as men. And women entrepreneurs have rights. Or do they have any special rights. To look into the rights of women entrepreneurs, one must look at the Constitution of India[2] followed by the International Laws that the Indian State is a party to.

These include the Convention on the Elimination of All Forms of Discrimination Against Women, hereinafter called the CEDAW, the World Trade Organisations' Agreement *principal*, the General Agreement on Tariffs in Trade and the texts devised by the United Nations Convention on Trade and Development. Apart from this the Agenda set by the world community in the form of Sustainable Development Goals, and in particular, Goal number 5, which calls for commitment by the governments took improve gender gap should be studied in the context of relating trade and gender. Then come the domestic policies and laws which include Foreign Trade Policy and Foreign Trade Act. It is impossible however not to relate the women specific laws related to civil and criminal remedies which include the Criminal Procedure Code, the Civil Codes like the Hindu Succession Act, and the Sharia'h.

II. THE CONSTITUTION AND THE DOMESTIC LAWS

The Constitution of India provides the basic framework for all the norms in the State of India. There are other laws for the citizens and persons flowing from it. The judiciary has been, off and on, vocal about human

[2] The Constitution of India.

rights.[3] But much remains on paper. And much remains confined to the letter of the norms designed by the advocates of freedom. A recent example of this can be seen as that given by Deepak Mishra J in the *Sabarimala* judgment when he said that "Mankind, since time immemorial, has been searching for explanation or justification to substantiate a point of view that hurts humanity. The theoretical human values remain on paper." [4]

There is a Constitution which guarantees all the rights to every citizen and even non- citizens in India.[5] It is that basic norm from which all the laws flow. There is a need to understand why norms act or behave differently for the various segments of society. There is also a need to understand why some norms are more important than others. If the norms relate to civil and political rights, there is a need to understand how much and to what extent these are valid and effective. If the norms relate to social and economic rights[6] there is a need to understand what makes these rights more effective for a segment of the population and why not for the other.

The Constitution has not been brought from anywhere. It has been pondered over and over again during the transition between handing over the government from the British to the Indians. It is a legitimate document like the texts of Constitutions, which have continued legally. It does not have the likings of a legal continuity like in the case of New

[3] *Indian Young Lawyers Association* v. *The State of Kerala*, WRIT PETITION (CIVIL) NO. 373 OF 2006.
[4] *Ibid.*
[5] The Constitution of India, , art 21, the Preamble of the Constitution of India, 1949.
[6] The Constitution of India, , arts 19, 301.

Zealand. Legal continuity as pointed out cannot be the only source of constitutional legitimacy, since it does not explain how the constitutions of newly independent nations acquire legitimacy under the doctrine of autochthony, or how post- revolutionary administrations are deemed legitimate under the doctrine of effectiveness.[7] So it is the grundnorm for women too. Is the Constitution the grundnorm and does it satisfy the value of norms from a female perspective?

There is a mention of the word 'women' about sixteen times in the Constitution. One is Article 15 (3) which is the validator of all special provisions for women. Other; provisions are those related to health, equal pay, reservations in panchayat and municipalities. However, everything flowing from 15(3)[8] is qualified implicitly due to India as a State party's declarations to the Convention on Elimination of All Kinds of Discrimination Against Women, where it has a stand on religious and cultural affairs[9], and affirms to keeping away from the family as an institution and therefore which should not be touched. Rest of the provisions are directive principles which are unenforceable and those related to appointments of scheduled castes and scheduled tribes. In spite of these provisions, women are under-represented. Take for example, nine out of ten parliamentarians in India are men.[10] Such dismal figures reveal the lasting grip of unfavourable social norms.

---

[7] Aishwarya S Bagchi, "Exploring Constitutional legitimacy" 2014 NZPubIntLawJl 8 *available at:* http://www.nzlii.org/nz/journals/NZPubIntLawJl/2014/8.html (last visited on Jan. 20, 2019).

[8] The Constitution of India, art 15(3).

[9] CEDAW, art 5, 16.

[10] Oxfam India, "Why India Needs the Women's Reservation Bill", Policy Brief, No 10 of March 2014.

What does it have to do it trade however? This can justly be answered only of we look at participation of women in the economy and political life as a stepping stone to helping these women change the balance of payments of the country. This may not happen in a day, but there is a need to question the cultural patterns of society. For example, treating family as a social function calls for a thorough revision of the laws related to paternity and maternity. On the outside, things seems to have improved but unless Article 5 and 16 of CEDAW are taken seriously by India, the goal of closing the gender gap by 2030 looks bleak. For example, it may be clear that simply institutionalising voluntary paternity leave and flexi-time for mothers remain inadequate. Take for example, as suggested in a report[11] that new fathers opt against taking paid time off due to the fear of lagging behind their work responsibilities. It does not however mean that it is easy to change the cultural patterns overnight.[12] This hampers the motto of economic inclusion of women. Laws should be able to facilitate participation of women and more specifically in the context of International Trade.

The Foreign Trade Act[13] does not have mention of the women exporters. It mandates exporters to procure the Importer Exporter Code Number from the Director General of Foreign Trade under Section 7[14] and everyone has to go through the same process of obtaining it online. Technology may be working as a barrier here, which may not be a long-

[11] Terri Chapman and Vidisha Mishra, "Rewriting the Rules: Women and Work in India", 3, ORF Special Report No. 80, January 2019, Observer Research Foundation.
[12] *Ibid.*
[13] Foreign Trade (Development and Regulation) Act, 1992 *available at:* https://dgft.gov.in/sites/default/files/om199.htm (last visited on Feb. 20, 2019).
[14] Foreign Trade Act, 1992, s. 7.

term argument but at least for the present when many women do not know how to use technology. The policy of keeping trade a gender-neutral subject may not be doing good to increase the number of women exporters. Women are left behind in even in access to digital sources and information.[15]

For example, data received from the Khadi and Village Industries Commission tells that the number of women receiving training for small scale industries is quite comparable to the that of men. But how many of them become exporters depends on access to credit for their products and services. The RTI reply from the NSDA tells a different story. A total of 180 women have been trained in the national skill development programmes till date. The National Policy for Women draft 2016 has still not been adopted. The 2001 National Gender Policy of India was to be replaced by a more robust and effective policy to mainstream the women and improve the gender gaps.

III. WOMEN AND THE AGREEMENTS OF THE WORLD TRADE ORGANISATION

The primary agreement of the WTO, the General Agreement on Tariffs in Trade, nowhere mentions about facilitating women exporters. Even in Article XX of the agreement which includes exceptions'[16] and where it was quite apt to put some conditions related to women exporters, there is no particular mention of women. Protagonists of trade say that relating

[15] Kim Andreasson, "Digital Divides: The New Challenges and Opportunities of e-Inclusion" 195 PAPP (2015) 27.
[16] General Agreement on Tariffs in Trade, art XX.

trade with gender is not essential. Same as what the stand is on the Declaration on Buenos Aires[17] of the many of the members of the WTO citing national interest.

The Declaration on Trade and Women's Empowerment

It was unprecedented that WTO member states and observers in 2017 endorsed a joint motion to surge the contribution of women in trade by participating in various ways. In order that women reach their full potential in the world economy, one hundred and eighteen WTO members and observers agreed to support the Buenos Aires Declaration on Women and Trade, which sought to eliminate blocks to and promote women's economic empowerment.[18] This declaration, on which there are deliberations world over, sought to improve the participation of women in world trade but some members fear that it could be used as a ruse to curb exports of some members, more particularly from developing countries by the global north.

A significant hurdle in gender justice on this front is that proper data on women's entrepreneurship is not available. A growing number of databases, such as the World Bank's Enterprise Surveys, capture data on women's enterprise ownership and management. Yet, little comprehensive evidence is collected on how many women-owned and managed companies participate in international trade, what type of products they export or what barriers discourage women from entering

[17] Joint Declaration on Trade and Women's Economic Empowerment on the Occasion of the WTO Ministerial Conference in Buenos Aires in December 2017 *available at:* https:// www.wto.org/ english/thewto_e/ minist_e/ mc11_e/ genderdeclarationmc11_e.pdf (last visited on Jan. 20, 2019).

[18] https://www.wto.org/english/news_e/news17_e/mc11_12dec17_e.htm

international trade. Data on women's participation in supply chains is rarely available. Because of these issues, it is difficult to draw a comprehensive picture of women's participation in international trade. UN statistics tell that India has never kept gender disintegrated data for adult population which has registered for business.[19]

The Declaration on Trade and Women's Economic Empowerment was espoused during the ministerial meeting of the WTO in Buenos Aires in towards the end of 2017. On the one hand this document involved applaud by a lot of WTO members, many were not ready to endorse it with India rejecting WTO as the right platform to deliberate upon gender related matters. Some groups had labelled it a "pink herring" for off-putting the damage that WTO laws and rules cause to the women and aimed at hide the main issues which include public procurement veiled as gender investigation.[20] These worries may be principally right and trying to connect gender with trade looks like as something which would not be able to improve substantially any negative effects of trade on women.[21]

Regional Trade Agreements like the Chile- Canada Regional Trade Agreement have in the recent past been able to incorporate gender related provisions. As on today about sixty of them have established and notified

[19]UN, Minimum Set of Gender Indicators, *available at:* https://genderstats.un.org/#/data-availability (last visited on Feb. 28, 2019).

[20] Balakrishnan Rajagopal, "Women and Trade at the WTO: Pink Herring, Trojan Horse or Historic Advance" , in Special Report-CIGI titled "Reshaping Trade through Women's' Economic Empowerment" pg. 39 *available at:* https://www.cigionline.org/sites/default/files/documents/Women%20and%20Trade.pdf (last visited on: Feb. 28, 2019).

[21] *Ibid.*

gender provisions. [22] Some have implicit provisions but during the past three years the trend has been that these provisions have been incorporated in detail. Out of seventy-four RTAs sixty of these which has detailed provisions have come into force. But there is no proper blueprint to incorporate gender in these and most of the times the same countries have added these provisions in different ways. So, there is a lot of heterogeneity in structure.[23]

IV. CULTURE, STEREOTYPES AND CEDAW

The Convention on the Elimination of all kinds of Discrimination Against Women was ratified by India but with 'reservations'. Post CEDAW, the gender disparity for women and girls with regard to educational enrolment, life expectancy and labour force participation has considerably shrunk. India for example stands among one of those countries which is progressive in its approach towards human rights. Yet gender gaps persist, particularly with regard to higher mortality rates of girls and women, disparities in girls' education, unequal access to economic opportunities and differences in household and societal decision-making. This could have an impact on the rights of women and in particular on the economic participation of women in India if the State party ignores its responsibilities under International Law.

[22] José-Antonio Monteiro, Working Paper – "Gender Related Provisions in Regional Trade Agreements", 33 (Economic Research and Statistics Division, World Trade Organization, Geneva, Switzerland, December 2018).
[23] *Ibid.*

Article 5 is an important provision of the document and India has reservation to it. Some countries have ratified the convention without reservations and some with. With regard to articles 5 (a) and 16 (1) of the Convention on the Elimination of All Forms of Discrimination Against Women, the Government of the Republic of India declared that it shall abide by and ensure these provisions in conformity with its policy of non-interference in the personal affairs of any Community without its initiative and consent.[24]

There is a significant role of the human rights treaties such as CEDAW as institutions that codify and uphold international norms about women's rights. CEDAW has perhaps even after years of coming into existence not been able to cascade with the legislations in the domestic set up of countries. A middle eastern country, Saudi Arabia, has a declaration on the entire text of CEDAW in 2000.[25] Afghanistan on the other hand has ratified the convention without any reservations in 2003.[26]

In these countries, unlike India, it is clear that nothing can overrule the Sharia. Ion the other hand, India has ratified it with declarations but has a plethora of legislations for women and being a secular country, no religion can challenge these legislations. The judiciary in India has done its bit too.[27] But a lot needs to done. For example, ground-breaking rules are essential to promote additional allocation of familial and parental

---

[24] CEDAW Comments.

[25] https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&lang=en#EndDec

[26] Bhavana Rao, "Reservations Based On Personal Laws To Cedaw: A Study Of Effect On The Status Of Equality of Women In India By Comparing It With Afghanistan" , Winter *ILR* 49 (2016) *available at:* http://www.ili.ac.in/pdf/p5_bhavana.pdf

[27] *Vishakha* v. *State of Rajasthan,* AIR 1997 SC 3011.

tasks and duties and thereby make alterations to completely eliminate motherhood penalty.[28]

What may have been an infringement on human rights otherwise would pass off with impunity because it is protected by the culture, or a religion in a certain jurisdiction. In many, and to quite an extent, the laws, if not the enforcement agencies, have taken care to bring women the same protection which men enjoy bypassing religious practices. Where religion is not responsible, the stereotypical attitude treats women unequally. They are subject to a three-fold burden within their private sphere, the difference in the amount of time women spend on housework in comparison to men.[29] There is also impact of Signatory Reservations to CEDAW on the Participation of Women in World Trade. Some countries' have attempted to find the gaps based on some parameters devised. For example, in 2002, the American Bar Association's Rule of Law Initiative developed the CEDAW Assessment Tool as a resource to measure the status of women with regard to a country's effective implementation of CEDAW. The *CEDAW Assessment Tool* evaluates a country's laws and the degree to which they protect the rights of women as mandated by CEDAW.

Writers have reiterated that research is required on differences between male and female entrepreneur's behavior in the context of social forces

[28] *Supra* note 16.

[29] Brigitte Gresy, "Challenging stereotypes and every-day sexism" 2 (European Commission or of the Directorate-General for Justice and Consumers Publications) *available at:* http://ec.europa.eu/justice/gender-equality/files/documents/background_note_gender_roles_and_stereotypes_en.pdf (last visited on Dec. 20, 2017).

impacting them.[30] It is suggested that there is a need to re-frame the perspective on gender in entrepreneurship research to include aspects of men, women, femininity or masculinity.[31] A better dialogue can be achieved by using the word gender as a socially constructed phenomenon. In other words, scholars need to focus on understanding the distinguishing process of "doing entrepreneurship" in terms of "what women do" and "what men do".[32]

V. THE EFFICACY OF LAWS

In spite of the contemporary forms of criminal and civil code, women in many jurisdictions are subjected to crimes but those are left from being incriminated on the ruse of religion, or culture or societal stereotypes. Violence involving men and women, in which the female is usually the victim and which is derived from unequal power relationships between men and women. Violence is directed specifically against a woman because she is a woman, or affects women disproportionately. It includes, but is not limited to, physical, sexual and psychological harm (including intimidation, suffering, coercion, and/or deprivation of liberty within the family, or within the general community).

---

[30] Ahl and Nelson, mentioned in Yadav and Unni, "Women entrepreneurship: research review and future directions", Journal of Global Entrepreneurship Research (2016) 6:12 DOI 10.1186/s40497-016-0055-x , pg 13 *available at:* https: //www.researchgate.net/ Publication/308976679_Women_entrepreneurship _research_ review_ and_ future directions (last visited on Feb. 28, 2019).

[31] *Ibid.*

[32] *Ibid.*

It includes that violence which is perpetrated or condoned by the State.[33] The assumptions under Sections 155(4) (now repealed) and 146 of the Evidence Act for example had been characterised as (i) women lie about rape; (ii) women deserve to be raped; (iii) women provoke rape.[34] Some provisions of law may have been repealed but many remain. Allegedly for their protection, women are relegated to jobs supposedly adapted to their unique physical capacities and excluded from jobs which are said to endanger their health.

Though in the ultimate breakdown, some member countries cannot boast of the perfect position of women and protection of these women under laws, there is a need to look into the laws and culture which affect the women in India along with some important jurisdictions. The focal point should be whether the culture, morality and religion could bypass the basic human rights of the women and cast no duty on the State. The role of the State and the courts becomes significant. Crimes related to stereotyping both at the domestic level and the public spheres are a manifestation of how cultural set up treats women. This eventually effects women's participation.

Therefore, the inquiry should be on the following questions. If CEDAW is the bill of rights for women, whether Article 5 is the soul of the Convention? If this is answered in the positive, whether reservation to it negatively affects women's rights in countries having reservations? Whether participation of women in International Trade is restricted due

[33] *Ibid*.

[34] Kumari, Ved., "Gender Analysis of the Indian Penal Code", 5 *available at:* http://www.womenstudies.in/elib/crime_ag_women/ca_gender_analysis.pdf (last visited on Dec. 20, 2018).

to the country's reservation to the Convention? Are juri-pluralistic countries not able to uphold the rights of their women population? Is multi-culturalism a threat to having a cascading effect of international norms in these countries?

In relation to how culture treats women and acts as a barrier to economic development of women, it has been observed that there is still unconscious bias and unconscious favour for men in certain jobs, particularly like those involving management, and statistics.[35]

I have been involved in the whole gender debate for close to thirty years now, and I'm not sure that we have really moved forward in the way we had hoped. I thought at some stage that we could pave the way for the next generation of women, but I don't see that happening. I think we are up against some really fundamental cultural barriers to women being treated in the same way as men in terms of work opportunities. I think it has to do with unconscious bias, where unconsciously people feel that men are better suited for doing certain types of jobs, involving management, and numeracy, and I think we need to become more aware of when we are applying this kind of unconscious bias.

There is a requirement of gender mainstreaming in the approach not only of the legislative framework of a country but also in implementation of the Agreements of the WTO and projects in companies engaged in international trade. Gender mainstreaming means such methods applied in relation to trade linked projects in which the participants direct their

[35] Interview of Lise Kongo, Executive Director- UN Global Compact, "Without Transformative Shifts, Women will Wait for Two Centuries for Gender Equality", *available at:* https://news.un.org/ en/story/2019 /02/1033702 (last visited on Feb. 28, 2019).

questions towards the design of the operations.[36] The inquiries typically question the topics which have an effect on the recipients and stakeholders in the projects in a different way according to the gender. And after this, what particular procedures may be encompassed within the plan and application of trade related projects in order that latent discriminations are averted or to encourage gender justice and female empowerment[37]

Gender policies on trade, and business ownership should be more open. The negative effects of an ever-changing marketplace, including trends such as automation, fall disproportionately on women. Due to this woman depend heavily than men on informal, hazardous and least compensated jobs.[38]All these have to be factored in while drafting the law.

VI. CONCLUSION

Anything which snatches away the rights of women should be abandoned and the signatory country should pave way for legislations which uphold the rights of women. There should be difference between upholding the rights of women traders empowering them on the one hand and controlling women's rights and behaviour "under the guise of protection of women" which is a mere manifestation of the patriarchal and

[36]Alejandra Eguíluz, Zamora María Inés and Vásquez Alma, "Advances in the Process of Gender Mainstreaming in Trade Operations" 20, Technical Note, Inter-American Development Bank, September 2012 *available at:* https://publications.iadb.org/bitstream/handle/11319/5831/Trade%20and%20Gender.pdf?sequence=1 (last visited on Jul. 12, 2018)
[37]*Ibid*.
[38]Isabelle Durant, "Regional integration creates opportunities for SMEs and women", ITC, December 2017, *available at:* http://www.tradeforum.org/news/Regional-integration-creates-opportunities-for-SMEs-and-women/ (last visited on Jul. 12, 2018).

stereotypical societal norms, and its paternalistic undertones. This can be done only by complementing the general positive laws with gender specific laws.

The researcher believes, and this belief comes from a scanning of the current legal documents in India and the world, that changes in the current laws like those which facilitate international market access to women entrepreneurs, or those which help them in receiving credit without collaterals, or investing in capabilities of these women would bring a positive change in the number of women brought to the fore as entrepreneurs, and not merely as factors of production in the form of labour in labour intensive jobs, where they are treated only as an alternative and paid without fairness.

What is therefore required is a transnational legal Approach[39] where treaties are respected in letter and spirit. Laws and policies need to acknowledge that society punishes women who do not follow the stereotypical patterns, and therefore legal system should take measures to protect them.[40] If India is a party to CEDAW, albeit with declarations, it is duty bound to include gender specific positive provisions for women and obligated to abide by it and deviate from the idea that trade policy should be a gender-neutral polic

---

[39] Kadambi Kinoti, Book Review of Rebecca J. Cook and Simone Cusack, *Dismantling Gender Stereotypes: The Role of Laws, available at:* https://www.awid.org/news-and-analysis/dismantling-gender-stereotypes-role-laws (last visited on Oct. 30, 2019).

[40] *Ibid.*

THE CONCEPT OF MANDATORY MEDIATION: MEANING AND PRACTICE

Sarvesh Sharma & Ms Upma Shree[1]

ABSTRACT

ADR mechanisms, including mediation, have a great deal of potential in ridding the present justice delivery system of its infirmities, not just in terms of financial outcomes and harassment for the parties concerned, but also in terms of creating public faith in state institutions. The enormous potential, however, is largely left unutilized or under-utilized due to several unexplored reasons. It has been found that Voluntary Mediation is readily accepted by the parties due to several reasons such as low cost, confidentiality and right to walk away of whenever feels so. But it has been found that the concept of Mandatory/Compulsory mediation is emerging around the world and many trial courts have implemented them in their litigation process for different types of disputes.

The concept of Mandatory mediation is when the parties are forced to mediate. Here it would be incumbent on parties to resolve their dispute by way of mediation before they proceed to trial. Keeping in mind certain limitations to the areas where mediation would not be very helpful, Mandatory mediation should be made as the initial step towards the litigation and only after exhausting this remedy, parties would be allowed to proceed further in their dispute. There

[1] *Assistant Professors, VSLLS, VIPS, PitamPura,Delhi*

is a need to lay down a proper model for the implementation of Mandatory mediation which not only motivates the parties to dispute to resolve the matter by way of mediation but also provides them the option to choose other alternative methods to resolve their dispute. One of such models was evolved in European Community in the name of "EC Opt-out Mandatory Mediation" where it is compulsory to opt mediation before going to courts but there is room to opt-out if the results are not satisfactory.

Many Countries have already evolved the concept of mandatory mediation in their legal framework for different fields where mediation is considered to be helpful. In September 2002, California Governor Davis signed legislation compelling mandatory mediation in certain situations as it pertained to collective bargaining relative to farm labor."

I. INTRODUCTION

Indian legal system is struggling hard to combat with the increasing number of pending cases. As per the statics around three crore cases are pending before the courts across the country from last many years[2]. And if that would be the situation the annoyance will lead to vexation to frustration and the whole justice system will come to a deadlock. It seems judicial system is highly overburdened in comparison to other organs of the state which is not a positive sign for ensuring the ends of justice as judiciary acts as a backbone of Indian democracy. Though on a contrary,

[2] Rashika Narain & Abhinav Sankaranarayanan, "Formulating a Model Legislative Framework for Mediation in India", 11 NUJS L. Rev. 75 (2018)

people still continue to petition in courts with a hope that they will met with justice. In such a scenario the other means of speedier dispute resolution has drawn attention of the society and are being appreciated too. Alternative Dispute Resolutions is the need of the hour and has already been incorporated in the judicial system from last many years. So it would ot be wrong to say that pendency in courts has let to the emergence of formal ways of alternative dispute resolution.

The issue is even after having different sorts of Alternative measure of dispute resolution the reduction in the pending number of cases is not remarkable. Why? We need to think where are judicial system is lagging behind. Why ADR are not giving effective results? We need to think ahead of common ADR techniques.

A. Need of Alternative Dispute Resolution

The Indian Judiciary system is not very famous in disposing of cases at a faster rate due to various reasons, many of them out of which are not in control of the parties. Sue to this, at several occasions, the law Commission of India, the Supreme Court of India and many jurist talked about the need for an alternative method of resolution not only hearsay but in practicality. Alternative Dispute Resolution is an informal, speedier, cost effective method of resolving a dispute with an amicable solution preferred by both the parties. It does not only saves the time and money of the parties but it also maintains a smooth relation among the disputant parties unlike the adversarial litigation. There are various modes of ADR for resolving a dispute such as Arbitration, Conciliation, Mediation, Lok Adalat, Negotiation and many more. Each and every

mode of resolution has its own merits and demerits but all of them are considered more effective and approachable in contrast to the traditional adversarial methods of litigation in the following three ways. Firstly, the traditional legal system are more time and money consuming because of lengthy and complex procedures attached with them. Secondly the traditional system of litigation in now a day's is found to be more concerned in winning the case at whatever cost it can be. It has left behind the real issues and truth involved in the case. Thirdly, since it is win or lose situation, it is going to affect the relation between the parties. And it will increase the conflict among the parties instead of reducing it. Hence, there is a pressing need to institutionalize other methods of dispute resolution, which are quicker, less, expensive, more respectful of relationships, and more focused on solutions.[3]

1. The concept of Mediation

The relevance of mediation can be best reflected via this quote of Mahatma Gandhi:

"**I** realized that the true function of a lawyer was to unite parties. The lesson was so indelibly burnt into me that a large part of my time during the twenty years of my practice as a lawyer was occupied in bringing about private compromise of hundreds of cases. **I** lost nothing thereby not even money; certainly not my soul." …. (Mahatma Gandhi, An Autobiography 97 (1959).

[3] Sriram Panchu, "The Road Less Travelled - An Increasingly Attractive Path", 19 NlSIU Bangalore,(SBR) 30 (2007)

Among all ADR mechanisms, mediation is considered to be the most important, efficient and acceptable remedy. It is not a new concept which is the result of pendency of cases on tradition courts but in fact many tradition ways of mediation can be found in history. Mediation was formally introduced in the legal system in 2002 thorough Section 89 and Order 10, Rule IA of the Code of Civil Procedure, 1908. These provisions empower judges to refer appropriate disputes to ADR, in which mediation is expressly included.[4] In last few years Mediation has grown fast not only in India but in the whole world at large. It is a voluntary method of dispute resolution where the disputant parties appoint a Neutral third party, a mediator who helps them in getting an amicable solution acceptable to all. In other words it can be said that Mediator facilitates the disputant parties in achieving a mutually acceptable solution to all.[5] Author divides Mediation in three types 1) Post Litigation Mediation, 2) Mediation within the Statutes and 3) Pre-Litigation Mediation. Section 89 of CPC, 1908 talks about the post litigation mediation where court refers the parties for different alternative dispute resolutions including mediation. The second type includes number of other statutes apart from CPC which has the provision of mediation such as Industrial Disputes, Act, 1947, Companies Act, 2013 and Arbitration and Conciliation Act, 1987. Though these statues do not talk about mediation per se but they refer Conciliation without making any difference between the two. The third type gives the notion of Pre-litigation mediation where the parties

[4] Juhi Gupta, "Bridge over Troubled Water: The Case for Private Commercial Mediation in India", 11 Am. J.Mediation,59 (2018)

[5] Megan Marrie, "Alternative Dispute Resolution in Administration Litigation: A Call for Mandatory Mediation", 37 Advoc. Q. 149 (2010)

try to settle their dispute before reaching the court or traditional litigation system, without any kind of Court's interference.

In short following could be the reasons why mediation should be favoured in comparison to traditional litigation system:

1) Voluntary in nature: Being voluntary in nature parties have liberty to withdraw from mediation at any stage in cases where the result is not as per their expectations.
2) Control over procedure and outcome: Parties are having full control over the procedure and the probable outcome in mediation in contrast to any formal litigation system. Here mediator is considered only as a facilitator but he cannot supervise the parties.
3) Cost and time effective: Mediation is generally considered to be less expensive and less time taking because Mediator is generally not a high profile attorney but most of the time court appointed professional and the procedure involved is not complex and lengthy.
4) Confidential in nature: Unlike traditional litigations mediation is private and confidential in nature. Mediator is not allowed to share any of the information to anybody except the parties. Infact without one party's prior permission mediator is not allowed to share the details to the other party of the dispute.
5) Preserve relationship between the parties: Mediation stresses on mutual benefit and settlement between the parties. The key objective of any negotiation or mediation is not to attack the other side but to find an

amicable solution acceptable to all. Due to this relationship between the parties in mediation is less hampered.

6) High rate of compliance: Since parties evolve their own outcomes and agree to their own resolution therefore chances to comply with them are more in comparison to a compelled resolution.

Participation in mediation can be effected in two ways i.e. voluntarily and mandatorily. The paper will discuss about the concept of mandatory mediation and its pragmatics in different countries and its presence in India.

VI. MANDATORY MEDIATION

The term "mandatory mediation" sounds like an oxymoron. When we talk about mediation, the first idea which comes our mind that parties will have no restrictions and imposition in expressing their formal and informal views and mediation would reflect their willingness to come to solution. However the question arises that could two parties be forced for mediation? Should mediation not be considered a voluntary mechanism opted by the disputants? Perhaps answer could be reluctance of the parties who consider that suggesting or initiating the process of mediation is sign of weakness. One party waits for another party to make its proposal for settlement. Since mandated mediation aims at eliminating this barrier, neither party has to show itself as initiator.

One of the most important issues is the timing for mandated mediation procedure. There is no straight jacket formula as when to commence process of the mediation. There are stages when mediation process could be initiated. First is prior to filing a lawsuit, wherein parties could be compelled by mediation clause, statutory mandate, or court rules. Second

stage is "at any at any point during the litigation process". Parties finding litigation process not yielding to their interests, may be asked to go for mediation by the direction of court's orders. The third one would be "even during or after trial." The nature and complexity and issues involved in disputes determine the temporal settings of mediation.[6]

Ideally mediation should start the moment lawyers could gauge possibility of appropriate settlement. Typically this point is achieved in litigation when much of discovery of the case has been completed. However this frustrates the very objective of mediation which is to cut litigation expenditure and time, incurred and wasted in pre-trial discovery. If mediation is not sought at early stage of litigation i.e. pre-litigation stage, much of its benefits will be lost. If parties antedate that they should get engaged in honest efforts for mediated solution, they should be mandated to exchange information to the mediation table without wasting any time and money. [7]

A. Modals of Mandatory Mediation

The following are the modals that different countries have adopted. Now the discussion will revolve around them.

1. The EU Mediation Directive

EU Mediation Directive (Directive 2008/52/EC), adopted on 23 April 2008, brought an attitudinal shift for mandatory mediation. It primarily focuses on the certain class of civil and commercial matters. It is

[6] Campbell C. Hutchinson, "The Case for Mandatory Mediation", 42 Loy. L. Rev. 85 (1996)
[7] *Ibid.*

applicable to all member states of European Union. It aims to encourage amicable settlement of disputes and especially encourages a balance relationship between mediation and court litigation.[8] It identifies some significant benefits of mediation over litigation which includes such as:[9]

a) Procedure which is cost effective and time saving
b) Tailored-made solutions as per the needs of parties.
c) Helps in maintaining the relationship between parties

The EU directive only talks about voluntary mediation. It does not necessarily talk about the mandatory mediation though it suggests that EU States can use the method of mandatory mediation and impose economic sanctions in case of default.[10] The court in *Rosalba Alassini and Others case*[11] reinforced the view that mandated mediation is not contrary to EU law. The Fourth Chamber upheld the views of Advocate General and observed that telecom dispute is subject to an out-of-court resolution mechanism before being heard in Court is not excluded in EU law. It is important note here that before this decision, the concern was that mandatory mediation is violation of right to fair trial as guaranteed in article 6 of European Convention on Human Rights. This case set a precedent and authorized the view that mandatory mediation is not prohibited by EU law.

---

[8] EU Directive 2008/52/EC, Article 1
[9] Shepherd and Wedderburn LLP, Should mediation be mandatory?, October 1 2013, available at: https://www.lexology.com/library/detail.aspx?g=68019975-f314-4d43-8966-483af9e95667 (Last visited on 25th June 2021.)
[10] *Ibid.*
[11] *Rosalba Alassini* v *Telecom Italia,* SpA (C-317/08) 2010

2. Italian modal of Mandatory Mediation

The concept of mandatory mediation as prerequisite to litigation was first brought in Italian legal system in 2011. It was introduced by the government after implementing the EU Mediation Directive of 2008. However this legislative step received a lot criticism from legal fraternity resulting lawyers' strike against its enforcement. In 2012 Italian Constitutional Court declared the provision of mandatory mediation as unconstitutional citing the government's legislative incompetency to enact such mandatory process.

In 2013 Italian Parliament reintroduced the concept of mandatory mediation in modified form of earlier mechanism. It was for particular civil and commercial matters. The modified mediation addressed certain issues raised which includes allowing parties to mandatorily attend initial information session and dispensing with the mandate of their personal appearance. The parties have freedom to opt-out which means they can move out of mediation process before it actually takes place without any consequence attached thereto for opting out from mediation. The initial information sessions acquaint the parties about the whole process of mediation so that they could make an informed choice as to opt for out-of-court settlement through mediation or engage in litigation. The session is fee of cost and non-attendance of the session attracts sanctions in subsequent trial. After the initial session, if parties agree to commence mediation proceeding, the mediator formally initiates the process and invites the parties to provide information and facilitates discussion of the dispute. The Italian mediation law has elements of voluntary mediation.

However, only mandate is to compel parties to attend the initial information session so that they educate themselves about the option of mediation.[12]

The Italian mandatory mediation model can be summarised in following way.

a) Initial information session
b) Nominal fee for mediation
c) Sanctions for not attending the initial session
d) No obligation to pay more unless parties agree to continue with mediation
e) No sanction for opting-out from mediation
f) Economic benefits to parties to mediation

Mediation remains as pre-trial requisite in certain classes of cases. The category has limited nature of disputes like car accident disputes. Litigants have been given freedom to move out of mediation process at very early stage if they consider settlement is unlikely result. However the fact to be noted here is that the opt-out mechanism gives mediation experience to parties. The reintroduced law contained a procedure under which the parties are asked to think twice before opting out of mediation. As a party exercises its option to opt out, the mediator may suggest a

[12] Giulio Zanolla, "The New Italian Mediation Law: Experimenting with a "Soft" Approach to Mandatory Mediation", February 11, 2016, available at https://blog.cpradr.org/2016/02/11/the-new-italian-mediation-law-experimenting-with-a-soft-approach-to-mandatory-mediation/ (last visited 5 June 2021)

solution and if the solution is rejected, the case will go to trial. The trial judge may impose on the party all mediation and litigation cost for rejecting proposed solution if the judgement is delivered on the same grounds of proposal. The new modified law allows parties to mediation to be assisted by their legal counsel. However this seems highly doubtful.[13]

As per the report of Ministry of Justice related to first six months of 2014, the number of disputes which went through initial mandatory session got resolved in 50 percent cases without resorting to litigation. The law has shown tangible benefits not only for the parties but also Italian legal system.[14]

3. Slovenian Modal on Mandatory Mediation

The Slovenian government implemented EU Directive 2008 and has transposed the provisions of the Directive in its laws giving effect to the idea of mandatory mediation.

Slovenia government enacted the Alternative Legal Dispute Resolution Act 2009. Slovenia has an Alternative Legal Dispute Resolution Act which imposes an obligation on the Slovenian courts to offer mediation in certain civil and commercial matters. The Act has brought in a quasi-compulsory mediation procedure with an opt-out. It also introduces

[13] Rafal Morek, "Mandatory Mediation in Italy – Reloaded", October 9, 2013 ,available at :http://kluwermediationblog.com/2013/10/09/mandatory-mediation-in-italy-reloaded/?print=pdf (last visited 5 June 2020)
[14] *Supra note 3* at 2.

special information session.[15] Article 19 of ALDR Act provides for the mandatory referral to mediation. It says that court may refer the parties for mediation by suspending the proceeding for three months. It obliges the court to do so only when it is suitable, justified by circumstances, and after consulting parties.[16] The referral contains a warning as to consequences for unreasonable rejection of referral.[17] However parties may submit their objection against the decision of mandatory referral within 8 days. The court can review the decision and annul it and no appeal shall lie thereafter.[18] . The court can review the decision and annul it and no appeal shall lie thereafter. The court can ask a party to reimburse the other party for expenses incurred in judicial proceeding.[19]

Slovenian's The Mediation in Civil and Commercial Matters Act has drafted keeping in consideration the provisions of EU directive.[20]

Several countries follow the concept of mandatory mediation in one or other form. U.S Court can refer cases to for mandatory mediation to the US Federal Mediation Service (FMCS). In Ontario, Canada mandatory mediation is regulated through court ruleswith the US state courts being able to refer cases to the US Federal Mediation service (FMCS) for mandatory mediation, and in Ontario, Canada, mandatory mediation is

[15] Bojana Jovin Hrastnik, "The Slovenian Legislation Implementing the EU Mediation Directive", 6 European Parliament, Brussels, (2011)
[16] Alternative Legal Dispute Resolution Act 2009, Art. 19(1)
[17] *Ibid*., art. 19(2)
[18] *Ibid*., art. 19(4)
[19] *Ibid*., art. 19(5)
[20] *Supra* note 9 at 6.

provided for in their court rules (Ontario Court Rules for the Ontario Superior Court of Justice (Rule 24.1)).

In **Australia**, alternative dispute resolutions mechanism in family matter is facilitated through various kinds of organisation and community based service, counselling sessions. Australian Family Law Act of 1975 (amended in 2006) mandates parties to family disputes to make genuine efforts to settle their disputes through family dispute resolution.[21] Australia has been following the mandatory mediation for many years specifically in Queensland and Victoria.

Azerbaijan has recently adopted the Mediation Law based on the UNCITRAL modal law. The mediation procedure in the law is drafted based on the principle of "OPT-OUT" mediation modal. It contains the provision of initial mediation session before bringing an action. In the session, the mediator educates parties about essence, benefits and rules of mediation. In the session, parties are left with the option to decide whether they want to initiate the proceeding of mediation or not.[22]

4. Mandatory Mediation in Indian Perspective:

In spite of being cheaper, faster and efficient as a dispute resolution mechanism people in India are still not very confident about mediation in comparison to the traditional litigation system. Reasons could be

[21] Greta Baksa, "Foreign Experience of Mandatory Mediation in Family Law Disputes", 511 Jogi Tanulmanyok 510 (2014)

[22] Ruslan Mirzayev, After Italy And Turkey, Azerbaijan Also Follows The Opt-Out Mediation Model, May 1, 2019, available at :http://mediationblog.kluwerarbitration.com/2019/05/01/after-italy-and-turkey-azerbaijan-also-follows-the-opt-out-mediation-model/ (last visited on 5 June 2019)

manifold but one among them is lack of any statutory regulation on mediation and its non-binding nature. In *K. Srinivas Rao v. D.A. Deepa,*[23] the Supreme Court clearly pointed out the need of pre-litigation mediation in the context of family disputes. While deciding the case on divorce the court in the present case highlighted the benefits of pre-litigation mediation. It also stated that in cases of matrimonial issues, had the parties approached pre litigation mediation there would be no requirement of divorce.[24] The Court went to the extent of holding that if parties are willing, even non-compoundable offences (offences that cannot be settled out of Court) under 498A of the Indian Penal Code should be referred to mediation **by** courts.[25] In many other cases such *as B. S. Joshi and others v. State of Haryana* [26] and *Gian Singh v. State of Punjab*[27] the court has clearly appreciated out of court settlement in the matrimonial cases and stated that people should focus on pre litigation mediation where ever possible in order to obtain better outcomes.

Unless and until people start using them in their day to day disputes they will not be able to realise the difference between mediation and traditional methods of dispute resolution. In order to combat this issue and to make people aware of the nature, importance and effects of mediation, mandatory mediation need to be incorporated in Indian judiciary system.

---

[23] *K. Srinivas Rao* v. *D.A. Deepa*, (2013) 5 SCC 226
[24] *Supra note* 3 at 2.
[25] *Supra note* 5 at 3.
[26] AIR 2003 SC 1386
[27] AIR 2012 SC (Supp) 838

Mediation is generally understood to be an informal voluntary mechanism which is non-binding in nature. This is the reason in its first glance the concept of mandatory mediation appears to be contradictory in nature. How can we compel someone to enter into a non-binding process? People have not understood it in a right way because mandatary mediation does not violate any one's fundamental right of choosing their remedy. It does not takes away people's right to go to court for getting justice but it only compels you to refer mediation before going to litigation. In Italy there is a practice of an "opt-out" model of mediation as since 2013 in limited cases of commercial disputes where it is compulsory for parties to prove that they have exhausted the remedy of mediation in the initial stage before reaching the Italian Courts. Such kind of remedies need to be added in Indian Courts because till the time mediation is voluntary and optional people will not refer them because they not aware of them.

Section 12 A which has been recently inserted in the Commercial Courts Act, 2015 by the Commercial Courts, Commercial division and Commercial Appellate division of High Court (Amendment) Ordinance of 2018 introduced the concept of pre-litigation mediation in the said Act in India for the 1st time. Sec 12 A (1)[28] of the Commercial Courts Act, 2015 makes it obligatory to attend and exhaust the remedy of mediation before filing any suit in the present Act. United Kingdom, Greece, Lithuania, Ireland, Turkey and Luxembourg have also opt for this

[28] Section 12A (1) states that "a suit which does not contemplate any urgent relief under this Act, shall not be instituted unless the plaintiff exhausts the remedy of pre-institution mediation and settlement in accordance with such manner and procedure as may be prescribed by rules made by the central government".

mechanism with respect to certain kinds of disputes. The time period prescribed for completion of the mediation process is three months from the date of the application for initiating such mediation which may be extended by two months, with the consent of the parties.[29] Also the settlement arrived during the mediation process will have the same status and effect as that of an arbitral award under sub-section (4) of 30 of the Arbitration and Conciliation Act, 1996.[30]

It is a great initiative that has been taken in India to further the aim of Alternative dispute resolutions to combat the continuing delay in the justice delivery system. It will help in developing the environment of Alternative dispute resolutions not only in India but in the whole world at large. The Mandatory mediation in Italy has resolved around 200,000 disputes through Opt-out model in 2017. Similarly in Greece and Turkey it also met with great success. Turkey went from 0 to 30,828 Mediations in just one Month.[31]

In order to make the Opt-in model of mandatory mediation workable and efficient in Indian scenario following efforts need to be taken:

1) Clients are required to be informed and educated by their lawyers' or advocates about the pre-condition of referring the initial Mediation

---

[29] The Commercial Courts Act, 2015, s. 12A (3)

[30] Ibid., s. 12A (5)

[31] *Shantha Chellapa & Tara Ollapally,* Mandatory Mediation under Commercial Courts Act – A Boost to Effective and Efficient Dispute Resolution in India, Bar & Bench, Indian Legal News, June 12 2018 available at https://barandbench.com/mandatory-mediation-commercial-courts-act/, (last visited on 3rd Oct, 2021)

process in cases where it seems to have positive result. They should also be informed about the benefits of referring mediation in that present case.

2) Lawyers need to make it very clear to the parties what they mean by Opt-out model so that they would not be any fear of loosing chances to approach the court later, if need be.

3) Parties and lawyers need to be present in the initial stage of mediation.

4) There should be a sanction by the court if parties do not appear for the 1st session of mediation.

5) In every law school the concept of mandatory mediation, its relevance and objective should be inculcated in students in their advocacy skills.

6) Last but not the least, there should be full support by the government and other organs of the state to make this provision flourish in India. We need to have a proper legal framework to incorporate this in our legislative and judicial system.

VII. LIMITATIONS OF MANDATORY MEDIATION

Mandatory mediation sometimes backfires the very essence of mediation, and it's utility. It could be understood in the following manner:

1. Mandatory mediation is effected through legislative, regulatory, or judicial rules. It eliminates the choice for opting or opting out the Mediation. Such removal of choice affects parties differently. There are different kind parties to a mandatory mediation i.e. both parties willing mediation, one willing and other not willing, or both are unwilling for mediation. So far as both parties are willing to mediation, the mediation

being mandatory would only enhance their enthusiasm for it. But where one or neither party willing for mediation, the matter of concern arises. They are compelled to take part in mediation participate in mediation, they cannot be expect to behave in the same way as the parties willing to participate in mediation.

2. Voluntary mediation provides a good rapport between parties and mediator and contributes in better communication. However same cannot be expected in mandatory mediation, where parties are unwilling to participate. It may likely to sabotage the voluntary nature of mediation. The parties may react in hostile manner to any assistance if they consider mediators' suggestions to be contradictory to their interest. It will affect mediators' neutrality.

3. In mandatory mediation, the unwilling parties remain conscious of a sense compulsion and experience feeling denial and distancing. They never stick to any commitment to the mediation process. They would not easily reveal anything which mediator asks them, which may cause them loss.

4. Mediation is considered as preference to litigation. For unwilling parties, mandatory mediation is not preference to litigation.

5. In mediation, the mediator develops a narrative for the process that helps in resolving the disputes. The parties follow the mediator's narrative.

However the parties not willing for mediation might affect the effectiveness of mediation.

VIII. CONCLUSION

Mandatory mediation will effectively work if the parties are willing and enthusiastic about the process. If that feeling is missing then neither side be it parties or mediator will be able to commit themselves to the very spirit of mediation. Mediation could be the most valuable means of dispute resolution system if the concept of mandatory mediation is being adopted world-wide. Italy and other EU countries are developing the jurisprudence of mandatory mediation and bringing reforms to their legal system. In India, attitudinal shift has to be brought for implementing the mandatory mediation. Considering the number of cases pending, the entire judicial system appears to be clogged. Mandatory mediation could be the way ahead as an alternative dispute resolution to answer this problem. And efforts have been taken by introducing mandatory mediation in some of the legislation such as the commercial courts Act, 2015 and the Real estate development authority Act, 2016. Matters which involve sentiments of people, which could not be decided by formal adjudication mechanism, must be resolved through mediation. Recently many such issue were being discussed in the India-Singapore Mediation Summit 2021 in order to make mediation mainstream.

In present situation of Pandemic Covid, when courts are not working physically in full-fledged form, we should encourage the role of mandatory mediation in India in different fields. Pandemic has shown that non-adjudicatory process such as mediation has a wider scope in comparison

to adjudicative process in terms of feasibility, approachability and financially. Recently a plea has also been filed in the Supreme Court for the formulation of a Standard Operating Procedure for ensuring that parties mandatorily engage in mediation proceeding at the pre-litigative stage rather than piling cases before the courts.

POLICY SHORTCOMINGS: EFFECTIVE IMPLEMENTATION OF THE RIGHTS OF PERSONS WITH DISABILITIES ACT, 2016

Apurva Thakur[1]

ABSTRACT

Disability rights movements around the world have made societies recognize the need of an effective law and policy to ensure rights of Persons with Disability (PWD). To attain this, the United Nations Convention on Rights of Persons with Disabilities (UNCRPD), 2006 was accepted by countries around the world. Encouraged by international commitments, India enacted the Rights of Persons with Disabilities Act, 2016 (RWPD Act) with an intent to balance the moral-social-legal and political aspirations of PWD. The effectiveness of any legislation, however, depends on its efficacy and not merely in text.

The Paper suggests that implementation of the RPWD Act requires effective policy strategies from governments. The Paper also identifies inadequacies in the National Disability Policy, 2006 and identifies mis-steps taken in designing appropriate policy thereunder. The pressing need to revamp the existing disability policy will necessitate structural changes along with a shift in perceptions of disability. The focus should be to create accessible

[1] *Assistant Professor of Law, SVKM's Pravin Gandhi College of Law, Mumbai*

external environments rather than any inability of the disabled individual. The author suggests universalization of disability policies to address endemic shortcomings and also create an un-stigmatized and equal society for PWD.

Keywords: *Accessible, RPWD Act 2016, Disability, policy*

I. INTRODUCTION

In a popular painting titled 'The Cripples', four men with locomotor disability are depicted, each of them, holding some form of prosthetics and having a deformed face. All of them are looking for the best begging spot and are engaged in overcoming challenges that are thrown up due to their disability. The painting depicts uncertainty, ordinariness and persistence rather than privilege. Disability presents an opportunity for solutions along with throwing up a multitude of problems. [2] It forces us to look at the unusual and seek non-linear solutions. Disability is intrinsic in the fact of human life.[3]

---

[2] Albrecht, G. L., et. al, 51 Handbook Of Disability Studies. Thousand Oaks, Calif, Sage Publications. (2001).

[3] Garland-Thomson, Rosemarie. "Eugenic World Building and Disability: The Strange World of Kazuo Ishiguro's Never Let Me Go". Journal of Medical Humanities. (2015). DOI- 38. 10.1007/s10912-015-9368-y.

Approximately 15% of the world's population has some form of disability[4]. An estimated 2.1 % of the Indian population is disabled, amongst which, 12.6 million are male and 9.3 million are females.[5]

The understanding of disability in India is mired in a complex web of stigmatization, a belated disability rights movement and an over-reliance on westernized models of law and policy formulation. As a result, disability in India lacks a clear definition, which gives wide power to the government to add, remove and decide, what constitutes disability. The categorization of disability is overly reliant on the medical model despite an increasing trend towards inclusivity and a theoretical shift from the medical model to the sociological model.

In keeping with international obligations under the United Nation Convention on Rights of Persons with Disabilities, 2007[6] (UNCRPD), the Government of India passed two legislations entitled Rights of Persons with Disabilities Act, 2016[7] (RPWD) and Mental Health Care Act 2017, (MHCA). These legislations were intended to bring about sociological shifts in perceptions of disability. However, a gap soon yawned between the intention of the RPWD Act and the intent thereof. The Paper will examine these deficiencies and suggest measures to achieve effective implementation.

---

[4] World Health Organization, World Report on Disability, available at: https://www.who.int/disabilities/world_report/2011/report/en/ (last visited on April 12,2020)

[5] Office of the Registrar General & Census Commissioner, IndiaMinistry of Home Affairs,Government of India available at: http://censusindia.gov.in/Census_And_You/disabled_population.aspx (last visited on April 12, 2020)

[6] UN General Assembly, Convention on the Rights of Persons with Disabilities : resolution / adopted by the General Assembly, 24 January 2007, A/RES/61/106, available at: https://www.refworld.org/docid/45f973632.html (last visited on April 12,2020)

[7] Rights of Persons with Disabilities, 2016 (No 49 of 2016)

A. Perceptions of Disability

In order to gauge the true nature of disability, it is necessary to divorce impairment from disability. Impairment means that a person has limited function of one or multiple bodily function, and is a purely medical term. On the other hand, disability is a socio-political barrier which hinders full participation of PWD in society, primarily due to the inability of the State to formulate an effective integration policy.

Perceptions of disability are multi-faceted and stem from systemic discrimination based on cultural perceptions. This paper addresses two theories of disability viz., the medical and the sociological model.

1. The Medical Model:

The medical model of disability describes it as something of a personal tragedy that an individual has to face and sometimes their families too. It categorizes disability based on medical science and devises strategies aimed at alleviating such disadvantages. The focus is on remedies which lean towards compensation, whether by way of concessions or relaxations, rather than remedies which should be based on inclusion. Under the medical model, PWD are based on an *inherent* inequality by way of their disability and need to be treated specially by way of reservations. The medical model is criticized because of a singular focus on impairment of the disabled for the purpose of legal redressal distracts

attention from the social and structural barriers that prevent 'equal participation' of the disabled in the society.[8]

2. The Sociological model:

The sociological model of disability focuses on inclusion by presuming that disability is a mere difference and that persons with disability are able and equal. Some authors have regarded disability as another form of human diversity.[9] The only circumstance that makes such people different is the apathetic approach of the government while drafting policies for the disabled, i.e., the policy which overlooks constructing a ramp to every staircase and doesn't provide a braille copy of all texts. The sociological model attempts to break free from the constraints of mere medical incapacity toward a truly equal society.

In India, even in decisions around disability, the medical definition is primarily relied upon, since it is the most visible and available piece of evidence. If medical disability of a petitioner can be proved (for rights) and disproved (for liability), then the result of the case hinges on this sole factor. In *Deaf Employees Welfare Association v UOI*[10], equal treatment of deaf as well as blind government employees with regard to transport allowance was sought. The court, in its wisdom, allowed the petition granting the concession, stating that the type of disability cannot be a

[8]Renu Addlakha and Saptarishi Mandal, "Disability Law in India: Paradigm Shift or Evolving Discourse" 44 EPW 62-68,(2009).
[9] Greg Bognar, "Is Disability a Mere Difference", 42 Med Ethics 46–49, (2016).
[10] Civil Petition 107 of 2011, decided on December 12, 2013

ground of further discrimination. In passing such an order, the court unknowingly used the medical definition of disability, albeit to prevent a social discrimination. While disability is defined as a medical concept, its implications in law are socio-legal. These two concepts of disability are inter-woven and cannot be extricated. When these two fundamentally conflicting definitions of disability are applied, it is a jurisprudential nightmare, as the scope widens beyond comprehension, leading to dilution of common law and policy.

II. THE INDIAN DISABILITY POLICY

The National Policy for Persons with Disability was framed in 2006[11] (Policy) was enacted to usher in physical as well as physiological changes in the approach to PWD. Interestingly, it states that *"every child with disability must have access to appropriate pre-school, primary and secondary level education by 2020"*.[12] It states that special care must be taken to increase accessibility - physically, structurally and socially. The recommendations include barrier free access to buildings, adapting methods of teaching to suit needs of disabled children, availability of braille/audiobooks/ sign language interpreters and promotion of distance learning programmes etc. However, even after notification of the RPWD

---

[11] National Disability Policy, 2006 , available at : http://www.mospi.gov.in/sites/default/files/reports_and_publication/statistical_publication/social_statistics/Chapter%208%20-National%20redressal.pdf, (last visited on 18 June, 2020)

[12] National Policy for Persons with Disabilities, No.3-1/1993-DD.III Government of India Ministry of Social Justice and Empowerment available at :http://disabilityaffairs.gov.in/upload/uploadfiles/files/National%20Policy.pdf, (last visited on 18 June,2020)

Act, 2016, the Policy remains the same, in spite of having been framed a decade earlier. Moreover, even the recommendations contained in the Policy are yet to be implemented since musch of the suggestions are still being recycled and shuttled between the Human Resource Development Ministry and the Ministry of Social Justice and Welfare.

A. Hindrances in Policy Implementation

1. Divestment of Responsibility to State and Local Governments

The RPWD Act has made the Central, State and Local governments responsible for ensuring implementation of its obligations[13]. The formulation of the Policy has now been divested to the respective State Governments and local bodies. This divestment of power to the state governments has proven to be ineffective as most states lack the will and finances to introduce disability programmes. In 2018, merely one-third of the States had notified the Disability Rules.[14].

National budgets will be tight for the foreseeable future, especially in light of the COVID-19 pandemic. Any policy will need to justify expenditure of every rupee in order to see the light of the day. This raises the age-old policy dilemma, of whether to cut-back benefits from a small

[13] Rights of Persons with Disabilities, 2016 (No 49 of 2016), S. 2 (b)

[14] PTI, "Only one third states have notified rules under disabilities act: NCPEDP", Business Standard, July 22, 2018 available at: https://www.business-standard.com/article/pti-stories/only-one-third-states-have-notified-rules-under-disabilities-act-ncpedp-118072200333_1.html (last visited on June 18, 2020)

section of society or to continue long standing welfare policies for a larger section of society, despite increasing fiscal deficits.

Devolution is the panacea of the day. While the Union Government has increasingly devolved its responsibilities under the RPWD Act to the states, it has not provided enough funds to the states to enable them to do so. This pattern is, in turn, repeated in local Governments. Political agencies are apparently constrained on their operational roles to private sectors and NGOs as much as they can. However, this has led to an abdication by the Government of its responsibilities under the RPWD.

2. Budgetary Allocation

The budgetary allocation to the Department of Social Welfare and Empowerment Ministry is INR 1325.39 crores for the year 2020-2021, which is a slight improvement from the budget allocation of INR 1009.11 in 2019-2020.[15] The allocation of a mere 0.04 per cent of the total expenditure of the Government is grossly inadequate to address the needs of a population of nearly 2 .6 crore persons[16]. Moreover, the allocations for the Department of Social Welfare have remained constant for the last three years.[17] It is discouraging that even those policy schemes which are

[15] Ministry of Social Justice And Empowerment Demand No. 93 Department of Empowerment of Persons with Disabilities, Govt .of India, available at: https://www.indiabudget.gov.in/doc/eb/sbe93.pdf, (last visited on 20 April,2021)

[16] Disabled Persons in India: A Statistical Profile (2016) available at: http://mospi.nic.in/sites/default/files/publication_reports/Disabled_persons_in_India_2016.pdf (Last visited on 1 June, 2021)

CRPD Alternate Report for India (2019) available at: http://accessability.co.in/wp-content/uploads/2019/02/CRPD-Alternate-Report-for-India-1.pdf, pp 44 (last visited on 20 April,2021)

focused on only medical rehabilitation of PWD such as Assistance to Disabled Persons for purchasing/fitting of aids/appliances (ADIP), Artificial Limbs Manufacturing Corporation of India (ALIMCO); and National Handicapped Finance and Development Corporation (NHFDC), show a declining in budgetary allocation[18]. The Research and Rehabilitation Institutes and the Institute of Sign Language find no allocation in this financial year (2020-2021). Scheme for Implementation of Persons with Disabilities Act (SIPDA), which concerns accessibility and district rehabilitation, finds a reduction of funds from INR 63.50 crores when compared to 2019-2020.[19]

The Government's dictum seems to be "devolution" down the chain of government and out into the private- profit making sectors or to the individual in the form of tax reliefs. The Disability Policy requires the state and local governments to spend on providing facilities to PWD, yet, the Financial Memorandum does not provide any estimate of the finances required to meet the Policy obligations[20]. There is no estimate of the expenditure expected to be incurred by the Centre or States, or the manner of sharing of funds between them. The memorandum states "since disability is a state subject under the Constitution, it is also expected that over time the states will contribute substantially to the implementation of

[18] Decoding the Priorities: An analysis of the Union Budget available at: https://www.cbgaindia.org/wp-content/uploads/2020/02/Decoding-the-Priorities-An-Analysis-of-Union-Budget-2020-21-2.pdf?cv=1 (last visited on 25 April,2021)

[19] ibid

[20] CRPD Alternate Report for India (2019) (last accessed on 20 April,2021) available at: http://accessability.co.in/wp-content/uploads/2019/02/CRPD-Alternate-Report-for-India-1.pdf

the provisions of the Bill." [21] However, without adequate funds, the implementation of the Bill is at best patchy, and at worst, non-existent. The spending by the Central Government towards PWD has remained fixed at 0.02% in the last three years.[22] Even though the budgetary allocation is dismal, even those funds remain underutilized.[23] The end result is a complex administrative web of under-funding and mis-management.

3. Faulty Statistics and Poor Monitoring

India lacks a comprehensive statistical research study on disabled population, this is so, in part, due to poor interest and therefore poor fund allocation to promote policy-research through better disability census. Moreover, even the veracity of the census data gathered is questionable as being outdated and under-reported. Governments often, also inflate the level of effort and success in implementation of welfare schemes. There is no independent and reliable research organization that may gather unbiased data. As a result, what remains is the official government, non-contested data.

[21] "Legislative Brief: The Rights of Persons with Disability Bill,2004", PRS India, available at:https://www.prsindia.org/uploads/media/Person%20with%20Disabilities/Legislative%20Brief%20%20-%20Disabilities%202014.pdf (last visited on 20 April,2021)
[22] CRPD Alternate Report for India (2019) available at: http://accessability.co.in/wp-content/uploads/2019/02/CRPD-Alternate-Report-for-India-1.pdf , (last visited on 20 April,2021)
[23] Ibid, pp. 4

For instance, the 2011 census states that the disabled population in India is 2.21%[24], which is lower than global average. The World Bank however, estimates that there is a prevalence of 4-8% disability in India.[25] This shows a variance of 2-6% in disability estimates. When put in percentages, it may look like insignificant, but when put in absolute numbers, that translates to one in every forty-four persons that are disabled. This sort of statistical representation depicts the disabled population as a small minority which then may justify the meagre involvement of the Policy makers toward PWD, allowing governments to focus on larger agendas, like poverty eradication or mal-nutrition. This approach denies the fact that disability should be a major part of the healthcare policy- *"we are all temporarily abled[26]"*. If India's largely young, population realizes that a disability policy is likely to benefit it in the future, they are more likely to push for government reforms.

Deficient and derisory data and monitoring sets the government up for failure across all levels of governance, which makes it difficult to calculate and estimate population data and in turn leads to inadequate design, implementation and monitoring targeted programmes. Though

[24]Office of the Registrar General & Census Commissioner, India, GOI, available at: https://censusindia.gov.in/census_and_you/disabled_population.aspx (last visited on 10 May ,2021)

[25]The World Bank, "People with Disabilities in India: From Commitments to Outcomes" (last accessed on 20 June, 2020) available at: http://documents.worldbank.org/curated/en/577801468259486686/pdf/502090WP0Peopl1Box0342042B01PUBLIC1.pdf (last visited on 20 June ,2021)

[26] Parth Shastri, "We all are temporarily abled, says Pranav Desai" TOI, (Dec 5, 2016) available at: https://timesofindia.indiatimes.com/city/ahmedabad/We-all-are-temporarily-abled-says-Pranav Desai/articleshow/55798052.cms (last visited on June 20, 2020)

RPWD Act, 2016 talks about 'social audit[27]' of all schemes and programs concerned with PWD, this is not reflected in policy design.

4. Lack of Cross-Sectoral Approach

Disability inclusion falls under by the Ministry of Social Justice and Empowerment (MSJE)[28]. However, unlike the intent of the RPWD Act, 2016 which speaks of looking at policies in a cross-sectoral manner, only 8 out of 100 Ministries and Departments include PWD in their programs and schemes.[29] In addition, many government websites lack inclusivity and accessibility, intensifying the need for a cross-sectoral approach to inclusion strategies.

There is also a gap in the study of intersectionality in disability, leading to blind spots in policy formulation. For instance, women with disabilities are more likely to face violence at home[30]. A 2018 World Bank Study disclosed that women with disabilities are more likely to be victims of violence or rape than non-disabled women[31]. A 2004 survey in Odisha, India found that virtually all the women and girls with disabilities were beaten at home, 25% of women with intellectual disabilities had been

[27]Rights of Persons with Disabilities, 2016 (No 49 of 2016) S. 48.

[28] Department of Disability Affairs available at: http://disabilityaffairs.gov.in/content/

[29]National CRPD Coalition-India, towards Parallel report, (2019) available at: http://accessability.co.in/wp-content/uploads/2019/02/CRPD-Alternate-Report-for-India-1.pdf (last visited on June 21,2020)

[30] United Nations Organization, Department of Economic and Social Affairs, "Women and girls with disabilities" available at: https://www.un.org/development/desa/disabilities/issues/women-and-girls-with-disabilities.html (last visited on, May 11,2021)

[31] The World Bank Study, "Disability Inclusion" (2018) available at: https://www.worldbank.org/en/topic/disability(last visited on, July 1,2020)

raped and 6% of women with disabilities had been forcibly sterilized.[32] The skewed disability perspective that views disability only through the lens of men, has overlooked the discrimination of women that stems especially from disability, particularly those of childbearing and employment[33]

A cross sectoral outlook would imply bringing together various discrimination markers of disability. Research on how aspects, like caste, gender or income support or unsettle the disability experience is crucial and involves difficult analysis across socio-cultural categories, which Indian policymaking, at present, lacks.

5. Overlooked Inclusive Education

Inclusive education has gathered momentum amid rising awareness of Disability Rights'. India, too, has given inclusive education a fair thought, establishing safeguards through the RPWD Act. The Act is ideal, balancing the medical and sociological schools of thought into a modern, updated outlook towards PWD. However, the effect of the RPWD Act, like its predecessor, has remained ensconced in legal jargon with little or patchy implementation.

The RPWD Act uses the term 'accessibility' with its many facets and has wisely, included various facets of accessibility including access to

[32] Departmet of Economic and Social Disability, Factsheet on Persons with Disability, available at: https://www.un.org/development/desa/disabilities/resources/factsheet-on-persons-with-disabilities.html (last visisted on July 1, 2020)

[33] Thomas J. Gerschick, 25 "Toward a Theory of Disability and Gender Signs", 1283-1268, Feminisms at a Millennium, The University of Chicago Press (2000)

education, housing, and justice among others. It seems to have disregarded, however, inclusive education and a workable strategy to include children with disability into the mainstream of education practices.

Right to Education is a fundamental guarantee of equal rights for children with disabilities and their social inclusion. In 2002, the provision of universal primary education was recognized as a fundamental right under Article 21A[34] of the Indian Constitution, thereby guaranteeing all children between the ages of 6-14, a justiciable right to free and compulsory primary education. This was subsequently mandated through legislation such as the Right of Children to Free and Compulsory Education Act, 2009[35] (RTE Act). The RTE Act buttresses its intention to include disability within its ambit by clarifying that the right to education includes those who belong to a broadly termed 'disadvantaged groups.'

The RPWD Act defines inclusive education as *"a system of education wherein students with and without disability learn together and the system of teaching and learning is suitably adapted to meet the learning needs of different types of students with disabilities."*[36] It also imposes an obligation on the government to take steps to ensure inclusive education.

[34]Eighty sixth Constitutional Amendment Act, 2002 (December 12, 2002)
[35] Act No. 35 of 2009
[36] Rights of Persons with Disability Act, 2016, Act 49 of 2016, S. 2(m)

In the face of evolving legal standards, there are many irregularities between the RTE Act and the RPWD Act which have resulted in an inconsistent legislative and regulatory framework for inclusive education. Since the RTE Act was enacted prior to the modification of the disability law framework, it appears to have carried forward the approach of "integration" as opposed to "inclusion". As Sharma and Deppler explain, integrated education emphasises the "student to fit in the system rather than the system to adapt", while inclusive education emphasises changes in system-level practices and policies to meet student needs."[37]

Disability and lack of education share an uncomfortable bond. According to the 76th National Sample Survey[38], 2018, about 48% of disabled people are illiterate and only 62.9% of disabled people between the ages of 3 and 35 had ever attended regular schools. Meanwhile, only 4.1 % of those not enrolled in regular schools had ever been enrolled in special schools. Disabled children rarely progress beyond primary school, and only 9% have completed higher secondary education.4 The 2011 Census estimates that there are 2.13 million children with a disability, of which 28% are not in school. Overall, children with disabilities are less likely to be in school and more likely to drop out of school.[39] In light of these realities, it is imperative that the RTE Act and the RPWD Act be brought on the

[37] Umesh Sharma and Deppeler Joanne,1 "Integrated Education in India: Challenges and Prospect" Disability Studies Quarterly 25 (2005)

[38] The World Bank, "People with Disabilities in India: From Commitment to Outcomes" (2007) available at: http://documents1.worldbank.org/curated/en/358151468268839622/pdf/415850IN0Disab1ort0NOV200701PUBLIC1.pdf (last visited on June5,2020)

[39] Parul Bakhshi, Ganesh M Babulal and Jean Francois Trani, 1 "Education of Children with Disabilities in New PLoS ONE 12 Delhi: When Does Exclusion Occur?" (2017)

same page, with regard to the ideation and implementation of inclusive education.

6. Lack of Design Innovation

India lags behind on its inclusivity and accessible design innovations. A study shows that a mere 3% of buildings in India are accessible.[40] There is no aggregated data of public transport and institutions, however, state studies show that these figures are dismal. One of the most common problems when designing for accessibility knows what needs you should design for.[41] Moreover, all the accessibility data has been collected is only with respect to physical disability.

Traditional measurements of accessibility may be flawed, as they often ignore organizational barriers and individual mobility limitations which may affect travel time, effort, and even successful completion.[42] Several studies done by the Dr Bhanuben Nanavati College of Architecture for Women[43] in Pune have shown that though accessibility measures have been undertaken by the local government, they are done without a proper understanding of the exercise and without conducting feasibility studies.

---

[40]"Disabled Accessibility", Hindustan Times, (2018) available at: https://www.hindustantimes.com/editorials/with-just-3-of-india-s-buildings-accessible-our-disabled-are-at-a-huge-disadvantage/story-Rh2rd4QzNzw9kHpmaTPV1H.html (last visited on June 5,2020)

[41] Steven Lambert, "Designing for accessibility and inclusion", Smash Magazine (9 May 2018) available at: https://www.smashingmagazine.com/2018/04/designing-accessibility-inclusion/ (Last visited on July 6, 2020)

[42] Church, Richard & Marston, James. "Measuring Accessibility for People with a Disability". Geographical Analysis. (2003). 10.1111/j.1538-4632. 2003.tb01102. x.

[43] "Universal Design", available at: https://www.bnca.ac.in/bnca-cells/universal-design/ (Last visited on July 6,2020)

Basic design errors such as awkwardly placed tactile tiles and unevenly placed footpaths, too steep slopes, ultimately result in redundancy of the exercise. Accessibility training of architects will ensure the aim of such inclusivity measures is effectively translated and reproduced.

7. Participatory Process

Stakeholders' engagement is the key to a participatory and democratic process. It is imperative that policy decisions involve those who are directly affected by them and have a keen insight into the impediments in implementation strategies. Stakeholders may support or oppose decisions and may be influential in the organization or within the community in which they operate. Inputs from stakeholders will help identify areas of agreement and disagreement by providing a platform for dialogue and will hence present an opportunity to address key stakeholder questions. It will also help policy makers identify underlying community beliefs and align policy with them. Welfare policies often involve a high volume of complex, statistical information that may cause policy-drafters to overlook the finer, indispensable aspects of disability policy-design and hence, it is essential to take the help of on-ground workers and PWD themselves to design a holistic and workable stratagem. Moreover, by building mutual understanding, credibility, and trust, policies are more likely to be implemented as were they were intended.[44]

[44] Lemke, Amy A, and Julie N Harris-Wai. "Stakeholder engagement in policy development: challenges and opportunities for human genomics."17 Genetics in medicine: official journal of the American College of Medical Genetics 949-57 (2015): doi:10.1038/gim.2015.8

Trends show India lags behind in encouraging participatory process, despite being the largest democracy[45]. The UNCRPD requires allstate parties that have ratified the treaty to submit reports on their progress to a Committee established by the UN.[46] The 2019 parallel report filed on the municipal implementation of UNCRPD in India shows that very little progress has been made with respect to the parameters set out by the UNCRPD. PWD have not been included in the policymaking and planning by the respective ministries. This is crucial to designing good policy is to make the relevant stakeholders' part of the process.

8. Lack of Training

Many developing countries lack inclination to conduct training programmes for rehabilitation professionals. According to the 2005 global survey of 114 countries, 37 had not taken action to train rehabilitation personnel and 56 had outdated medical knowledge on disability.[47] Feasibility of training programmes is dependent on several factors such as political stability, availability of trained educators, adequate financial support, domestic educational standards, cost and time for training and the overall desire of local governments to facilitate such training programmes. [48] Training for rehabilitation personnel must be

[45] G. Palanithurai, 68, "Participatory Democracy in Indian Political System",9-20, IJPS http://www.jstor.org/stable/41858816 (2007) (Last accessed on August 1,2020)
[46] United Nations Convention on Rights of Persons with Disabilities,1996 S.33
[47] World Health Organization, "expanding education and training", WHO Library Cataloguing-in-Publication Data, 134 available at: https://www.who.int/disabilities/world_report/2011/report.pdf (2011) (Last visited on August 1,2020)
[48] Ibid

designed keeping in mind relevant national and international legislation, particularly the UNCRPD. This will help promote a client-centered approach and encourage sharing of ideas between people with disabilities and professionals[49]

India trails behind in its training initiatives which are limited to scattered sensitization programmes, workshops and seminars. In order to achieve a well- rounded implementation of disability initiatives, it is imperative to introduce training at the institutional levels, and make it a mandatory process. Every person must be trained in disability empathy and approaches, and only then will it be possible to achieve a truly inclusive society.

9. Preoccupation with westernized models of disability law and policy

Despite the engagement with disability studies in the western countries, countries at the periphery of the English-speaking world, such as India, South Africa and the Asia- Pacific rim countries, require analyses of disability that reflect their own specific colonial-settler histories.[50] In India, disability theory is varied and inconsistent; occasionally, derived from folklore and myth. It is a belief that one is born disabled to pay for the sins of past karma.[51] While it is spiritually impossible to refute this notion, science, has yet prove the same.

---

[49] Heinicke-Motsch K, Sygall s, et al., "Building an inclusive development community: a manual on including people with disabilities in international development programs". Bloomfield, Kumarian Press (2004).

[50] Meekosha H, "Contextualizing disability: developing southern/ global theory" (2004)

[51] "Disabilities and Bad Deeds in Past Life" available at: http://www.lonelyphilosopher.com/do-people-with-disabilities-have-done-bad-deeds-in-their-past-lives/ (Last visited on August 12, 2020)

Shaun Grech seeks to challenge the shortcomings implicit in the assumptions of disability studies that originate from the more developed nations. Such assumptions conceptualize the less developed (Global North) and developing nations (Global South)[52]. Empathy is key to change the context of understanding disability and must, especially in anti-discrimination research, be understood, not only in the context of the researcher's frame of mind, but also in terms of the existing history of the area where the study is being carried out. In India, it takes on myriad tints when viewed through various lenses - religion, folklore, cultural underpinnings and prevailing jurisprudence, leading to discrimination that is both sociological and physiological. It is therefore vital, that when carrying out a research in disability, historical, political and theosophical moralities are examined.

India's disability is mired with realities of poverty, colonization and caste-class divisions.[53]

It is important to remember that in de-colonized nations, concerns associated with educational inclusion, human rights and the development of positive disability cultures might be of less importance to people who are living a hand to mouth existence.[54] It is therefore, essential that policy

[52] Grech, Shaun. "Disability, Poverty and Development: Critical Reflections on the Majority World Debate'. 771-784 Disability & Society 24.6 (2009).

[53] Anita Ghai, "Disability in the Indian Context: Post-colonial perspectives, Disability/Postmodernity: Embodying Disability Theory", Sage Publications (2002)

[54] Dan goodley , 28:5 "Dis/entangling critical disability studies", Disability & Society,631-644 (2013) DOI: 10.1080/09687599.2012.717884

initiatives should take into account social realities rather than toe the line of westernized models of disability law and policy.

Such an approach is not the solution to addressing disability rights in India. With its cultural underpinnings, disability in India needs a unique approach- contextualizing superstitions, local belief systems and religious ideology.

III. TOWARDS UNIVERSALIZATION OF A DISABILITY POLICY:

A. Future Course of Action

The objective of public policy for disability seems to focus largely on solo efforts for an individual and isolated set-up. Policy must be aimed not only at generating employment for PWD, but also at eliminating barriers-both physical and physiological, at present and future work-places.[55]. Placing disability in a context which is universal, and realizing that we are all disabled in some sense will help expand the scope of disability interventions- gradually allowing for a shift from internal incapability to external environments and social realities. Ultimately, to rethink disability policy will necessitate re-examination of our elementary values.[56] A disability policy that only focusses on PWD will invariably be a short-sighted approach. A universal policy, which

[55] Zola, Irving Kenneth. "Toward the Necessary Universalizing of a Disability Policy." The Milbank Quarterly(2005). doi:10.1111/j.1468-0009.2005.00436.x
[56]Lawton, M. P., & Moss, M. (1987). "The social relationships of older people".Sage focus editions, Vol. 86., Sage Publications, Inc.(1987)

imagines entire populations as disabled and in doing so, designs would help achieve an inclusive and effective result.[57]

The lack of such an approach has led to a circular path of segregation and exclusion. Who is considered disabled, is consistently determined by the medical model of disability as codified in the RPWD Act as it classifies anyone who has a dis-use of 40 % of a limb/ sensory organ as a disabled person.[58]

Any disability policy must be a community policy, applicable to all persons, irrespective of their 'able-ness'. The problems of disability are therefore not purely statistical and not confined to a fixed number of people. It is not essential that issues faced by someone with a disability is merely medical, it could be the result of a number of intersectional disabilities arising from social, architectural, attitudinal and political environments.

A universal design strategy as envisaged by architect Ronal Mace may be the answer to problems of both accessibility as well as stigma. He famously stated, "*universal design is the design of products and environments to be usable by all people, to the greatest extent possible, without the need for adaptation or specialized design*"[59]

---

[57] Supra note 42, at 8

[58] No.3603 5/1 /2012-Estt.(Res) Government of India Ministry of Personnel, Public Grievances and Pensions Department of Personnel and Training available at: (http://documents.doptcirculars.nic.in/D2/D02adm/36035_1_2012-Estt.Res.-29112013.pdf (Last visited on August 13, 2020)

[59] "Centre for Universal Design" available at: https://projects.ncsu.edu/ncsu/design/cud/about_ud/about_ud.htm (Last visited on August 8,2020)

There is a dire need to acknowledge that design practices- whether physical, educational, or physiological are biased. An able-bodied measure is flawed since everyone is at some point, disabled. For instance, the standard temperature for air-conditioners in office buildings is found uncomfortable by the employees as being too warm or too cool. The reason for this is because the standard-measure is based on a 'normative' male body that weighs about 70 kgs.[60]. This is an example of a design bias- where a homogenous measure is presumed to be suitable for all.[61] To be more inclusive, it is essential to design for a varied, heterogeneous group of people. When design is formulated in such a way, disability, no longer remains an inability.[62]

The stigma of disability is ever present—it can be used to indicate inferiority, withdraw privilege, and evoke sympathy. This makes it crucial to break the barrier of able-ism by adopting universal design practices, not just in architecture but also in education, arts and technology.

We must remember Anita Ghai's wise words, "we are all temporarily-abled"[63].

---

[60] Pam Belluck, NY Times, (2015) available at: https://www.nytimes.com/2015/08/04/science/chilly-at-work-a-decades-old-formula-may-be-to-blame.html (Last visited on August 9, 2020)

[61] Ronald Mace, "A perspective on Universal Design" (August 1998), available at: https://projects.ncsu.edu/ncsu/design/cud/about_us/usronmacespeech.htm (Last visited on August 9,2020)

[62] Dolmage, Jay Timothy. "Universal Design. In Academic Ableism": Disability and Higher Education, 115-52. Ann Arbor: University of Michigan Press, (2017). www.jstor.org/stable/j.ctvr33d50.7

[63] Supra, note 42 at 8

IV. CONCLUSION

Reform efforts focused on establishing basic legal rights for PWD and defending equality have culminated in the enactment of the RPWD Act, 2016. The Act attempts to pave the way towards an inclusive society, by designing comprehensive disability policies. Policy development, however, cannot be done only through the medium of statue-law. A successful policy requires coming together of governments, civil society, stake holders and law. One of the biggest barriers in a policy implementation for PWD remains the 'morality' angle of such a policy. How much spending is justified to benefit a numerically small population?

Research and technology provide solutions to help people overcome or compensate for disabilities, and offer the promise of eventual cures for many conditions. Evolving knowledge of the human genome offers nearly unlimited opportunities to prevent disability. The revolution in communications technology promises benefits to help people overcome disabilities such as deafness or speech problems, and to allow people who have mobility impairments to "commute" to the office or "visit" a museum from their own home. However, questions remain as to the availability of such measures to all. The questions about funding, and discrimination are always looming large in any policy designed for PWD. Dilemma over bio-ethics and the pursuit of a normatively defined "perfect" baby are also worrisome developments. Will the "information

superhighway" lead to an isolation of individuals and a re-segregation of people with disabilities.[64]

Attempting to balance justice and efficiency is an 'Achilles Heel' for all social policymakers. Any form disability policy will have some efficiency cost, and hurdles in implementation. However, for reasons of equality, society must offer some stipulated level of Disability benefits even if it results in some efficiency losses. Perhaps, the shift to a wider net for Disability Policy, will add to unnecessary costs, however, that is a cost Governments must be willing to pay in order to truly achieve an accessible society.[65] If all citizens were fully accommodated, there would be little need for concessions and reservations specifically related to disabilities. It is therefore, essential to build consensus around disability as a reality, and to incorporate a policy for disability as a part of a universal healthcare and national policy rather than an isolated disability policy.

[64] Scallet, Leslie J. "Disability Policy and Legislation: A Retrospective and Prospective Overview." 5 Mental and Physical Disability Law Reporter 622-26 (1996) available at: www.jstor.org/stable/20784738 (Last visited on August 11,2020)

[65] Richard V. Burkhauser, ,: "U.S. Disability Policy in a Changing Environment," 16 Policy Watch The Journal of Economic Perspectives, 213-224, (2002) available at: http://www.jstor.com/stable/2696583 Last visited on August 11, 2020)

BOOK REVIEW

PROF. V.K. AHUJA, PROF. PINKI SHARMA AND ASHUTOSH ACHARYA
INTERNATIONAL LAW- CONTEMPORARY DEVELOPMENTS *(ESSAYS IN THE HONOUR OF PROF. A.K. KAUL)* (2021)

Publisher: Satyam Law International, Daryaganj, New Delhi-110002, India PP.416 Price Rs.1195/- $ 50. Printed in India. ISBN: 978-93-91345-11-2.

Reviewed by: *Dr. Santosh Kumar*[1]

I. INTRODUCTION

Books are considered “tools for communication between two minds”. A comprehensive review of the same can tell you whether the book worked as a communication tool between the author and the reader or not. In light of these lines of **Hon’ble Justice A.K. Sikri**, Former Judge, Supreme Court of India. At present, International Judge, SICC Singapore, the foreword written to the present context of the book gives timeless necessity and extent of protecting, recognizing with the inclination in the legal society, to recognize the importance and preservation of books in any form whatsoever.

As per the ancient Indian culture, texts are regarded as divine beings. Presently, books hold various roles, such as entertainment, scientific experiments in the educational sectors and research etc. Books have a

[1] *Associate Professor of Law, Amity Law School, Delhi.*

major contribution to the diet of knowledge. Since the inception of mankind, humans have been dependent on domestic knowledge but interaction and vast development in all walks of life as protected by the means of law has great impact. There are various guidelines in the ancient religious scriptures of India for the protection of texts.

The preface of the book gives an apt foundation of the subject, covering the position of International law and the impact of COVID-19 pandemic. Thus, the editors mentioned it as the testing ground of the issues surrounding International relations. Rightly said, it is important here now to revisit also the roles and functions of International institutions that formed platform for these issues to be resolved either at regional or global level.

Year 2020 due to COVID-19 has given the contemporary world order a new challenge in addition to the already existing ones wherein the nation states were engulfed with major economic turbulences as aptly opined by the editors.

The main focus of book lies in understanding the relationship between modern developments of laws and real issues in International relations.

II. The Editors/Contributors

Prof.V.K. Ahuja, Prof. Pinki Sharma and Dr. Ashutosh Acharya, the *Learned Editors* of the book "***INTERNATIONAL LAW Contemporary Developments***", all have demonstrated the deep legal flavor par excellence through teaching and research in the field of Law. The research papers amalgamate concepts from streams such as socio-

political and International legal aspects, the divinity of law, and historical institutionalism to study the cyclical nature of changes in legal systems. The book also relates to the true nature of gratitude to great legal luminary and all time proven and erudite scholar Late **Prof. A. K. KAUL** and his remarkable contributions in the field of International Law in the opening chapter one by Prof. V. K. AHUJA himself.

III. THE BOOK AND CONTENTS

The book, ***INTERNATIONAL LAW Contemporary Developments*** examines the role that International bodies have on world affairs and policymaking. Throughout the book, the contemporary law discussed to satisfy the needs of powerful stakeholders looking to be real world problems and perspectives.

Meticulously summarised in the book, the authors/contributors lists many facts from concerned and diverse subjects of International laws.

The book is divided into **Twenty Five** chapters.

The present book is divided in its scheme of presentation as already mentioned above a large sum of knowledge in its essence, the ***Chapter one***[2] relates to tribute to great legal luminary and scholar Late **Prof. A.K. Kaul, University of Delhi**. **Prof. Kaul** had established himself by hard work and consistency, it is to note that by dedication, even a village lad can rise to the position of Vice Chancellor and earn name and fame not only in the country but also abroad. **Prof. Kaul** faced many challenges in

[2] ***A Tribute to Professor A.K. Koul*** By V.K. Ahuja, "INTERNATIONAL LAW Contemporary Developments" P. 1(2021).

life but nothing could deter him from becoming a renowned scholar of world fame. His academic journey is a motivation for all of us. The work and the contributions are noteworthy and that has been described by the author to a great extent in humble manner, a real tribute to his guide, mentor and a real academician par excellence by **Prof. V. K. Ahuja**.

Chapter two addresses the interface of 'Technology and Law' covering different areas of International Law such as Law of the Sea, Space Law, Humanitarian Law, Artificial Intelligence and their interface with technological trends and advancements. **Prof. Kennedy Gastorn**, Secretary General, Asian-African Legal Consultative Organization (AALCO); in the chapter covers aspects of Technological Innovations and changing dynamics of International Law.

The shifting paradigms and issue of International Law and Non-Military Pre-Emptive Strike by India in Pakistan is examined in ***Chapter three*** with a focus on the various existing issues and the righteous acts of India in Balakot is based on the arguments of Pakistan's failure to fulfill its obligations under various norms of International Law. The chapter elaborates upon legal basis for the said airstrike by India that includes understanding of self- defense and notion of pre-emption in the contemporary times facing challenges posed by terrorism. The chapter is valuable and scholarly contribution by **Mr. Aniruddha Rajput**, Member, UN International Law Commission.

The ***Chapter fourth*** i.e. a chapter on Law of Letter of Credit Law on Letter of Credit: An Examination of Judicial Response in India. The

chapter (by **Prof. Anupam Jha**, Associate Professor, Law Centre-II, Faculty of Law, University of Delhi) highlights uniform customs and practices of documentary credits (UCP) 600 and a number of judgments to establish Indian case basis for the Law of Letter of Credit in India. The chapter takes into account challenges common in different domestic legal systems such as fraud, forgery, force majeure etc. and explains how Indian Judiciary has dealt with such concerns as compared to foreign judicial response. It caters to the exposition of the various facets of practice and judicial view.

Chapter fifth deals with caption US–China Trade (Innovation, Technology & Intellectual Property) War: A Loser's Game. The chapter contributed by **Dr. M.R. Sreenivasa Murthy**, Associate Professor, National University of Study and Research in Law (NUSRL), Ranchi; covering aspects on innovation, technology and intellectual property. The inter-twined linkages between the domestic economy & international trade, provides a dominant position to the super economic countries such as US & China to declare techno-economic world war, first of its kind. The repercussion of such war is distortion of world economy and the weapon chosen is the innovation & IPR. The US – China trade war can be better described as a fight for dominance over innovation, technology & IPR. The USTR Special 301 Report 2019 alleges China's IP regulations and policies revised or made under Made in China – 2025 accommodates IP theft and violates the WTO norms, especially TRIPs Agreement.

Chapter sixth considers the Participation of NGO in The WTO: Benefit or Burden, in which the Authors shared it as its impact is positive and submitted that NGOs can perform an effective advisory role in decision making by acting as resource enhancers, experts and facilitators. The member states of the WTO should strive for consensus on this issue without jeopardizing their rights and obligations as provided under the WTO Agreement.

Chapter seventh considers the TRIPS-Plus Provisions and Regional Trade Agreements: A World of Preferential and Detrimental Relationships. This chapter attempts to discuss the approach to interpretation of TRIPS considering the possibilities of the relationship between TRIPS and the TRIPS-plus provisions in the intellectual property chapters of the RTA regime. The chapter analyses definition of the TRIPS-plus provisions and the history behind the development of the regional agreements that incorporate TRIPS-plus obligations. It examines the implications of the regional and bilateral TRIPS-plus agreements for the current minimum standards under TRIPS.

Restrictions on Opportunistic Takeover by India: Possible Claims of China under China - India BIT is examined in ***Chapter eighth*** with a focus on the various existing and technical issues. This chapter is about the analysis and interpretations of principles, clauses, and exceptions of China-India BIT (bilateral investment treaty) and to analyze the validity of the amendment in connection with the international investment treaties.

Chapter ninth take note of a very important issue captioned as "Understanding The Interface Between Anti-Dumping and Competition Law in India". The authors, after a detailed examination of various factors, have concluded that the competition policy is better equipped to ensure promotion of consumer welfare through protection of competition from the unfair and abusive conduct of competitors.

Chapter ten considers the issue of Legal Interpretation of Trade Liberalism: A Study of WTO Security Exception Clause. It is suggested that the power of the US presidential administration to take punitive measures arbitrarily by using national security should be restricted. In addition, from the judge Gary S. Katzmann's opinion on the case and the comparison of the application of section 232 and the WTO security exception clause, the reasons and rationality on the discretion of the President of the United States also discussed. Free trade and security exceptions compete with each other and depend on each other. Appropriate application of the safety exception clause can balance these two competing objectives, otherwise it will seriously damage the development of free trade. Therefore, the chapter concludes by calling on the United States to reduce unreasonable restrictions on the development of free trade, reduce trade protectionism, and actively participate in and promote the global economy.

Chapter eleven tries to undertake the first-ever study of the linkage between the number of BITs signed by South Asian countries and Investor-State Dispute Settlement Cases(ISDS) pending against these

countries. The chapter titled as "Growing Regime of BITs and Increase in ISDS Cases Against South Asian Countries: Assessing Concerns".

Chapter twelve attempts to define creativity and innovation and its dependency on the quality of IP standards. This chapter attempts to analyze the position of India in comparison to other countries in the WIPO-Global Innovation Index (2019) as well as the US Chamber of Commerce -7th International IP Index (2019) and highlights the strengths and weaknesses of India. The chapter also analyzes the various legislative, regulatory and policy changes brought in by India in the recent years to boost the innovation and enhance the IP standards in the country and attempted to provide suggestions. This chapter captioned as "Innovation & IPR–Status of India at the Global Platform: A Study" written by **Dr. K. Syamala**, Associate Professor, National University of Study and Research in Law (NUSRL), Ranchi.

Chapter thirteen captioned as "IP Protection of Plant Variety: An Unsettled Issue of International IP Law" written by **Dr. Gargi Chakrabarti**, Associate Professor, Coordinator DIPP IPR Chair on IPR, NLU Jodhpur. Corporations and companies engaged in scientific breeding tries to optimally utilize their products and also to get the temporary monopoly by getting intellectual property protection in the form of patent or plant variety protection, as applicable, to secure the economic return. Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS Agreement) is providing the minimum basic standard for all different kinds of intellectual property rights (IPRs) for

the Member States, but the provisions of intellectual property (IP) protection for plants and plant varieties are not very clear in TRIPS Agreement. This is an unsettled issue of international law and discussed in depth in the chapter.

Chapter fourteen relating to Patenting of Pharmaceutical Products and Covid-19 Pandemic: Some Reflections on IPRs v. Human Rights, the chapter concludes that the Covid-19 health hazard has created gulf between nations, group, classes such as elderly group, diseased person, person of disability, homeless, migrant and low income social group and nation. The vertical and stratified division of nation and deprivation of access to affordable and effective public health measures to low and middle income group, increasing incidence of discrimination and stigmatization and indifference towards principle of social inclusion at global level has had caused significant dent on International human right protection. The public health emergency arising out of Covid-19 pandemic and complex of health care equipment can be grouped under two heads one is the protection of proprietary right of innovation on the other hand are surgical, therapeutic, diagnostic kit and availability of necessary medical equipment. The pandemic and circumstances of extreme emergency has been exempted from monopoly constraint in larger interest of community. These exceptions in TRIPS and their reinforcement by Doha declaration is still not sufficient to meet the monstrous Public Health crisis faced by global community. Therefore going beyond economic consideration the Global Public Health crisis has been recognised as subject of Intangible asset under Global Public Goods

(GPG) construct soliciting International co-operation and evolving multi-pronged strategies to jointly defeat the Covid-19 Pandemic.

Chapter fifteen covers the issues relating to International Regulation of Traditional Cultural Expressions: Recent Development and Criticism under Intellectual Property Law. The chapter has given detailed discussion to the existing intellectual property regime which accords the protection to TCEs under the subject matter of copyright, trademarks, design, geographical indication and traditional knowledge at national and international level. Still, there have been found gaps and challenges with existing intellectual property protection for TCEs especially in digital environment. Consequently, there have been started negotiations for international legal instrument(s) on folklore or TCEs by Inter-governmental Committee (IGC) under World Intellectual Property Organization (WIPO), but no concrete and final agreement or instrument achieved till now. In light of this, the literature in chapter traces the recent development and criticism made under international intellectual property law for the protection of traditional cultural expressions especially under WIPO regime. First of all, it examines the different terms and definitions related with TCEs and guiding principles suitable for the effective protection of TCEs. It further makes an overview on the relationship between TCEs and IP and the development taken place in several sessions under WIPO-IGC.

Chapter sixteen relates to the dispute resolution mechanism related to commercializing Intellectual Property (IP) through licenses, assignments, agreements, etc. Arbitration being one of the most favoured mechanism

of dispute resolution inter se parties, the chapter unwraps the widely accepted practice of arbitrability of IP disputes in some major countries of the world and the contrary approach being practiced in India. This chapter also throws light on WIPO's arbitration mechanism, speed arbitration and other modes to resolve disputes in arena of IP. It is titled as "Arbitrability of Intellectual Property Disputes: International Scenario vis-à-vis India's Position".

Chapter seventeen includes, the Hague Conference on Choice of Court Agreements which came into force in 2015 is an important step in the direction of imparting greater certainty and enforceability to such agreements. India is not a signatory to this Convention. Is it time for India to take a step forward and become party to this Convention or the peculiar economic and social circumstances ordain that India should refrain from the same? The chapter looks into the important features of this Convention and undertakes critical analysis of India's approach towards the Convention under the caption "The Hague Convention on Choice of Court Agreements: A New Reason for India to reconsider its Stance towards International Conventions".

Chapter eighteen relates to the concepts of ordre public and public policy in private international law with an aim to trace their origin and subsequent evolution – both under the civil law system and the common law regime. While delving into and evaluating the nuances associated with the concepts of ordre public and public policy in terms of their application and effect in private international law, the focus will remain

on two crucial areas, i.e. choice of law and enforcement of foreign judgments. Also, the chapter presents it to fore the often-contentious issue of varying standards of ordre public or public policy resorted to by the national courts while interpreting the doctrines. The chapter included under the caption "Ordre Public and Public Policy in Private International Law: Evolution, Relevance, and Application".

Chapter nineteen covers the aspects of Foreign Fighters – nationals of one country taking part in armed conflicts in another country for ideological reasons – is now unfolding itself in many nuanced ways. Though this phenomenon is not completely new but the scale and threat posed by current phenomenon is unprecedented. The involvement of foreign fighters in Syria, Iraq and other adjoining areas under the banners of ISIL, ISIS etc. and its outfall around the world have no parallel in the history. These fighters are indoctrinated in the militant religious ideologies and after receiving extensive training in weaponry and terrorist methodologies, they become constant threats to the countries of their residence even after their returns from the battle fields. In order to curb the menace, the UN Security Council under its Chapter VII powers has adopted resolution 2178 in 2014. This resolution is in series of the Security Council resolutions against terrorism. It uses the term 'Foreign Terrorist Fighters' (FTFs) to describe the phenomenon. It prohibits inter alia the movements, recruitments and even engagement of such fighters for purposes related to armed conflicts. The chapter captioned as "Making Sense of Foreign Fighters Phenomenon under International Law".

Chapter twenty analyses the relationship of United Nations Security Council and ICC using both historical and a historical methods. It is an attempt to explore the dynamism of this relationship in the light of debates of political power versus legal power. It endeavors to map out the role of UNSC for the development, working and control of ICL. Further it seeks to highlight the democratic deficit and selectivity of cases and how it is shaped by this relationship. The chapter titled as "Relationship between the United Nations Security Council and the International Criminal Court: A Perspective from the Third World Approaches to International Law".

Chapter twenty one includes the empowerment of youth through the lens of human rights and duties education perspective. The strength of youth can contribute to better upliftment of the society with full potential. They need to re-shape and trigger with a value and duty based education. Every youth as a human possesses basic human rights which shall be recognised, protected and enforced with the help of law. It is captioned as "Youth Empowerment through Human Rights Education–Socio-Legal Discourse".

Chapter twenty two relates to the rights and needs of internally displaced persons (IDPs) remain as human rights and humanitarian problems. The IDPs unlike refugees do not have a separate legal status and their problems were taken up by international community only in 1990s.In order to address their concerns United Nations Human Rights

Commission in 1998 adopted the guiding principles on internal displacement as non-binding instruments. Though the guiding principles display characteristics of soft law, they nevertheless influenced countries to adopt a domestic legislation for protection of IDPs. The chapter titled as “Global Regime on Internally Displaced Persons: Issues and Challenges”.

Chapter twenty three relates to Severe Acute Respiratory Syndrome Corona virus 2 (SARS-CoV-2) has wreaked havoc across the globe by severely impacting and destructing both human lives and economies. The wide spread of the virus in more than 200 countries has put them on their back foot and Wuhan (in China) is considered as the epicenter and assumed originator of the SARS-CoV-2. The chapter discusses whether China has committed any “wrongful act” or has breached any obligation(s) of any international institution in the duration of transmission of the virus and if yes, can China be held responsible for adversely transmitting and impacting the other sovereign states. It is captioned as “The International Law of State Responsibility and Covid-19”.

Chapter twenty four covers the issues relating to the recent development of the legal regime available internationally as well as in India to regulate the activities in outer space. It is titled as “Privatization of Outer Space: Contemporary Developments”.

Chapter twenty five emphasizes the advancements in major aspects of artificial intelligence and their implications for international law and to

broaden the interplay of artificial intelligence in international laws. The arguments in the chapter hint towards the existing negligible international law framework and necessary modifications required for the governance of artificial intelligence under its multiple facades like robotics, automation, personhood of artificial intelligence, intellectual property rights if any, control, and deliberations about artificial intelligence as weapons and allied topics of research under International law. The chapter captioned as "Global Impact of Artificial Intelligence in International Law- Legal and Ethical Code".

Overall, the book provides a bird's eye view of the wide range of contemporary issues and developments in the world affairs; encompassing both the traditional as well as the nascent issues in the field of International Law in its framework. In its elucidation, the book draws from laws and cases from multiple subject jurisdictions to provide a better perspective and expound the direction that the law is currently taking a shape across the world. The book sets the ground work for understanding the existing trends in policies, legislations and cases in this field; coupled with an attempt to highlight the socio-political and socio-legal implications of such decisions in the domain of International Law.

The authors/contributors have successfully undertaken the gargantuan task of addressing the multitude of issues in this field. The book offers a crisp and lucid take on the diverse legal issues prevailing in the area of International Law. With summaries of the latest issues, cases and important legal provisions on specific issues, the book is available in a

single bound copy at an affordable price. The discourse is a good is an informative piece of work for teachers, students, researchers, social activists, academicians various stakeholders, and for those who are concerned with the provisions and developing perspectives of the International Law.

BACK ISSUES OF ALR

The following are the details of all the back issues of Amity Law Review. We would be happy to send you a copy of the desired issues, on request.

List of Contents of Vol.1 Part 1 Jan 2000-June 2000:

Title	Author
Torture as a challenge to Civil Society and the Administration of Justice	*Justice Markandey Katju*
Animal Cruelty and Protection Laws	*Maneka Gandhi*
The American Experience in the Field Of ADR	*Dana H. Freyer*
International Meditation- The U.K Experience	*Karl Mackie and Edward Lightburn*
Speeding up the wheels of Justice- Changes Needed for Court's Effective functioning	*Dr. A.M. Singhvi*
Mode of Search & Seizure under the Narcotic Drugs & Psychotropic Substances Act	*J.N. Barowalia*
Internet & The Copyright Law	*Manish Arora*
Legal Education & Legal Profession in India: How to Bridge the Gap?	*Dr. Surat Singh*
Interim relief under Consumer Protection Act	*Rajesh Gupta and Gunjan Gupta*
Justice for millions Half Clad-Half Hungry	*Dr. Janak Raj Jai*
India and the Geneva Convention	*Brig. Nilendra Kumar*
Whether the dishonour of a cheque can have a penal effect in case of Stop Payment	*S.N. Gupta*
The Debate on Capital Account Convertibility: The Indian Scenario	*Prof. A. Jayagovind*

Leading Questions in a Criminal Proceeding	*Vinay Reddy and Prakash N.*
Virtual Courts	*Rajesh Gupta*
The Executive Powers of the President	*Poornima Sampath*

List of Contents of Vol.1 Part 2, Vol.2 Part I; July 2000- June 2001:

Title	**Author**
The Spirit of Arbitration	*Fali S. Nariman*
Sexual harassment of women at workplace : In India & Abroad	*Sriniwas Gupta*
Information Technology and Legislative Design	*Nandan Kamath*
Alternative Dispute Resolution	*P.M. Bakshi*
Questions to accused by the court under the provisions of the Army Rule 58	*Brig. Nilendra Kumar*
Piracy Norms in Indian Cyberspace: A reading of the Act	*Rodney D. Ryder*
Definition of Law	*H.C. Jain*
Human Rights – Asian Initiative	*S. Parameswaran*
AIDS and Human Rights with special Reference to prison inmates	*Dr. Janak Raj Rai*
Convergence in India & Its Regulation	*Brig. Nilendra Kumar*
Legal Aspects of Credit Cards	*S.N. Gupta*

List of contents of Part 2, Vol. 2 July- Dec, 2001:

Title	**Author**
Global assault on terrorism & Law of war	*Maj. Gen. Nilendra Kumar*
The brides in the bath	*P.M. Bakshi*

Failure of Sterilization Operation- Claim for tort of Medical Negligence	*S.N. Gupta*
Defamation & the Internet: Analysing Risks and Liabilities under Indian Law	*Rodney D. Ryder*
Judicial Decision Making & Large Dams	*Videh Upadhyay and Sanjay Upadhyay*
Death Penalty and Constitution	*Dr. Janak Raj Jai*
About Cyber Squatting, Bad Faith and Domain Names	*Mayank Vaid*
Environment Poverty and the state in National Perspective	*Surendra Sahai Srivastava*
Rights of the Child and International Law: A Critical Study	*Vijay Kumar*
Proper Law Of a Contract	*Mayank Vaid*
Desirability of Restriction n Executive in the Appointment of Judges	*Surendra Sahai Srivastava*

List of Contents of Jan- June 2002, Part I Vol.3

Title	**Author**
The Mimansa Principles of Interpretation	*Justice Markandey Katju*
Matter of Evidence in Cases of Global Sponsors Terrorism	*Maj. Gen. Nilendra Kumar*
Rights of Minorities under the Constitution of India	*Prof. M.L. Upadhyay*
International Commercial Arbitration: An Indian Legal Perspective	*Anoop George Chaudhari*
Terrorism, Drug Trafficking & Mafia	*Dr. Janak Raj Jai*
Consumer Protection Act 1986- Complaint of Deficiency in Service by Bank	*S.N. Gupta*
Justifying Intellectual Property Rights in a Globalised World	*Nandan Kamath*

Incestuous Relations & Sexual Abuse of the Children in India & Abroad	*Shriniwas Gupta*
A study of Objectives of Juvenile Justice Act, 2000	*Dr. B. B. Das and Sunanda Padhy*
Regulations of Exchange Traded Financial Derivatives in India	*Sandeep Parekh*

List of Contents of Vol. 5 Part 2, Vol.6 Part 1 2004- June 2005

Title	**Author**
Legal Education in India	*Justice M. Katju*
The Doha Development Agenda on Disputes Resolution: An Indian Perspective	*Julien Chaisse, Debashis Chakraborty*
Judicial Legislation on the Status of Canteen Employees	*Suresh C. Srivastava*
The Growing Menace of Cyber Terrorism: Challenges before the Criminal Justice System	*Gurjeet Singh*
International Law on Water Resources	*Dr. B. L. Chavan*
Mandatory Import of Judicial discretion: Enforcement of Substantive rights through procedural Rules	*Rita Khanna*
The Historical Development of International Humanitarian Law: An Overview	*Harlovleen Kaur*
Gender Equality- The Vishakha Case and Onwards	*Sumit Basu*
Dual Citizenship for The Indian Diaspora: An Appraisal	*Siddhartha K.Wagav*
Vat- What and Why	*Sunita Kakkar*
Legal Issues Governing the Internet Contract	*Shamistha Ghos*

List of Contents of Vol. 7 No(s) (1 &2) Jan- December 2011

Title	Author
Institutional Reforms in Indian Higher Education	*Prof. (Dr.) N.R. Madhava Menon*
Roadshow Films Pvt. Ltd. Vs Net Limited: An Indian Standpoint on Secondary Liability of Copyright Infringement on the Internet	*Latha R. Nair*
All India Bar Examination- Facts, Reality, and the Law	*John Varghese*
Legal Representation in Quasi- Judicial Proceedings	*Dr. Rajan Varghese*
Informed Consent within Patient Autonomy as a Non Derogable Human Right	*Dr. Anil R. Nair*
Thousand Years' of War: Anti- Indianism in World Politics	*Dr. Saumyajit Ray*

List of Contents of Vol.8 January- June 2012

Title	Author
Contentious Judgments and their Impact on Consumers and Consumer Courts	*Prof. M. K. Balachandran*
Prostitution- The Unnoticed Dimensions in Indian Legal Scenario	*P. S. Seema*
'Total Disablement' Under the Employees Compensation Act' 1923- Need for a Fresh Look	*Dr. S. Surya Prakash*
Sustainable Development: An Important Tool for the Protection of Right to Environment and Right to Development	*Aneesh V. Pillai*
Human Rights and Administration of Criminal Justice	*Dr. Bhavish Gupta & Dr. Meenu Gupta*
Use of Method of Sociology in Constitutional Adjudication: A Critical Analysis of Cardozo's Perspectives	*Samarth Agrawal*

List of Contents of Vol. 8 No.(2) July- December 2012

Title	Author
Scope of ADR in Justice Delivery System in India	*K. K. Geetha*
Implementation of Right to Education as a Civil Right-A Critical Analysis	*M. Saktivel*
The Second Optional Protocol to the United Nations Convention against Transnational Organized Crime and Human Trafficking	*Shouvik Kumar Guha*
The SPS Agreement and Harmonization- A challenge	*Sumedha Upadhyay*
Gender Justice, Labour Laws and Policies in India	*Neelam Tyagi*

List of Contents of Vol. Jan-Dec. 9 2013

Title	Author
Cross Border Terrorism and Contradictions of Governance	*A.P. Singh*
Chief Justice's Power to Appoint Arbitrators :	*Guru Gyan Singh*

Judicial Approach	
NOTA Ensures Right to Secrecy Not Right to Reject	*Isheeta Rutabhasini*
Constitution Human Rights & Social Democracy in India- Revisited	*Alok Misra*
Implications of the Supreme Court Judgment on Presidential Reference in 2G Spectrum Allocation Case	*Kanwal D.P. Singh & Varun Chauhan*
Questioning- The Concept of Sustainable & Corporate Responsibility for 'Buda Nala' in the city of Ludhiana: A Study	*Ashish Virk & Aman A. Cheema*
Vulnerability of Laws Relating to Sexual Harassment of Women at Workplace in India	*Ashutosh Hajela*
Environment & Corporate Social Responsibility: A Constitutional Perspective	*Dr. Bhavish Gupta & Dr. Meenu Gupta*
Crime & Criminology in India	*Debajit K. Sarmah*

List of Contents of Volume 10 2014

Title	**Author**
Judicial Review of Administrative Action in India	*Dr. Rajan Verghese*
International peace and Security: An Appraisal of the Role of UN Security Council	*Dr. Bhavish Gupta & Dr. Meenu Gupta*
War against Terrorism: Effectiveness and law Applicability of International Humanitarian Law	*Dr. Md. Abdur Rahim Mia*
Shared Parentage In India	*Dr. V.P. Tiwari*
"The Mask of sanity" (A psychopath): Is there a need to include psychological Defense plea in criminal Jurisprudence?	*Dr. Aman Amrit Cheema*
Criminal Liability in cases of Gross Medical Negligence: Crossroads of a Medico- Legal Conundrum Ahead	*Dr. Debasis Poddar*
Abandoned and Divorced by NRI Husbands Harassment of Women in a Globalizing World	*Ms. Priti Rana*
Right to Information Under Environmental Law: The Changing Perspective	*Dr. Kshemendra Mani Tripathi*

Legal Dimensions of Disaster Management: Global and Indian Perspectives	*Dr. Alok Gupta*
Law Library: Importance & A Guide to Using It	*Dr. Chiranji Lal*

List of Contents of Volume 10 2015

Title	Author
Negotiation of Tax Treaties in Compliance of International Conventions and Domestic Laws	*Prof. (Dr.) Kanwal D. P. Singh*
Nature of Requirement of Number of Arbitrators, Judicial Approach: A Study	*Prof. (Dr.) Guru Gyan Singh*
Implementation of Right to Information Act: Prospects & Challenges	*Dr. Bhavish Gupta*
Enforced Disappearance: An Undefined Crime in Bangladesh	*Md. Raisul Islam Sourav*
Evaluation of the Rights of Issuing Bank Under Documentary Credit Law in India: A Critique	*Dr. Susmitha P. Mallaya*
Special Federal Provisions of the Indian Constitution: An Overview	*Dr. Vijay Saigal*
Environmental Pollution and Development of International Environmental Law	*Dr. Anshuman Mishra*
Legal Challenges of Commercial Surrogacy for Fertility Tourism in India	*Mr. Zubair Ahmed Khan*
Delayed Justice: Can We Choose to Ignore the Denial of Justice?	*Mr. Shaharyar Asaf Khan & Mr. Faisal Zafar*
Validity of Rules of Acceptance in Digital Contract Formation: A Comparative Study of English Law and Indian Law	*Dr. Reeta Garg*
Live in Relationship Vis-À-Vis Marriage: Emerging Legal Issues and Challenges in India	*Ms. Rupal Marwah*
	CASE COMMENTS
NALSA v. Union of India and Others, AIR 2014 SC 1863	*Prof. (Dr.) Meenu Gupta*
K. P. Manu v. Chairman, Scrutiny Committee for Verification of Community Certificate, AIR 2015 SC 1402	*Dr. Sanjay Gupta*

Rajiv Choudharie (HUF) v. Union of India and Others, (2015) 3 SCC 541	*Dr. Seema Sharma*
	BOOK REVIEWS
Emerging Trends in Corporate Governance: Legal Issues and Challenges in India	*Prof. (Dr.) Sanjeev Bansal*
Integrated Clinical Legal Education	*Prof. (Dr.) R. L. Kaul*

List of Contents of Volume 12 2016

Title	**Author**
A Case of Gender Discrimination in the Information Technology Enabled Sectors (ITES): Case Study in Bangalore	*Dr. Sapna S.*
Analytical Study of International Terrorism: A Research Problem	*Komal Audichya*
Development Induced Displacement: Judicial Trends in India	*Dr. Anurag Deep*
CBI at work- Problems and prescription for change	*Dr Upma Gautam*
Circumventing Public Participating in Land Acquisition: Loss of People's Voice	*Dr. Deeksha Bajpei Tewari*
Assisted Reproductive Technologies: Problems and Concerns	*Dr. Rajinder Kaur R. Andhawa*
The Concept of Right to Entitlement: A Critical Analysis	*Bhavna B. Rao*
A Socio Historical Perspective on Domestic Work	*Nikita Audichya*
Can Adam Plead Abortion As A Ground For Divorce Against Eve?: A Jurisprudential Analysis'	*Renjith Thomas & Devi Jagani*
What Turns The Good Samaritan Better After Road Disaster : Reading A Judicial Cynicism Over Legalism	*Dr. Debasis Poddar*
Case Comment on the Arbitration between the Republic of the Philippines and the People's Republic of China	*Dr. Kavitha Chalakkal*
A.M Bhattacharjee's Muslim Law and the Constitution – Book Review	*Dr. Qazi Mohammed Usmaan*

Public International Law–Book Review	*Dr. Rahul J Nikam*

List of Contents of Volume 13 2017

Title	Author
Freedom of Religion in Australia: An Introductory Outline	*Paul Babie*
Can Insider Trading Be Committed Without Trading?	*Russell Stanley Q. Geronimo*
Competition Law Compliance Strategy: A New Mindset for Corporates	*Dr. Qazi Mohammed Usman*
International Commercial Arbitration: Roadmap for A Bright Future	*Prachi Tyagi & Shaharyar Asaf Khan*
The Citizenship Amendment Bill 2016 and Its Impact on Migrants from South Asia: A Critical Analyses	*Ms. Kumari Nitu*
Comparative Analysis of Higher Education in India vis-a- vis Australia, United States of America and United Kingdom	*Manish Rohatgi*
Law, Science And Technology: Relative Developments	*Prof. (Dr.) Aditya Tomer*
Narcho-Analysis And Its Constitutionality In India: A Critical Study	*Ms. Sweta Singh & Dr. Arvind P. Bhanu*
Consumer Empowerment vis a vis Consumer Awareness	*Ms. Chhavi Gupta*
CASE COMMENT	
Waive Off cooling Period In Divorce By Mutual Consent Amardeep Singh versus Harveen Kaur	*Prof. (Dr.) Naresh Kumar Vats*
Independent Thought V. Union of India	
Marital Rape of Child Brides V. Prevention of Child Marriage	*Ms. Richa Krishan*
	BOOK REVIEW
Neelam and Shekhar Krishnamoorthy, Trial By Fire	*Subhradipta Sarkar*

List of Contents of Volume 14 2018

Title	Author
Spontaneously Emerging New Property Forms: Reflection on Dharavi	*Paul Babie*
The Paris Climate Change Agreement: An Analysis of The Legal, Economic and Other Underlying Dynamics	*Maureen Ngozi Agbasi and Olaitan O. Olusegun*
Delegation of Obligations Under Part III/IV of the Indian Constitution to Non State Actors: Ushering of Police State in India	*Dr. Ashutosh Hajela*
Individualism vis-à-vis Collectivism: A Constitutional Perspective	*Dr. Subir Kumar*
An Overview of the Practice and Prospect of Alternative Dispute Resolution in Criminal Justice System of Bangladesh: Promotion of Access to Justice	*Mohammad Atkarul Alam Chowdhury and Md. Hasnath Kabir Fahim*
Surrogacy Laws in India: Are We Ready for Womb on Rent?	*Ankit Kumar and Amit Kumar Padhy*
Democracy is Anti-Federalist – Putting Two Alpha Males Together	*Ashit Kumar Srivastava and Abhivardhan*
Citizenship and Assam: Legality and Politics Behind	*Himangshu Ranjan Nath*
Grundnorm for Effective International Commercial Arbitration in India	*Pallavi Bajpai*
Accumulative Harms of Improper Sanitation in India: An Appeal for Swachh Bharat	*Swati Bajaj*
Engendering Competition in Multisided Platform Economy	*Rakesh Kumar Sehgal and Dr. R L Koul*

List of Contents of Volume 15, 2019

Title	**Author**
Property in Indian Water: A Future Transformed by Climate	*Paul Theodore Babie*
To Appeal or Not to Appeal: Interrogating the Finality of the Decisions of The NICN	*Dr. Philip A. Folarin*
Clinical Legal Education Through Mediation Centers in Law Schools: An Analysis	*Dr. Vandana Singh and Dr. Rakesh Kumar*
Decoding Boundaries of Hate Speech During Elections: A Comparative Analysis of India and USA	*Dr. M. P. Chengappa and Manaswi*
Personal Law Reforms and the Muslim Women (Protection of Rights on Marriage), Act, 2019: A Study of Triple Talaq After 'Shayarabano'	*Dr. Naseema P. K*
Patent on Green Technology and Its Impact on Environmental Protection with Particular Reference to Technology Transfer Mandate Under Trips	*Dr. Sunil Gladson Mathias*
Contextualizing Disability in the Evolving Human Rights Paradigm	*Ashutosh Raj Anand and Kislay Soni*
Privacy and Different Technological Application Interphase: Indian Perspective	*Jayanta Ghosh and Late Naresh Pal*
	BOOK REVIEW

Towards the Renaissance: Shibli and Maulana Thanvi on Sharia	*Abhishek Gupta*
	CASE COMMENT
Abortion as a Fundamental Choice in Z V. State of Bihar	*Kaushiki Brahma*

List of Contents of Volume 16, 2020

Title	**Author**
Free Exercise, the Implied Freedom of Political Communication, And the Australian Constitution	*Gian-Luca Stirling and Paul Babie*
Religious Police as State Actors and Impediments to the Protection of Integrity of The Person in Nigeria: Borrowing A Leaf from Saudi Arabia	*Simon-Peter Ayoolwa St.Emmanuel*
Protest Needs to be Addressed by Setting up a New Machinery	*D.K. Bandyopadhyay and Arvind P. Bhanu*
University-Industry Collaboration: Institutionalizing the Culture of Innovation in Developing Countries	*Sumit Sonkar*
Conceptualising ‘Black Lives Matter’: Time to Consider Substantive Equality as A Fundamental Constitutional Guarantee	*Sawinder Singh*

Reasonable Accommodation of Persons with Disabilities in Employment and Workplaces	*Dr. Rumi Ahmed*
Contemporary Social Determinants and Law of Under-Age Marriage in India	*Dr. Shaveta Gagneja*
Child Rights in Jeopardy: Challenges in Recruiting Families for Foster Care in India	*Ms. Vasundhra and Dr. Subhradipta Sarkar*
Child Trafficking: An Ignominy to Indian Society	*Dr. Kumkum Agarwal*
Re-Aligning the Indian Legal Education System for Learning, Innovation and Service	*Dr. Amita Verma, Smriti Kanwar*
Negotiating the Boundaries - An Analysis of the Gambia v. Myanmar	*Ankur Sood*

FEEDBACK FORM

Would you take a moment to evaluate this issue of the "Amity Law Review"? Your valuable comments will help shape future issues. Thank you!

	Highly Appreciable	*Somewhat Appreciable*	*Not Appreciable*	*Did not Read*
Articles	☐	☐	☐	☐
Legal Watch	☐	☐	☐	☐
Book Review	☐	☐	☐	☐

We'd appreciate your comments and suggestions about this issue of the "Amity Law Review" in general:

____

____

____

____

____

____

____

Name: Mr./Ms. ____

Designation:______________________________Ph.: __________________

Organisation: ____

Address: ____

SUBSCRIPTION/MEMBERSHIP FORM

I wish to subscribe to Amity Law Review for 1/2/3 year(s)/Life Membership. A bank draft/cheque bearing No.__________dated_______________for Rs. ____drawn in favour of Amity Law School, Delhi, Towards Subscription/Membership for 1/2/3 Year(s)/ Life Membership is enclosed.

Name: ____

Designation: ____

Address: ____

____

Pin: ___________________________________

City:____________________________Country: ____________________

Phone: _________________________________Fax: ________________

E-mail: ____

Date :
Signature

SUBSCRIPTION RATES

Category Group	Amount (in Rs.)			
	1 yr.	2 Yrs.	3 Yrs.	Life Membership
Institution/Individual	200	300	400	1000
Alumni	100	200	300	800
Student	75	150	225	500

Please send the amount by DD/Crossed Account Payee Cheque Favouring

"Amity Law School, Delhi" for the timely receipt of the journal.

SUBMISSION GUIDELINES

ABSTRACT: All submissions should be accompanied by an abstract of about 200 words outlining the central argument(s) of the paper.

COPYRIGHT: Authors shall warrant that the papers submitted for publication do not infringe the copyright of any other person. Except agreed otherwise, the copyright of the articles published shall vest with the publisher, viz., the Amity Law School, Delhi. However, Amity Law School shall not be liable for any copyright infringement by the authors.

COVER PAGE: In order to facilitate anonymity, authors must mention their names, contact details and affiliations only on the cover page of the manuscript.

ENGLISH: Follow British spellings and punctuation conventions.

FONT SIZE AND STYLE: Kindly use Times New Roman, 12 point, for the main text and 10 point for footnotes.

HEADINGS: The headings should be used as per the following style:

- First heading: 12pt, bold, centre
- Second heading: 12pt, bold, left-aligned

- Third heading: 12pt, italics, centre

LENGTH: Articles should generally be between 8,000 and 10,000 words (including footnotes). Notes, Case Comments and Book Reviews should be between 3,000 and 5,000 words. The Editors may, however, accept longer submissions in appropriate cases.

LINE SPACING: The line spacing of main text of paper should be 1.5.

REFERENCES: Footnotes should be used and not endnotes.
FOOTNOTING STYLE FOR BOOKS AND ARTICLES: Books: Name of the author, Title of the book (in italics), Edition (if any), Name of the Publisher, Place of publication, Year, Page no. **Articles:** Name of the author, Title (in double quotes), Name of the journal, Volume, Year, Page No. (otherwise the mode of citation provided in the journal itself).

REVIEW PROCESS: All papers will be reviewed anonymously by the Editorial Board. Authors will be notified within 4-6 weeks about the status of their papers. Request for expedited review may not be entertained.

SUBSTANCE: Papers should contain an original contribution to scholarship by making a cohesive argument supported with appropriate authorities.

QUOTATIONS/QUOTATION MARK: Quotations over 50 words should be indented. Double quotation marks should be used; single quotation marks should be used only for quotes within a quotation.

COMPLEMENTARY COPIES: All authors will be provided 3 complementary copies of the issue in which their paper appears.

NOTE: Kindly send your Articles on *alsdpublications@amity.edu*

LIFE MEMBERS – AMITY LAW REVIEW

S/No.	Name	Designation	E-mail ID:	Present Address
1	Prof (Dr.) B P Singh Sehgal	Director	bpssehgal@amity.edu	O-215, Vivek Vihar, Sector - 82, Noida
2	Prof M K Balachandran	Chair Professor	mkbalachandran@amity.edu	
3	Prof (Dr.) Alok Mishra	Professor	amishra3@amity.edu	107, Sector-2C, Vasundhara, Ghaziabad
4	Prof.(Dr.) Mona Sharma	Professor	msharma6@amity.edu	18, Ishwar Nagar, Mathura Road, New Delhi
5	Prof.(Dr.) Isheeta Rutabhasini	Professor	irutabhasini@amity.edu	Flat No. 2/502, East End Apartment, Mayur Vihar, Phase – I,N.D
6	Prof.(Dr.) Ashok Kr. Kantroo	Professor	akantroo@amity.edu	704, Sector-8, Karnal, Haryana
7	Dr. Bhavish Gupta	Associate Professor	bgupta1@amity.edu	B-72,Sector-50, Noida, U.P.

8	Dr. Susmitha P. Mallaya	Assistant Professor	spmallaya@amity.edu	54-C, Pocket A-12, Kalkaji DDA Extension,N.D -19
9	Mr. Ashutosh Raj Anand	Asst. Professor	aranand@amity.edu ashutoshrajanand@gmail.com	C-111, Nirman Vihar, Delhi-92
10	Ms. Nisha Dhanraj	Asst. Professor (GR I)	ndhanraj@amity.edu	D-757, M.P. Colony, Paschim Vihar, New Delhi
11	Mr. Shaharyar Asaf Khan	Asst. Professor (GR I)	sakhan@amity.edu	F-28/B, 4th Floor, Abul Fazal Enclave, Jamia Nagar, New Delhi
12	Dr. Neelam Tyagi	Asst. Professor (GR I)	ntyagi@amity.edu n.neelamtyagi@gmail.com	108, Milano, Mahagun Mosaic Phase-II, Sector-4, Vaishali, Ghaziabad
13	Dr. Tapan Kumar Chandola	Asst. Professor (GR I)	tkchandola@amity.edu tapanc	29, Chauhan Mohalla, Madanpur, Khadar, New Delhi

			handola90@gmail.com	
14	Ms. Rubina Grewal Nagra	Asst. Professor (GR I)	rgnagra@amity.edu	B-4/118,3rd Floor, Safdarjung Enclave, New Delhi – 110 029
15	Dr. Alok Gupta	Asst. Professor (GR I)	agupta11@amity.edu	16/17,SF-2,Adharshila Appts, Sect-3, Rajendra Nagar, Sahibabad-201005 (U.P)
16	Mr. Manish Sharma	Asst. Professor	msharma20@amity.edu	A-22, Sector-47, Noida, U.P.
17	Mr. Debajit K. Sarmah	Asst. Professor (GR I)	dksarmah@amty.edu dksarmah@gmail.com	207, Hari nagar, Ashram, New Delhi - 110014
18	Dr. Reeta Garg	Asst. Professor (GR I)	rgarg2@amity.edu garg_reeeta@yahoo.com	1528, G.F-2, Sector-5, Vasundhara, Ghaziabad

19	Dr. Aparna Sharma	Asst. Professor	asharma23@amity.edu	16D, MIG Flats, Sector-10C, Noida
20	Ms. Gurpreet K. Johal	Asst. Professor	gkaur@amity.edu	C-21, UHW Chatra Marg, Delhi University, New Delhi-110007
21	Ms. Titasha Banerjee	Asst. Professor	tbanerjee@amity.edu	40/155, Chittranjan Park, Top Floor, Pkt-40, Near Market No.1, New Delhi-19
22	Ms. Venu Parnami	Asst. Professor	vparnami@amity.edu renuparnami@gmail.com	C-94,1st Floor, Mansarover Garden, New Delhi
23	Dr. Sanjana Sharma	Asst. Professor	ssharma37@amity.edu	E-801,Ranjit Vihar-I, Sector-23, Dwarka, New Delhi
24	Ms. Manjula Raghav	Asst. Professor (GR I)	mraghav@amity.edu	Flat no. 202, H2/20F, Mahavir Enclave, Delhi-110045
25	Ms. Vandana	Asst. Professor	vsehgal@ami	H.No.167/A, Sector-20,

	Sehgal	(GR I)	ty.edu vandana09@gmail.com	vandana09@gmail.com
26	Dr. Rakesh Rai	Asst. Professor (GR I)	rrai@amity.edu rakesh.rai33014@gmail.com	189 Bhai Parmanand Colony, Near Hospital, Mukherjee Nagar, Delhi-110009.
27	Dr. Sudha Jha Pathak	Asst. Professor (GR I)	sjpathak@amity.edu dr.sudhapathak@gmail.com	6064/4, D-6, Vasant Kunj, New Delhi-70
28	Ms. Deepti Thomas	Asst. Professor	dthomas@amity.edu	Mayur Vihar
29	Dr Gaurav Varshney	Assistant Professor	gauravmani1@gmail.com	99-D, "Akhil Mani Kunj", Bank Colony, Premier Nagar, Aligarh-202001, U.P.
30	Mr. Ashutosh Hajela	Assistant Professor (GR II)	ahajela@amity.edu	C-96, Pocket-6, Kendriya Vihar-II, Sector - 82, Noida - 201

				304
\ 3 1	Mr. Ashish Kaushik	Asst. Professor	akaushik98@amity.edu ashishkaushiklaw@gmail.com	Beta-2, SF Enclave, 203 Appt. no., Greater Noida, Gautam Budha Nagar, Noida, U.P
3 2	Dr Soumaiya Musharraf	Assistant Professor	smusharraf@amity.edu	504, Sabha Apartment, D-3, Sector - 44, Noida (U.P.)
3 3	Dr Vijay Saigal	Assistant Professor	vijsag76@gmail.com; vij_sag@rediffmail.com	Department of Law, University of Jammu, Jammu
3 4	Dr Sanjay Gupta	Associate Professor	sanjaytutu08@yahoo.in	Department of Law, University of Jammu, Jammu
3 5	Dr Anshuman Mishra	Assistant Professor	anshumanmishra73@gmail.com	4-D, Bank Road, Teacher's Colony, Allahabad - 211002
3 6	Mr. J. Ravindran	Assistant Professor	ravindran_vips@yahoo.co	Sector-3, Plot-3, Flat No. 1101, Astha Kunj

			m	Apartments, Dwarka, New Delhi - 110 078
37	Mr. Shyam Krishan Kaushik	Associate Professor	krishanshyam@yahoo.com	GH Lower, National Law University, Jodhpur - 342 304, Rajasthan
38	Prof. Subash C. Raina	Professor	scrainaclc@gmail.com	C-4 (29-31), Chhatra Marg, University of Delhi, Delhi
39	Dr Kanwal D P Singh	Professor	kanwal.als@gmail.com	B-55, Sector - 48, Noida
40	Dr V P Tiwari	Associate Professor-VIPS	tiwarivp@gmail.com	B-12/S-6, DLF, Sahibabad, Ghaziabad - 201005
41	Dr (Mrs.) Ashish Virk	Assistant Professor (Laws)	ashishkaur@yahoo.com	115, Sant Nagar, Civil Lines, Near Government College for Men, Ludhiana - 141 001
42	Dr Aman Amrit Cheema	Assistant Professor	aamanamrit@gmail.com	University Institute of Law, Punjab University, Regional Centre, Ludhiana

				(Punjab)
43	Dr Monika Bhardwaj	Assistant Professor	bhardmona@rediffmail.com	House No. 23, Resham Ghar Colony, Opposite Ambedkar Hall, Jammu - 180 001
44	Mr. Jitesh Kumar Dudani	Student	jitesh.roxx@gmail.com	
45	Ms. Garima Sharma	Student	garima9124@gmail.com	A-275/6, Gulabi Bagh, Near Nabeda Metro Station, Uttam Nagar, New Delhi-110059
46	Ms. Akshita Bansal	Student	bansal aaksh @gma il.com	
47	Mr. Sunil Gupta	Student	sunil.gupta@gmail.com	26, Margath Road, Ist Cross Road, Bangalore - 560025

Amity Law School

The School has been consistently ranked as one of the Top Law Schools in the Country since 2006. In the survey of the India's Best Law Colleges by India Today (THE INDIA TODAY NIELSEN SURVEY), the National Magazine, Amity Law School Delhi(ALSD) bagged 4th rank in India in 2017 moving up in ranks from Rank 11 in the same in 2016. In THE WEEK (HANSA RESEARCH SURVEY) ALSD was ranked at 12th in 2016 and 11th in 2015. THE OUTLOOK (OUTLOOK GFK MODE SURVEY), ALSD was ranked 10th in 2016.

The Amity Law School, Delhi(ALSD) has the unique distinction of being the first Law School in Delhi to start a 5-year integrated LL.B (H) programme in 1999. The School was established under the Ritnand Balved Education Foundation (RBEF) to achieve world-class legal education in the country. Dr. Ashok K. Chauhan, the Founder President of the Law School is a great philanthropist and a man of extraordinary vision. This great vision has been translated into practical reality through the establishment of various educational institutions including the Amity Law School. His vision for the Law School is to provide excellence in legal education and to produce quality lawyers with good moral principles and great human values. The President RBEF, Dr. Atul Chauhan has been providing dynamic leadership intervention in strengthening the vision of the Founder President. Presently the academic values are being inculcated by Prof. (Dr.) D. K. Bandyopadhyay, (Former Vice-chancellor, GGSIPU) Chairman, Amity Law Schools.

Amity Law School Delhi has been granted affiliation by the Guru Gobind Singh Indraprastha University, Delhi for running a 5-year Integrated LL.B (H) programme and the affiliation has been approved by the Bar Council of India. The programme is designed to incorporate teaching methods for realizing holistic legal education.

The programme offered by Amity Law School Delhi seeks to promote multi-disciplinary analysis of the socio-legal problems by designing/pursuing/giving effect toits course-structure and teaching methods to realize these objectives. The methods of teaching in the Law School include lecture, discussions, case law analysis, moot court training, project assignment and placement programmes. In addition, the School organizes seminars on contemporary legal issues, conducts clinical courses and train students in legal research and legal writing. By the time a student completes the 5-year programme he/she will be fully equipped with the required theoretical knowledge and practical experience in the field of law to become a full-fledged responsible member of the legal profession.

AMITY LAW SCHOOL (DELHI)
(An Institution of Ritnand Balved Education Foundation,
Affiliated to Guru Gobind Singh Indraprastha University, Delhi)
F-I Block, Amity University Campus, Sector-125, Noida-201313 (Uttar Pradesh)
Tel: 0120-4392681 E-mail: alsdelhi@amity.edu Website: www.amity.edu/als