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“For decades, the Supreme Court has witnessed claims resting on the essentiality of a practice that militate against the constitutional protection of dignity and individual freedom under the Constitution. It is the duty of the courts to ensure that what is protected is in conformity with fundamental constitutional values and guarantees and accords with constitutional morality. While the Constitution is solicitous in its protection of religious freedom as well as denominational rights, it must be understood that dignity, liberty and equality constitute the trinity which defines the faith of the Constitution. Together, these three values combine to define a constitutional order of priorities. Practices or beliefs which detract from these foundational values cannot claim legitimacy.”

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- Abhay S. Oka, J. in

Central Board of Dawoodi Bohra Community v. State of Maharashtra,
(2023) 4 SCC 541, para 34

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- To develop and promote academic research activities on various contemporary socio-legal issues and trends in law,
- To provide a platform to discuss the problems related to socio-legal and research issues.

The most valuable and suggestive comments of all the readers are always awaited and welcomed to achieve the goal. We are looking forward for your contributions. All communications shall be made only in electronic form emailed to **editor(at)lexrevolution(gmail).com**. The submission guidelines are available at website.

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A WAR OVER WORSHIP IN INDIA: A SPECIAL REFERENCE TO THE PLACES OF WORSHIP ACT, 1991

- Dr. Simmi Virk*

Abstract

Recently, the country has seen an increase in the number of lawsuits filed against Islamic structures/sites, alleging that these structures were created by Mughal rulers by destroying Hindu temples. We have the different lawsuits involving Hindu and Muslim places of worship, for example, Hindu Mahasabha plea on 'Shahi Idgah Mosque', 'Gyanvapi Mosque case', 'Taj Mahal an old Shiva temple', 'Vagdevi temple-Kamal Maula Mosque dispute', The Qutab Minar case etc. Thus, through this article, author tried to explain the opinion of our Apex Court on the validity of the Places of Worship Act, 1991. Author also explained the intention behind the enactment of the Act.

Keywords: Courts, Worship, Secularism, Constitutional, Verdict.

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* Former Associate Professor @ School of Law, Galgotias University, Greater Noida;
Former Assistant Professor @ Amity Law School, Delhi

INTRODUCTION

Following the ‘*Babri Masjid-Ram Janmabhoomi*’ judgement in 2019, the country has seen an increase in the number of lawsuits filed against Islamic structures/sites, alleging that these structures were created by Mughal rulers by destroying Hindu temples. Currently, we have the following lawsuits involving Hindu and Muslim places of worship, for example; Hindu Mahasabha plea on Shahi Idgah mosque, Gyanvapi mosque case, Taj Mahal an old Shiva temple, Vagdevi temple-Kamal Maula mosque dispute, The Qutab Minar case.¹

In Hindu Mahasabha plea on Shahi Idgah mosque case, the Hindu Mahasabha has petitioned in Mathura civil court for the ‘purification’ of the Shahi Idgah mosque. The petitioner claims that the mosque was erected on the sanctum sanctorum of Shri Krishna Janmabhoomi and has asked the court for permission to perform ‘Abhishek’ (purification) and worship Lord Krishna at the site.

In *Gyanvapi mosque case*, the Anjuman Intezamia Masjid committee of the mosque appealed the Allahabad High Court’s decision to permit a commissioner to survey, inspect, and videotape the mosque, over which both Hindus and Muslims have asserted the right to worship.

Another recent example is the Taj Mahal dispute, in which Bharatiya Janata Party leader Rajneesh Singh petitioned the Allahabad High Court to unlock over locked rooms within the Taj Mahal. Petitioner contended that several

¹ Zeb Hasan, “As Islamic Structures are Targeted, Why are Courts ignoring the Places of Worship Act?” The Wire, available at: <https://thewire.in/law/islamic-monuments-places-of-worship-act> (last visited on: 01.06.2023)

Hindu organisations thought the Taj Mahal was an ancient Shiva temple known as the ‘Tejo Mahalaya.’

In *Vagdevi Temple-Kamal Maula Mosque* dispute, litigation is related to the Bhojshala monument in Madhya Pradesh. Muslims assert that the building is the Kamal Maula Mosque, while Hindus believe it to be a Vagdevi (a Hindu temple dedicated to Saraswati) temple. The ASI came to an agreement that permits Muslims to recite *namaz* there every Friday and Hindus to perform *puja* there every Tuesday.

Similarly, in Qutab Minar litigation, it was claimed that during the building of the Quwwut-Ul-Islam property, Qutub Ud-Din Aibak, a general in Mohammed Ghori’s army, partially damaged the Shree Vishnu Hari temple and 27 Hindu and Jain temples. As such, it sought the reinstatement of the deities as well as the right to worship on the grounds.

INTENTION BEHIND ENACTING THE WORSHIP ACT

The Places of Worship (Special Provisions) Act, 1991, which prohibited any litigation attempting to change the nature of a holy place from what it was at the time of independence, was challenged in a petition in the Supreme Court. The Court asked the Centre for a response. In *Ashwini Kumar Upadhyay v. Union of India*² the petitioner contended that some provisions³ of the Act are unconstitutional and which bar the judicial review, a basic structure of the Indian Constitution. It also undermines the fundamental concept of secularism. According to the petition, the Act favours one

² WP (C) 1246/2021. See, <https://www.scobserver.in/cases/ashwini-kumar-upadhyay-union-of-india-constitutionality-of-the-places-of-worship-act-case-background/> (last visited on 18.07.2023)

³ The Places of Worship (Special Provisions) Act 1991, Sec. 2.

religious' group over another.

He also contended that the choice of date adversely impacts Hindus, Sikhs, Jains and Buddhists. By freezing the date in 1947, it violates Article 21, the right to life, as well as Articles 14 and 15, which ensure equality. Additionally, the petition claims that this breaches Articles 25, 26, and 29's guarantee of the freedom of religion.

The petitioner further argued, "destroyed temples are protected by personal laws". According to Hindu law, deities are 'eternal,' and they do not lose land when their idols are destroyed. Similarly, Muslim law require a 'waqf' to acquire a place of mosque. Thus, destruction of temples does not constitute a mosque under Islamic law. As a result, demolished temples are still considered temples under the law.

The Centre is not permitted to obstruct Hindus, Jains, Buddhists, or Sikhs from acquiring full control of houses of worship through legal means, nor is it permitted to pass legislation that would restrict the rights protected by Articles 25 and 26 especially regarding retroactive application.

The Petitioner also contended that that Pilgrimage is State subject⁴, and Centre is not permitted to obstruct Hindus, Jains, Buddhists, or Sikhs from acquiring full control of houses of worship through any judicial process and nor it is permitted to pass any legislation which would restrict the rights protected by Articles 25 and 26 and particularly regarding retroactive application. He stated that the Center has encroached its legislative powers by prohibiting the judicial review. The Supreme Court has reaffirmed that

⁴ See, Constitution of India, Schedule - 7, List - II , Entry - 7

the remedy of judicial review cannot be taken away.⁵ Thus as per the petition, sections 2, 3, 4 offend the basic dictum of Hindu law that “the Idol represents the Supreme Being and so its existence is never lost, and deity cannot be divested from its property even by the Ruler or King. Hence, Hindus have fundamental rights under Articles 25 and 26 to worship the deity at the place”.⁶

In *Mahant Ram Swaroop Das Case*⁷, the Court held that, “Even if the idol gets broken or is lost or stolen, another image may be consecrated and it cannot be said that the original object has ceased to exist. According to Vedas, Purans, Geeta and Ramayan, it is a settled principle that deity property will continue to be deity property and other’s possession will be invalid.”

SUPREME COURT ON WORSHIP ACT IN ITS AYODHYA JUDGMENT

The Places of Worship Act, passed by Parliament in 1991, safeguards the basic principles of the Indian Constitution. The preamble of the Indian Constitution emphasizes the importance of protecting the “liberty of thought, expression, belief, faith and worship”. It also emphasizes upon “human dignity and fraternity”. A fundamental precept of fraternity is tolerance, respect for and recognition of the equality of all religious faiths. This was particularly mentioned by the Union Minister of Home Affairs in his address to the Rajya Sabha on September 12, 1991, by stating:⁸

⁵ See, *Indira Gandhi v. Raj Narayan* (1975) SCC (Supp) 1, *Minerva Mills Ltd v. Union of India* (1980) 3 SCC 625, *Kibota Holobon v. Zachilhu* (1992) 1 SCC 309, *Ismail Farooqui v. Union of India* (1994) 6 SCC 360, *L Chandra Kumar v. Union Of India* (1997)(3) SCC 261, *I.R. Coelho v. State of T.N.* (2007) 2 SCC 1

⁶ Ibid

⁷ AIR 1959 SC 951, para 10.

⁸ *M Siddiq (D) Thr Lrs v. Mahant Suresh Das & Ors*, 2019 SCC OnLine 1440, para 82.

“I believe that India is known for its civilization and the greatest contribution of India to the world civilization is the kind of tolerance, understanding, the kind of assimilative spirit and the cosmopolitan outlook that it shows...the Advaita philosophy...clearly says that there is no difference between God and us. We must realize that God is not in the mosque or in the temple only, but God is in the heart of a person... Let everybody understand that he owes his allegiance to the Constitution, allegiance to the unity of the country: the rest of the things are immaterial.”⁹

In M Siddiq case it was held, “The law addresses itself to the State as much as to every citizen of the nation. The State, has by enacting the law, enforced a constitutional commitment and operationalized its constitutional obligations to uphold the equality of all religions and secularism which is a part of the basic features of the Constitution. The Places of Worship Act imposes a non-derogable obligation towards enforcing our commitment to secularism under the Indian Constitution. The law is hence a legislative instrument designed to protect the secular features of the Indian polity, which is one of the basic features of the Constitution. The Places of Worship Act is a legislative intervention which preserves non-retrogression as an essential feature of our secular values”.¹⁰

The rationale behind the law’s enactment was explained by the Union Minister of Home Affairs on the floor of the Lok Sabha on 10 September 1991:¹¹

⁹ Rajya Sabha Debates, Volume CLX, Nos. 13-18, pp. 519-520 and 522.

¹⁰ Supra note 8

¹¹

“We see this Bill as a measure to provide and develop our glorious traditions of love, peace and harmony. These traditions are part of a cultural heritage of which every Indian is justifiably proud. Tolerance for all faiths has characterized our great civilization since time immemorial. These traditions of amity, harmony and mutual respect came under severe strain during the pre-independence period when the colonial power sought to actively create and encourage communal divide in the country. After independence we have set about healing the wounds of the past and endeavoured to restore our traditions of communal amity and goodwill to their past glory. By and large we have succeeded, although there have been, it must be admitted, some unfortunate setbacks. Rather than being discouraged by such setbacks, it is our duty and commitment to take lesson from them for the future.”

SECULARISM AS A CONSTITUTIONAL VALUE

In *S. R. Bommai v. Union of India*¹², it was held, “Secularism is thus more than a passive attitude of religious tolerance. It is a positive concept of equal treatment of all religions. This attitude is described by some as one of neutrality towards religion or as one of benevolent neutrality. This may be a concept evolved by western liberal thought or it may be, as some say, an abiding faith with the Indian people at all points of time. That is not material. What is material is that it is a constitutional goal and a basic feature of the Constitution. Any step inconsistent with this constitutional policy is, in plain words, unconstitutional.”

The Places of Worship Act, 1991 is related to the obligations of a secular state. It demonstrates the India’s commitment to the equality of all religions.

¹² (1994) 3 SCC 1

Above all, this Act affirms the State's solemn duty to safeguard the equality of all religions and faiths being a basic feature of the Constitution.

Thus, Places of Worship Act was enacted with a purpose. The law speaks about the history and the future of our Nation. We all are aware of our history and the necessity for the Nation to address it, the declaration of independence was a watershed event in healing the wounds of the past. In *M Siddiq (D) Thr Lrs v. Mahant Suresh Das & Ors*¹³, “Historical wrongs cannot be remedied by the people taking the law in their own hands. In preserving the character of places of public worship, Parliament has mandated in no uncertain terms that history and its wrongs shall not be used as instruments to oppress the present and the future.”

The Places of Worship Act, 1991 was passed at such time, when the Ayodhya movement was gathering traction, led by the Vishwa Hindu Parishad (VHP) and supported by the Rashtriya Swayamsevak Sangh and the BJP.

The Act states that “the nature of all places of worship, with the exception of the Ram Janmabhoomi-Babri Masjid in Ayodhya, shall be maintained as it was on August 15, 1947, and that no suit shall lie in any court with respect to the conversion of a place of worship’s religious character, as it existed on that date”.

After analyzing the Act, we can find that the long title describes it as “an Act to prohibit conversion of any place of worship and to provide for the maintenance of the religious character of any place of worship as it existed

¹³ Supra note 8 at para 83

on the 15th day of August 1947, and for matters connected therewith or incidental thereto.”

Section 3¹⁴ of the Act makes it a crime to ‘convert’ a place of worship from one faith or sect to another. It restricts the conversion either in full or part of a worship place of any religious denomination into a worship place of a different religious denomination or even a different segment of the same religious denomination.

Section 4¹⁵ of the Act states that the place of worship’s character shall be determined as it was on August 15th 1947. It also prohibits Courts from

¹⁴ The Places of Worship (Special Provisions) Act, 1991; Sec. 3. - Bar of conversion of places of worship. - No person shall convert any place of worship of any religious denomination or any section thereof into a place of worship of a different section of the same religious denomination or of a different religious denomination or any section thereof

¹⁵ Ibid, Sec. 4. - Declaration as to the religious character of certain places of worship and bar of jurisdiction of courts, etc. - (1) It is hereby declared that the religious character of a place of worship existing on the 15th day of August, 1947 shall continue to be the same as it existed on that day.

(2) If, on the commencement of this Act, any suit, appeal or other proceeding with respect to the conversion of the religious character of any place of worship, existing on the 15th day of August, 1947, is pending before any court, tribunal or other authority, the same shall abate, and no suit, appeal or other proceeding with respect to any such matter shall lie on or after such commencement in any court, tribunal or other authority:

Provided that if any suit, appeal or other proceeding, instituted or filed on the ground that conversion has taken place in the religious character of any such place after the 15th day of August, 1947, is pending on the commencement of this Act, such suit, appeal or other proceeding shall be disposed of in accordance with the provisions of sub-section (1).

(3) Nothing contained in sub-section (1) and sub-section (2) shall apply to,-

(a) any place of worship referred to in the said sub-sections which is an ancient and historical monument or an archaeological site or remains covered by the Ancient Monuments and Archaeological Sites and Remains Act, 1958 (24 of 1958) or any other law for the time being in force;

(b) any suit, appeal or other proceeding, with respect to any matter referred to in sub-section (2), finally decided, settled or disposed of by a court, tribunal or other authority before the commencement of this Act;

determining whether any place of worship has been converted after August 15th 1947. It declares that the religious character of a place of worship “shall continue to be the same as it existed” on August 15, 1947. Further, this section says that “any suit or legal proceeding with respect to the conversion of the religious character of any place of worship existing on August 15, 1947, pending before any court, shall abate and no fresh suit or legal proceedings shall be instituted”.

Section 5¹⁶ of the Act precludes its application to the ‘Ram Janma Bhumi’ or ‘Babri Masjid’ site. This section stipulates that, “the Act shall not apply to the *Ramjanmabhoomi-Babri Masjid* case, and to any suit, appeal or proceeding relating to it”.

In an article published in *The Quint*, Justice Govind Mathur, a former Chief Justice of the Allahabad High Court, wrote, “The Places of Worship (Special Provisions) Act, 1991 was introduced as a measure to provide and develop glorious traditions of love, peace, and harmony.”¹⁷ In 2019, in Ayodhya verdict, the hon’ble Supreme Court had referred to the Places of

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(c) any dispute with respect to any such matter settled by the parties amongst themselves before such commencement;

(d) any conversion of any such place effected before such commencement by acquiescence; (e) any conversion of any such place effected before such commencement which is not liable to be challenged in any court, tribunal or other authority being barred by limitation under any law for the time being in force.

¹⁶ Ibid, Sec. 5.- Act not to apply to Ram Janma Bhumi-Babri Masjid.—Nothing contained in this Act shall apply to the place or place of worship commonly known as Ram Janma Bhumi-Babri Masjid situated in Ayodhya in the State of Uttar Pradesh and to any suit, appeal or other proceeding relating to the said place or place of worship

¹⁷ “Explained: The relevance of the Places of Worship Act ahead of the Gyanvapi Mosque case hearing in Supreme Court”, available at: <https://www.firstpost.com/india/explained-the-places-of-worship-act-gyanvapi-mosque-case-hearing-supreme-court-10683221.html> (last visited on: 07.06.2022)

Worship Act, 1991 and said it manifests the secular values of the Constitution and prohibits retrogression and it was held by court that¹⁸:

“In providing a guarantee for the preservation of the religious character of places of public worship as they existed on 15 August 1947 and against the conversion of places of public worship, Parliament determined that independence from colonial rule furnishes a constitutional basis for healing the injustices of the past by providing the confidence to every religious community that their places of worship will be preserved and that their character will not be altered”.

As in Ayodhya case, the Supreme Court remarked on the Act without any lis before it. However, unlike the 1994 bench, the 2019 bench understood the significance of the Act for the present as well as the future more clearly than its predecessors could.

Thus, five judges’ bench in M. Siddiq unanimously held that, “by prohibiting the conversion of any place of worship, the Act speaks to the future by mandating that the character of a place of public worship shall not be altered. Secondly, according to the judgement, the legislation seeks to impose a positive obligation to maintain the religious character of all places of worship as it was on August 15, 1947 when India became independent from colonial rule”¹⁹

Those who now criticise the imposition of an “arbitrary” cut-off date to bar conversion of any place of worship must read the full sentence to

¹⁸ Supra note 8

¹⁹ Ibid

understand why it is significant.²⁰

The expression ‘place of worship’ is defined in broadly to include places of public religious worship of all religions and denominations. It prohibits actions and judicial processes relating to the conversion of the religious nature of any worship place that existed on August 15, 1947. In addition, the Act prohibits the institution of fresh litigation or legal actions, as the court in *M. Siddiq* emphasised.²¹

Further, Speaking in support of the cut-off date of 15 August 1947, the Supreme Court cited former MP Malini Bhattacharya, who explained the significance of the cut-off date thus²²:

“But I think this August 15, 1947, is crucial because on that date we are supposed to have emerged as a modern, democratic and sovereign State thrusting back such barbarity into the past once and for all. From that date, we also distinguished ourselves...as State which has no official religion, and which gives equal rights to all the different religious denominations. So, whatever may have happened before that, we all expected that from that date there should be no such retrogression into the past.”²³

CONCLUSION

Thus, by reading *M. Siddiq* case carefully we will understand that the grounds of “arbitrary irrational retrospective cut-off date” and

²⁰ V. Venkatesan, “*Places of Worship Act: Is Supreme Court Unwittingly Helping Centre With Proxy Litigation?*” available at: <https://thewire.in/law/places-of-worship-act-ashwini-kumar-supreme-court-ayodhya> (last visited on: 08.06.2022)

²¹ Ibid

²² Supra note 8 at para 81

²³ Supra note 11 at pp. 443-444

“unjustified bar on the remedies against illegal encroachment on the places of worship and barbaric acts of the invaders” have already been settled in the judgement. This judgement unequivocally supported the legality of the 1991 Act. If the Supreme Court now goes along and reopens this question, it may undermine an essential ingredient of its Ayodhya ruling. A responsive government at the Centre should clearly oppose the hearing of the petition challenging the validity of 1991 Act in view of the court’s Ayodhya judgment in 2019.



ARMED CONFLICT AND ITS IMPACT ON THE PROTECTION OF THE RIGHT OF PWD TO SOCIO-ECONOMIC INTEGRATION IN CAMEROON: EMPIRICAL OBSERVATIONS FROM MEZAM DIVISION

- M. T. Thomas* & N. L. Munting**

Abstract

The overall goal of this study was to assess the impact of armed conflict in the English-speaking regions of Cameroon on the protection of the rights of PWDs to socio-economic integration in the Mezam Division. The main issue at stake here is that despite the multiplicity of national and international legislations protecting the right of PWDs to socio-economic integration, such as the 2010 Law on the Promotion and Protection of the Rights of PWDs in Cameroon; the Convention on the Rights of PWDs of 2006; and Common Article 4 of the Geneva Convention of 1949, the armed conflict in the English speaking regions of Cameroon has violated the integration of PWDs in Mezam Division into socio-economic life. To realize the aim, the Survey Research design was used to collect and analyse data from PWDs having visual, hearing, speech and locomotive impairments. Data was collected from a sample size of 130 using the Snow Ball Sampling Technique. The main instruments used to collect data were questionnaires. Data collected were analysed using simple descriptive statistics, with the use of the Statistical Package for

* MENGNO TARDZENYUY Thomas, Ph.D., Lecturer-Researcher, Faculty of Law and Political Science, The University of Bamenda, Cameroon; Email: mengnjothomas218@gmail.com

** NGWANWI Lidwina MUNTING, M.A. in Communication and Development, Social Worker, Northwest Regional Delegation of Social Affairs, Cameroon; Email: lidiwnangwanwi@gmail.com

Social Science (SPSS) Version 23. While using the Social Exclusion Theory as an analytical tool, the main findings showed that an overwhelming majority of PWDs have been socio-economically disintegrated in Mezam Division due to the ongoing armed conflict. It is from this perspective that policy recommendations have been made to the government, civil society organisations and the belligerents on the various ways PWDs can be holistically integrated into socio-economic life even amid the ongoing conflict.

Keywords: Armed conflict, Protection, Persons with disabilities, Socio-economic integration, Mezam Division



INTRODUCTION

Armed conflict has very negative repercussions on society at large. It does not only lead to death, but it has other consequences that extend far beyond it, such as forced migration and destruction of infrastructures¹. Social, political and economic institutions have been permanently damaged in many countries because of armed conflicts. Armed conflicts mostly affect the population. The most common of these armed conflicts is in Sub-Saharan Africa, which has witnessed different types of armed conflicts. Some of these conflicts are as follows: state-based, which involves violence between two organized groups where at least one party is the government; nonstate-based, which occurs between two organized groups, neither of which is a government; and one-sided events where an organized group, which could be the government or a non-government actor, targets civilians². The loss of human life, destruction of infrastructure, human capital, and institutions, political instability, and greater uncertainty associated with conflicts have impeded investment and economic growth in Africa. These conflicts have been particularly deadly. Estimates demonstrate that in the 1990s alone, verified conflict-related deaths totaled at least 825,000 over two-thirds of global conflict deaths. The high death toll was driven by the genocide against the Tutsi in Rwanda; the Ethiopian-Eritrean war; and protracted violence in Angola, the Democratic Republic of the Congo, Liberia, and

¹ S. Gates, H. Hegre, H.M. Nygård & H. Strand, “The consequences of internal armed conflict for development (part 1)” available at: <https://www.sipri.org/commentary/blog/2015/consequences-internal-armed-conflict-development-part-1> (last visited on: 10.09.2021)

² X. Fang, S. Kothari, C. McLoughlin & M. Yenice. “The Economic Consequences of Conflict in Sub-Saharan Africa”, available at: <https://www.imf.org/en/Publications/WP/Issues/2020/10/30/The-Economic-Consequences-of-Conflict-in-Sub-Saharan-Africa-49834> (last visited on: 10.09.2021)

Sierra Leone. As several of these conflicts ended in the early 2000s, the number of conflict-related deaths in the region fell sharply, reaching its lowest level of about 2,400 deaths in 2010.

Among the population, the most affected in armed conflict, which are often not documented are PWDs³. These are persons with diverse forms of long-term impairments⁴ that cannot properly act or behave like normal persons when confronted with a problem. It is worth noting that, over one billion people worldwide are living with some form of disability, with 16% of them attributable to armed conflict. Everyone living in armed conflict faces unthinkable challenges in striving to protect themselves and their loved ones. For persons with disabilities, those challenges can be even more daunting. Many come up against additional barriers in seeking protection; some, particularly women and girls with disabilities, are physically unable to flee violence and many are vulnerable to human rights violations, violence and abuse, including sexual abuse. Also, they face disproportionate hurdles in accessing limited services, such as nutrition, health and psychosocial support. Survivors of explosive ordnance incidents and their families are often left without the support they need – from the provision of prosthetics to socioeconomic reintegration assistance – to rebuild their lives⁵. It is against this backdrop that in events or crisis like armed conflict, this group

³ A. Priddy, “Disability and armed conflict”, The Geneva Academy of International Humanitarian Law and Human Rights, available at: <https://www.geneva-academy.ch/joomlatools-files/docman-files/Academy%20Briefing%202014-interactif.pdf> (last visited on: 10.09.2021)

⁴ World Health Organization, Disability: People with disability vs persons with disabilities. available at: <https://www.who.int/news-room/q-a-detail/people-with-disability-vs-persons-with-disabilities> (last visited on: 11.09.2021)

⁵ United Nations Mine Action Service, “Persons with disabilities in armed conflict” (2020) available at: <https://unmas.org/en/persons-with-disabilities-armed-conflict> (last visited on: 12.02.2021)

of people are the most affected. This affection can be manifested through their socioeconomic disintegration from society.

In Cameroon, the inception of the Anglophone crisis in 2016 and its escalation into an armed conflict has had negative repercussions on PWDs in the English-speaking regions of the Northwest and South West Regions. This crisis, which initially owes its origin in November 2016, is based on the politics of marginalized people of Anglo-Saxon origin in the educational and judicial⁶ domain. Since 2017, this conflict has transformed into an armed conflict between state armed groups and non-state armed groups demanding the separation of the English-speaking parts from Cameroon. Mezam Division, which is the geographical scope of this study, is one of the divisions found in the Northwest territory of the English-speaking region of Cameroon. PWDs have negatively been affected by this armed conflict. Besides losing their lives, many of them have had limited access to education and vocational training opportunities, information and engagement in cultural activities, infrastructure and housing and employment. This scenario of the affliction of PWDs in the ongoing armed conflict has been painted by Tebeck as follows: “...*A good number of persons with disabilities have lost their lives, a good number of them have lost property, their houses have been burnt... Almost all of them have lost economic activities and a good number of them have lost access to education...*”⁷. Human Rights Watch⁸ has also

⁶ T. T. Mengnjo, *The Institutionalization of the use of the Internet for political communication by the Social Democratic Party (SDP) Party in Mezam Division of Cameroon*, (Unpublished PhD Thesis) University of Dschang)

⁷ A. Tebeck, “Challenges faced by Cameroonian living with disabilities aggravated by the Anglophone crisis”, available at: <https://reliefweb.int/report/cameroon/cameroon-people-disabilities-caught-crisis> (last visited on: 12.06.2021)

noted that in the ongoing armed conflict, PWDS and older people have been among those killed, violently assaulted, or kidnapped. It is on the bases of the foregoing that this study sets is based on the following specific research questions:

1. What legal instruments protect the rights of PWDs to socio-economic integration in Mezam?
2. How has the Anglophone crisis affected access to education and vocational training of PWDS in Mezam?
3. To what extent has the Anglophone crisis affected access to information and participation in cultural activities of PWDs in Mezam?
4. To what degree has the Anglophone crisis influenced access to infrastructure, housing and transport of PWDS in Mezam?
5. How has the Anglophone crisis affected the participation of PWDS in sports and leisure activities in Mezam?
6. To what rate has the Anglophone crisis affected access to employment of PWDS in Mezam?

THEORETICAL CONSIDERATION: THE SOCIAL EXCLUSION THEORY

⁸ Human Rights Watch, “Cameroon: People With Disabilities Caught in Crisis”, available at: <https://reliefweb.int/report/cameroon/cameroun-people-disabilities-caught-crisis> (last visited on: 12.02.2021)

The Social Exclusion Theory is used to analyse how armed conflict has disintegrated PWDs from socioeconomic life. Proponents of this theory include French sociologist Emile Durkheim, British sociologists, Garry Runciman and Peter Townsend, a German Sociologist, Axel Honneth amongst others. Exclusion is a process by which certain individuals and groups are systematically blocked from their rights, opportunities and resources that are normally available to members of other groups within a society⁹.

According to Muddiman¹⁰, Social exclusion relates not simply to a lack of material resources, but also to matters like inadequate social participation, lack of cultural and educational capital, inadequate access to services and lack of power. The main assumption of this theory is that social exclusion theoretically emerges at the level of four correlated factors: deprivation of material resources; denial of social rights; prevention of social participation and prevention of cultural integration.

Social exclusion happens when society fails to keep all its groups and individuals together in its social sphere. This Theory has been criticized for laying more emphasis on the fact that social exclusion exists in all aspects of society. Despite this criticism, the theory is still relevant to this work. Its relevance is based on the fact that during the ongoing armed conflict in the Northwest and Southwest Regions, PWDs have not fully been socially and economically integrated in Mezam. This is justified by their limited access to

⁹ J Thanni, “Theories and Practices of Exclusion”, available at: <https://medium.com/@jacobthanni/theories-and-practices-of-exclusion-1-43904f64e26b> (last visited on: 12.02.2021)

¹⁰ D. Muddiman, “Theories of Social Exclusion and The Public Library” Working Paper 1. Available at: <http://eprints.rclis.org/7118/1/vol3wp1.pdf> (last visited on: 12.02.2021)

education and vocational training, housing conditions, and high unemployment amongst others.

METHODOLOGY OF THE STUDY

Research Method and Design

This article is purely a Mixed Method comprising both the qualitative and quantitative methods of data collection and analysis. In this light, the Descriptive Survey Research Design has been adopted because it gives room for data to be collected from a small segment of the population that can be generalized.

The population of the study, Sample Size and Sampling Technique

The study population comprised all PWDs in Mezam with a disability rate of 50 per cent with the following impairments: visual, hearing, locomotive and speech. Statistics obtained from the Northwest Regional Delegation of Social Affairs; Cameroon (2022) indicate that PWDs with a 50 per cent disability in Mezam Division are estimated at 200 persons.

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The sample size has been determined using the *Krejcie and Morgan Table for Determining the Sample Size*. According to this table, a population size of 200 inhabitants has a sample size of 132.

Since the target population is known and widely dispersed around the Division, the Snowball Sampling Technique was used to select the respondents. In this light, some leaders of PWDs were identified and administered questionnaires, and thereafter, they directed us to their peers for the same exercise.

Techniques of data collection and Analysis

The main research instrument used to collect data was a questionnaire. Out of the 132 questionnaires administered, 92 of them were retained, thus, giving a percentage retained rate of 68.14 per cent, which is above average.

Data collected via questionnaires were analysed using simple descriptive statistical tools, such as tables and percentages, with the aid of *Statistical Package for Social Science (SPSS Version 25)*.

THE LEGAL FRAMEWORKS GUARANTEEING THE PROTECTION OF THE RIGHTS OF PWDS TO SOCIO-ECONOMIC INTEGRATION

Legislations exist at the national and international levels guaranteeing the protection of the rights of PWDs to socio-economic integration in Mezam. These include the following:

National legislation

The main national legislation is Law No 2010/002 of 13 April 2010 relating to the protection of PWDs in Cameroon. Section 27 (1) of this law defines “*integration*” as any social or economic measure that guarantees the full participation of PWDs in social life. Section 27(3) notes that the socio-economic integration of PWDs includes the following domains:

1. Access to education and vocational training

Given access to education, Section 28 notes that it is the role of the state to take specific measures to guarantee PWDs access to education and

vocational training. These measures to this provision include the provision of their material and financial needs and pedagogic support. To Section 29(1), it is also the responsibility of the state to contribute to the expenses for the education and initial vocational training of destitute people and students with disabilities. Such cover entails partial and total exemption from the payment of school or university fees and the award of scholarships. The cover referred to also includes children born to destitute parents with disabilities. Also, Section 30 notes that children and adolescents suffering from any disability are entitled to conditions for education and apprenticeship. Section 31 argues that children with disabilities are entitled to special conditions, notably, age weave, assignment of suitable teaching aids and specialized teachers.

2. Access to information and participation in cultural activities

Section 32 notes that the state, regional and local authorities and civil society are to take all relevant measures to facilitate: access by PWDs to information and communication technologies; the participation of PWDs in productions and artistic works; and access of PWDs to equipment, activities and culture-related trades.

3. Access to infrastructure, housing, and transport

From the position of Section 33(1) government and private buildings and institutions opened to the public are to be designed to facilitate access and use by PWDs. When carrying out renovations or measure transformation works on buildings, Section 33(2) noted that existing government or private buildings and facilities opened to the public are to be refurbished such as to facilitate access and use by PWDs. The construction of passages according

to Section 33(4) is to take into account facilities reserved for PWDs. The state, regional and local authorities and civil society as per Section 34 are to take measures to provide PWDS preferential access to low-cost housing. Also, to Section 35(1), PWDs who are holders of a national disability card are to be entitled to preferential treatment in public and private transport in particular: reduction in transport fare; priority during embarking and disembarking and reserved seats.

4. Participation in sports and leisure activities

As per Section 36, the state, regional and local authorities and civil society are to take necessary measures to encourage the participation of PWDs in sports and leisure activities and are to organize their participation in international competitions. As such, to Section 37, a sports and physical education program for PWDS is to be included in the school and university systems.

5. Access of PWDs to employment

From the view of Section 38(1), PWDs with vocational training or vocational training are entitled to preferential treatment in particular through an aged weaver through recruitment into government or private jobs when competing with non-handicapped persons where the position is compatible with their conditions. According to Section 28(2), with equal qualifications, priority in recruitment is to be given to PWDs. Section 38(3) notes that disability should not be a reason for discriminating against a PWD for employment. Section 39 (1) postulates that PWDs who on account of the seriousness of their disability cannot withstand normal conditions of work in a natural setting are to be entitled to protected

employment. Protected employment refers to a workstation arranged by taking into account the functional possibilities and the performance capacities of the PWDs. Also, Section 40 (1) observed that the state, regional and local authorities and civil societies are supposed to encourage PWDs to establish private enterprises and cooperatives. Furthermore, Section 40(2) highlights that PWDs are to be encouraged through tax and customs duty waivers granted as the case may be and upon the proposal of the minister in charge of social affairs; the granting of business type of assistance; assignment of technical trainers; and loan guarantees and technical support from government development organizations, particularly within the framework of project studies and monitoring.

International legislations

At the international level, the socioeconomic integration of PWDs is defined by the UN Convention on the Rights of PWDs adopted on December 13th, 2006, and the fourth Geneva Convention of 1949 which protects civilians during armed conflict.

Lex Revolution
The UN Convention on the Rights of PWDs adopted on December 13th 2006

This convention was adopted by the United National General Assembly in 2006. It upholds the socio-economic integration of PWDs in the following ways:

- *Recognition of the right to education of PWDs by state parties*

With regards to education, Article 25 (1) of the CRPD stipulates that States Parties shall recognize the right of persons with disabilities to education. States Parties shall ensure an inclusive education system at all levels and

lifelong learning directed to: the full development of human potential and sense of dignity and self-worth, and the strengthening of respect for human rights, fundamental freedoms and human diversity; the development by persons with disabilities of their personality, talents and creativity, as well as their mental and physical abilities, to their fullest potential; and enabling persons with disabilities to participate effectively in a free society. Sub-section 1 argues that States Parties shall ensure that: firstly, that PWDs are not excluded from the general education system based on disability, and that children with disabilities are not excluded from free and compulsory primary education, or secondary education, based on disability; secondly, that PWDs can access an inclusive, quality and free primary education and secondary education on an equal basis with others in the communities in which they live. Sub-section 5 is of the view that States Parties shall ensure that PWDs can access general tertiary education, vocational training, adult education and lifelong learning without discrimination and on an equal basis with others.

- *Recognition of the right to health by state parties*

In the health sector, Article 25 of this convention notes that States Parties should recognize that PWDs have the right to the enjoyment of the highest attainable standard of health without discrimination based on disability. States Parties shall take all appropriate measures to ensure access for PWDs to health services that are gender-sensitive, including health-related rehabilitation. In particular, States Parties as per this law shall have to:

- provide PWDs with the same range, quality and standard of free or affordable health care and programmes as provided to other

persons, including in the area of sexual and reproductive health and population-based public health programmes;

- provide those health services needed by PWDs specifically because of their disabilities, including early identification and intervention as appropriate, and services designed to minimize and prevent further disabilities, including among children and older persons;
- provide these health services as close as possible to people's communities, including in rural areas;
- require health professionals to provide care of the same quality to PWDs as to others, including based on free and informed consent by, *inter alia*, raising awareness of the human rights, dignity, autonomy and needs of persons with disabilities through training and the promulgation of ethical standards for public and private health care;
- prohibit discrimination against PWDs in the provision of health insurance, and life insurance where such insurance is permitted by national law, which shall be provided fairly and reasonably;
- Prevent discriminatory denial of health care or health services or food and fluids based on disability.
- *Promotion of the habilitation and rehabilitation of PWDs by state parties*

In the domain of habilitation and rehabilitation, Article 26 of this convention noted that States Parties shall take effective and appropriate measures to enable PWDs to attain and maintain maximum independence,

full physical, mental, social and vocational ability, and full inclusion and participation in all aspects of life. To that end, States Parties shall organize, strengthen and extend comprehensive habilitation and rehabilitation services and programmes, particularly in the areas of health, employment, education and social services, in such a way that these services and programmes.

- *Promotion of the right to employment of PWDs by state parties*

In the sphere of work and employment, Article 27 is of the view that States Parties shall recognize the right of PWDs to work on an equal basis with others. This includes the right to the opportunity to gain a living by work freely chosen or accepted in a labour market and work environment that is open, inclusive and accessible to PWDs. States Parties shall safeguard and promote the realization of the right to work, including for those who acquire a disability during employment, by taking appropriate steps, including through legislation, to, *inter alia*:

- Prohibit discrimination based on disability about all matters concerning all forms of employment, including conditions of recruitment, hiring and employment, a continuance of employment, career advancement and safe and healthy working conditions;
- Protect the rights of PWDs, on an equal basis with others, to just and favourable conditions of work, including equal opportunities and equal remuneration for work of equal value, safe and healthy working conditions, including protection from harassment, and the redress of grievances;

- Ensure that PWDs can exercise their labour and trade union rights on an equal basis with others;
- Enable PWDs to have effective access to general technical and vocational guidance programmes, placement services and vocational and continuing training;
- Promote employment opportunities and career advancement for PWDs in the labour market, as well as assistance in finding, obtaining, maintaining and returning to employment;
- Promote opportunities for self-employment, entrepreneurship, the development of cooperatives and starting one's own business;
- Employ PWDs in the public sector;
- Promote the employment of PWDs in the private sector through appropriate policies and measures, which may include affirmative action programmes, incentives and other measures;
- Ensure that reasonable accommodation is provided to PWDs in the workplace;
- Promote the acquisition by PWDs of work experience in the open labour market;
- Promote vocational and professional rehabilitation, job retention and return-to-work programmes for PWDs.
- *Promotion of the right to an adequate standard of living and social protection by state parties*

In the arena of an adequate standard of living and social protection, Article 28 is of the position that, States Parties shall recognize the right of PWDs to an adequate standard of living for themselves and their families, including adequate food, clothing and housing, and to the continuous improvement of living conditions, and shall take appropriate steps to safeguard and promote the realization of this right without discrimination based on disability. It also moves on to stipulate that, States Parties have to recognize the right of PWDs to social protection and to the enjoyment of that right without discrimination based on disability, and shall take appropriate steps to safeguard and promote the realization of this right, including measures:

- To ensure equal access by PWDs to clean water services, and to ensure access to appropriate and affordable services, devices and other assistance for disability-related needs;
- To ensure access by PWDs, in particular women and girls with disabilities and older persons with disabilities, to social protection programmes and poverty reduction programmes;
- To ensure access by PWDs and their families living in situations of poverty to assistance from the State with disability-related expenses, including adequate training, counselling, financial assistance and respite care;
- To ensure access by PWDs to public housing programmes;
- To ensure equal access by PWDs to retirement benefits and programmes.

- Promotion of the right to participation in cultural life, recreation, leisure and sports by state parties

In the domain of participation in cultural life, recreation, leisure and sports, Article 30 postulates that, States Parties shall recognize the right of PWDs to take part on an equal basis with others in cultural life, and shall take all appropriate measures to ensure that PWDs:

- enjoy access to cultural materials in accessible formats;
- enjoy access to television programmes, films, theatre and other cultural activities, in accessible formats;
- enjoy access to places for cultural performances or services, such as theatres, museums, cinemas, libraries and tourism services, and, as far as possible, enjoy access to monuments and sites of national cultural importance.

It has also argued that States Parties shall take appropriate measures to enable PWDs to have the opportunity to develop and utilize their creative, artistic and intellectual potential, not only for their benefit but also for the enrichment of society. To enable PWDs to participate on an equal basis with others in recreational, leisure and sporting activities, States Parties shall take appropriate measures:

- To encourage and promote the participation, to the fullest extent possible, of PWDs in mainstream sporting activities at all levels;
- To ensure that PWDs have an opportunity to organize, develop and participate in disability-specific sporting and recreational activities

and, to this end, encourage the provision, on an equal basis with others, of appropriate instruction, training and resources;

- To ensure that PWDs have access to sporting, recreational and tourism venues;
- To ensure that children with disabilities have equal access with other children to participation in play, recreation and leisure and sporting activities, including those activities in the school system;
- To ensure that PWDs have access to services from those involved in the organization of recreational, tourism, leisure and sporting activities.

The Fourth Geneva Convention of 1949 on the protection of civilian population during armed conflict

The protection of civilians during armed conflict under International Humanitarian Law is regulated by the Geneva Conventions of 12 August 1949 and was later reinforced in the two Additional Protocols of 1977. PWDs constitute part of this civilian population. However, the adoption of the fourth 1949 Geneva Convention relative to the protection of the civilian population and its Additional Protocols was a particular advancement since it introduced the most specific humanitarian protection to civilians¹¹. As such, in the conduct of hostilities either of international or non-international character, parties to the conflict, whether State or non-state armed groups are required to minimize harm to the civilian population resulting from armed conflict. Persons who are no longer or not participating in hostilities

¹¹ R. Adam & G. Richard, *Documents on the Laws of War*, 299 (3rd Ed., Oxford University Press)

including civilians, the wounded, the sick as well as prisoners of war are entitled to respect for their lives, and parties to conflict must treat them humanely. The provisions of Common Article 3 to the Geneva Conventions of 1949 establish minimum standards that parties to the conflict, including state and non-state armed groups shall respect. Thus, under Common Article 3 warring parties are prohibited from engaging in acts of violence against persons taking no active part in hostilities including members of the armed forces who do not bear arms without any distinction whether the armed conflict is of international or non-international character. This provision reads as follows: In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict should be bound to apply, as a minimum the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those not taking part in hostilities, the sick, wounded, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever concerning the above-mentioned persons:

(a) Violence to life and person, in particular, murder of all kinds, mutilation, cruel treatment and torture;

(b) Taking hostage (c) Outraging upon personal dignity, in particular, humiliating and degrading treatment;

- (d) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.
- 2) The wounded and sick shall be collected and cared for. An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict. The Parties to the conflict should further endeavour to bring into force, using special agreements, all or part of the other provisions of the present Convention. The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.¹²

THE IMPACT OF THE ARMED CONFLICT IN THE ENGLISH-SPEAKING REGIONS OF CAMEROON ON THE SOCIO-ECONOMIC INTEGRATION OF PWDS IN THE MEZAM DIVISION

The socio-economic integration of PWDs in this light is measured in terms of their accessibility to education and vocational training; information and participation in cultural activities; infrastructures, housing and transport; participation in sports and leisure; and their access to employment as demonstrated below:

Impact of the armed conflict on PWDs' Access to Educational and vocational training

¹² Common Article 3 to the Geneva Conventions of 1949

According to findings obtained through questionnaires, the armed conflict has affected PWD's access to educational and vocational training activities as presented in Table 9 below:

Table 1: Opinions of respondents on the impact of the armed conflict on access to educational and vocational training in Mezam Division.

Item	F/%	A	SA	D	SD	N
Since the armed conflict started, I have had access to educational training	F %	7 7.6	5 5.4	57 62.0	19 20.7	4 4.3
I have access to vocational training in the course of the armed conflict	F %	10 10.9	3 3.26	56 60.9	16 17.4	7 7.60

Source: **Designed by Author (2022)**

Table 1 above which is based on the opinion of PWDs on their access to educational and vocational training indicates that most of them were not opportune to have access to these services since the start of the armed conflict. An overwhelming majority of 82.9% (62 % disagreed and 20.7% strongly disagreed) and 78.3% (60.9% disagree and 17.4% strongly disagreed) respectively denied that they had had no access to educational and vocational training before the outbreak of the crisis, meanwhile, a minority of 13% (7.6% agree and 5.4% for strongly agree) and 14.16% (10.9% for agreed and 3.26% for strongly agreed) of our respondents held

affirmation views. However, 11.9% of our respondents expressed neutrality on their part. This finding falls in line with a study carried out by *Thomas, Brush, Jüriloo, Maladwala, Mitra & Risser*¹³ in Syria, Iraq, Sudan and Sierra Leone, when these authors concluded that armed conflicts have negatively affected children with disabilities in these countries. While using the example of 2018 related to Syrian refugees in Jordan and Lebanon, these authors have equally pointed out that among children of 13 years and above, refugees with disabilities were more likely to be illiterate and to have never been enrolled in school. Another study by *Amnesty International*¹⁴ in Yemen also concluded that PWDs are disrupted from exercising their rights to education during armed conflict. Another work carried out by *Mitra*¹⁵ in Syria, Somalia and Palestine also agree with the mentioned finding when it concludes that children with disabilities experienced a greater risk of exclusion during the armed conflicts, as an estimated 9.7 million PWDs were forcibly displaced. More so, this finding is in accord with that carried out by *Amah*¹⁶ in Cameroon. Using the case of the armed conflict in Northern Cameroon about the counter against the Boko Haram terrorist groups, and the armed conflict in the English-speaking regions of

¹³ “Children with Disabilities In Situations Of Armed Conflict”, Discussion Paper, available at:

https://reliefweb.int/sites/reliefweb.int/files/resources/Children_with_disabilities_in_situations_of_armed_conflict.pdf (last visited on: 12.02.2021)

¹⁴ Amnesty International, “Living with Disabilities in Yemen’s Armed Conflict”, available at: <https://www.justice.gov/eoir/page/file/1227171/download> (last visited on: 12.02.2021)

¹⁵ G. Mitra, “Children with disabilities affected by armed conflict”, available at: <https://blogs.unicef.org/blog/children-with-disabilities-affected-by-armed-conflict/> (last visited on: 12.02.2021)

¹⁶ J.P.P.A. Amah, “Attack on the child’s right to education: reinforcing resilience using the human rights-based approach in Cameroon”, A Master’s Thesis in Human Rights and Democratisation, Ruhr-University Bochum, Germany, available at: <https://repository.gchumanrights.org/bitstream/handle/20.500.11825/1804/Pwa%20Abe%20Amah%20John%20Paul.pdf?sequence=1&isAllowed=y> last visited on: (12.02.2021)

Cameroon, Amah noted that these armed conflicts have negatively affected children's right to education especially those with disabilities. Specifically, the author underlined that vulnerable groups like PWDs, the girl-child and young children are more exposed to dangers. *Human Rights Watch*¹⁷ has corroborated this, by mentioning in their study of armed conflicts in Afghanistan, Cameroon, the Central African Republic, Israel/Palestine, Jordan, Lebanon, South Sudan, and Syria that children with disabilities in the face of armed conflict often face serious obstacles in accessing education. In Afghanistan, the study estimated that 80 per cent of girls with disabilities are not enrolled in schools.

IMPACT OF THE ARMED CONFLICT ON PWDS ACCESS TO INFORMATION AND PARTICIPATION IN CULTURAL ACTIVITIES

The impact of the armed conflict on PWDs' access to information and their participation in cultural activities is summarized in the Table below:

Table 2: Opinions of respondents on the impact of the armed conflict on access to information and participation in cultural activities of PWDs

Item	F/%	A	SA	D	SD	N
I had access to	F	71	7	7	5	2.4

¹⁷ Human Rights Watch, "Submission to the U.N. Special Rapporteur on the Rights of Persons with Disabilities regarding Persons with Disabilities in the Context of Armed Conflict June 8, 2021", available at: https://www.hrw.org/sites/default/files/media_2021/06/Protection%20of%20Persons%20with%20Disabilities%20in%20Armed%20Conflict.pdf (last visited on: 12.02.2021)

information and communication technologies (computers, laptops, phones, internet...) since the armed conflict	%	77.1	7.7	7.7	5.4	2.1
	F	14	4	57	3	14
Since the armed conflict began, I have been participating in all forms of artistic works	%	15.5	4.3	62.0	3.3	15.2
	F	7	3	46	28	8
With the on-armed conflict, I have been participating in cultural activities	%	7.6	33.3	50.0	30.4	8.7
	F	1	3	14	7	2

Source: **Designed by Author (2022)**

Table 2 above hosts the opinions of respondents on the rate of access to information and participation in artistic and cultural activities of PWDs. It indicates that 73.9% (66.3% Agreed and 7.6% strongly agreed) of our respondents had had access to information and communication technologies, such as computers, laptops, phones and the internet since the outbreak of the ongoing armed conflict, while 13% of the respondents shared a contrary view that they do not have access such ICT services (7.6% disagreed and 5.4% strongly disagreed). 13% of the respondents expressed neutrality.

Regarding their participation in artistic activities, findings demonstrated that the majority of PWDs have not been able to engage in these activities since the outbreak of this crisis. 65.3% (62.0% disagreed and 3.3% strongly agreed) of PWDs acknowledged that they have not had access to participate in various forms of artistic works, while 19.8% (15.5 agreed and 4.3 strongly agreed) of them noted that they have been participating in different forms of artistic works since the outbreak of the armed conflict in 2016.

Also, the vast majority of our respondents constituting 80.4% (50.0% disagreed and 30.4% strongly disagreed) of our total population affirmed that they have not been participating in cultural activities since the outbreak of the current armed conflict, while 10.9% (7.6% agreed and 3.3% disagreed) of the proportion of our respondents agreed, that they have been participating in cultural activities since this crisis began in 2016. However, 8.7% of our respondents remained neutral.

Thus, it is evident that although the majority of PWDs have access to information and communication technologies since the armed conflict began, it is worth noting that their participation in artistic and cultural activities has been limited. This is partly due to their displacement from their original localities and insecurities, which have been manifested through rampant kidnappings, indiscriminate shootings, torture and arrest. This finding is in accord with a study carried out by Tebeck¹⁸ on the challenges faced by Cameroonian living with disabilities aggravated by armed conflict. This study observed that as a result of this armed conflict, PWDs have limited access to public and private infrastructures, housing and transport facilities. He also noted that besides the fact that some of them have been

¹⁸ A. Tebeck, Op Cit

killed, wounded, or abandoned, others have been forced out of their homes. He further underlined that as the armed conflict persists, PWDs are faced with heightened dangers of attacks because most of them find it difficult to flee when their communities come under assault. *Human Rights Watch*¹⁹ has also agreed with this finding when it conducted a study on how PWDs are caught in the war. According to this study, displaced people with disabilities face additional difficulties in getting assistance and meeting their basic needs such as food, sanitation, and health care. *Thomas, Brush, Juuriloo, Maladhwala, Mitra & Rissner*²⁰ in their study on the impact of armed conflict on children with disabilities have as well noted that children in war-torn countries, like Syria, Sudan and Sierra Leone have had limited access to key infrastructures, housing and transport facilities due to the armed conflict.

IMPACT OF THE ARMED CONFLICT ON PWDS' ACCESS TO INFRASTRUCTURES, HOUSING AND TRANSPORT

The level of PWDs' access to infrastructures, housing and transport facilities is summarized in the Table below:

Table 3: Opinions of respondents on the impact of the armed conflict on access to infrastructures, housing, and transport of PWDS

Item	F/%	A	SA	D	SD	N
Since the armed conflict, I have had access to government	F % 13.0	12 1.1	1 58.7	54 16.3	15 10.9	10

¹⁹ Human Rights Watch (2019), Op Cit

²⁰ Thomas, E et al, Op Cit

and private buildings and institutions.						
I have access to housing in the ongoing armed conflict	F	11	3	59	16	3
	%	12.0	3.3	64.1	17.4	3.3
I can access public transport services during this armed conflict	F	17	2	56	11	6
	%	18.5	2.2	60.9	12.0	6.5

Source: Designed by Author (2022)

Table 3 shows the frequency distribution of respondents on the impact of armed conflict on access to infrastructures, housing and transports of PWDs. From the table, we observe that 75% (58.7% disagree and 16.3% for strongly disagree) of our respondents pointed out that they had no access to government and private buildings and institutions since the start of the ongoing armed conflict. Meanwhile, 14.1% affirmed that since the start of the ongoing crisis, their access to government and private buildings and institutions has not been affected. 10.9% indicated that they were neutral showing that they might or might not have had access to such institutions. With regards to access to housing, an overwhelming majority of 81.5% (64.1 disagree% and 17.4% strongly disagree) of our total respondents disagreed with the fact that since the ongoing armed conflict they have had no access to housing facilities. Whereas, 15.3% (12.0% agree and 3.3% strongly disagree) of our total respondents sampled affirmed that they have had

access to housing facilities. 3.3% of our respondents however remained indifferent.

In the domain of transport services, 72.9% (60.9% disagree and 12% strongly disagreed) of our respondents negated the fact that they have had access to public transport services in the course of this ongoing armed conflict as opposed to 20.7% (18.5 for agree and 2.2% for strongly agreed) who affirmed satisfaction with regards to their access to public transport services. Meanwhile, 6.5% of our total respondents stood on grounds of neutrality. From the mentioned information, it is clear that since the beginning of the armed conflict, PWDs' access to public and private infrastructures, housing and transport facilities has been limited. This has been affirmed by a 27-year-old visually impaired student, who narrated his ordeal to Human Rights Watch²¹ as follows:

Here in Bamenda, I don't have a place to stay, I sleep where the night meets me. It's difficult, I am displaced. I have no friends or family to rely on, and generally, people don't like to have a disabled person around, so if you are blind or deaf or on crutches, no one will welcome you home. I often struggle to find a shelter

THE IMPACT OF THE ARMED CONFLICT ON PWDS' PARTICIPATION IN SPORTING AND LEISURE ACTIVITIES

The participation rate of PWDs in sporting and leisure activities since the armed conflict is demonstrated in the Table below:

²¹ Human Rights Watch, Cameroon: People with Disabilities Caught in Crisis (2019) available at: <https://reliefweb.int/report/cameroon/cameroon-people-disabilities-caught-crisis> ((last visited on: 12.02.2021))

Table 4: Opinions of respondents on the impact of armed conflict on the participation of PWDs in sporting and leisure activities

Item	F/%	A	SA	D	SD	N
I have been taking part in sporting activities in the armed conflict	F	13	4	52	22	1
	%	14.1	4.3	56.5	23.9	1.1
As the ongoing armed conflict started, I have been taking part in leisure activities (swimming, dancing, partying etc.) before the	F	11	6	48	22	5
	%	12.0	6.5	52.2	23.9	5.4

Source: Designed by Author (2022)

Table 12 above depicts the opinions of respondents on the level of participation of PWDs in sporting and leisure activities pursuance to the beginning of the armed conflict. With regards to sporting activities, 76.1% (52.2% disagree and 23.9% strongly disagreed) were for the fact that they have not been participating in sporting activities as a result of the armed conflict and 20.7% (18.5% agree and 2.2% for strongly agree) affirmed that they have been part in sporting activities even with the ongoing armed conflict. Concerning leisure activities a majority of 76.1% (52.2 disagree and 23.9% strongly disagreed) of our respondents indicated that since the start of the ongoing armed conflict, they have not been taking part in leisure activities such as swimming, dancing, and partying among other things.

5.4% of our respondents remained neutral. On these points, it is therefore clear that the majority of PWDs in Mezam have not been participating in sporting and leisure activities as a result of the armed conflict.

THE IMPACT OF THE ARMED CONFLICT ON THE EMPLOYMENT OF PWDS

With the inception of the armed conflict, the employment rate of PWDs is summarized as follows:

Table 13: Opinion of respondents on the impact of armed conflict on the employment of PWDs

Item	F/%	A	SA	D	SD	N
I have been benefiting from tax and custom duty waivers in my business even in the ongoing armed conflict	F %	6 6.52	3 3.26	32 34.8	49 53.26	2 2.17
With the current armed conflict, I have been granted a business start-up assistance	F %	6 6.52	1 1.1	29 31.5	51 55.4	5 5.4
I have benefited from a loan and technical support to start up a business during the	F %	7 7.6	4 4.34	30 32.60	47 51.01	4 4.34

armed conflict						
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Source: Designed by Author (2022)

Table 4 shows that an overwhelming majority of the total respondents constituting 88.1% (53.3 strongly disagreed and 34.8% disagree) pointed to the fact that as a result of the armed conflict they have not been benefiting from tax and custom duty waivers in their businesses compared to a minority constituting 9.8% (6.5% for agree and 3.3 for strongly agreed) of respondents who attested that they have been benefitting from tax and customs waivers even with the ongoing armed conflict, hence boasting their business profits. 2.2% of the respondents expressed neutrality.

With regards to business start-up assistance, a vast majority of our respondents constituting 88.9% (31.5% disagree and 55.4% strongly disagreed) indicated that they have not been granted any business start-up assistance even with the persistence of the armed conflict. This was followed by 17.5% (6.5% agree and 11% strongly agree) of the total respondents who affirmed that they had been granted business start-up assistance since the start of the armed conflict. Meanwhile, 5.4% of our respondents were neutral.

In this same light, 83.7% (32.6 agree and 51.1% disagreed) constituting a majority of the sampled respondent for this study stated that due to the ongoing armed conflict they have not benefited from any loan and/or technical support to start up a business venture, while 11.9% of the respondents affirmed their reception of such benefits. 4.3% of the respondents remained neutral. On this note, it is visible that since the

outbreak of the current armed conflict, which began in 2016, the level of employment amongst PWDs is limited and has remained low.

CONCLUSION AND RECOMMENDATIONS

This write-up has demonstrated that the protection of the rights of PWDs in Mezam has been violated as a result of the ongoing armed conflict in the English-speaking regions of Cameroon. As a result of this armed conflict, the right of PWDs to education, vocational and training services has been violated. Their accessibility to information and communication technologies; and participation in sporting and leisure activities have also been hampered. Their accessibility to public and private institutions as well as transport and housing facilities is also limited. Added to this, their rate of employment in terms of benefits from tax and custom duty waivers; business startup assistance; and loan and/or technical support to start-up a business venture, have all been reduced. From this perspective, it can thus be concluded that the armed conflict in the English-speaking regions in Cameroon has limited PWDs' access to socio-economic integration in Mezam. This finding is in line with the Social Exclusion Theory, which postulates that social exclusion, which is faced by PWDs in Mezam due to the ongoing armed conflict, has manifested itself through the following four correlated ways: *material resources deprivation; social rights denials; prevention from social participation; and to prevention from cultural integration*. It is from this backdrop that the following policy options have been recommended to PWDs, the belligerents, the government and to civil society organisations on how to ensure the socio-economic integration of PWDs even amid this armed conflict:

1. PWDs

It is recommended that PWDs displaced by the armed conflict should identify themselves with deconcentrated government services, like the Ministry of Social Affairs and other related structures so that they could easily be assisted. They are also advised to form and join disability organisations to better defend their interest by putting pressure on public authorities to take decisions that are favourable to them.

2. *The belligerents*

It is recommended that since they are the main actors in the ongoing armed conflict, they should endeavour to respect International Humanitarian Law by upholding the Fourth Geneva Convention of 1949 protecting the civilian population, and other places open to the public, such as schools, civilian homes, hospitals and markets during armed conflict.

3. *The government*

It is recommended that it should work with its deconcentrated services and developmental partners in Mezam to ensure that PWDs are better integrated into all aspects of socio-economic life. In this light, the following measures could be adopted:

- Individuals judged to have violated the rights of PWDs in the course of this armed conflict should be investigated and punished within the fabric of the law. This could serve as a deterrence to others not to emulate.
- There is a need for a special "*redistributive program*" to be set up to rehabilitate PWDs displaced by the crisis. This program could be

designed and implemented in partnership with organisations or associations of PWDs.

- There is an urgent need for the government to adopt a more broad-based approach with all the key stakeholders at the grassroots to end this conflict. Permanently resolving this crisis will serve as a stepping stone towards assuring the socio-economic integration of PWDs. No meaningful integration can occur during armed conflict.

4. *The civil society organisation*

There is a need for them to work together to identify and assist all PWDs in dire need, who have been socio-economically disintegrated by the armed conflict. They could work with the population, community leaders, traditional authorities and other grassroots militant to identify and assist PWDs to be integrated into socio-economic life.

RIGHTS OF THE VICTIM PRESENT DAYS IN INDIAN JUDICIAL SYSTEM

- Ashwini Kumar Sahu* & Dr. Laxmikanta Das**

Abstract

The Indian legal system recognises and protects victims' rights. The Indian Constitution and other laws safeguard victim rights. These laws provide victims dignity and respect, the right to be informed and participate in the legal process, protection and safety, compensation and restitution, and legal counsel. Victim rights implementation remains difficult. Lack of understanding, poor infrastructure and resources, long judicial processes, victim blaming, societal stigma, and limited support services are these issues. The Criminal Law (Amendment) Act and victim compensation systems have been implemented to address these issues. These programmes enhance victim rights protection and assistance. To improve victim rights in the Indian court system, knowledge, infrastructure, legal procedures, social stigma, and support services must be increased. A victim-centric legal system that empowers and protects victims requires collaboration between government, non-government, and civil society. In conclusion, victim rights recognition is still a work in progress. India can establish a more inclusive and compassionate justice system that safeguards victims' rights by resolving current issues and encouraging a victim-centric approach.

Keywords: *Victim rights, Indian judicial system, Legislative framework, Criminal Procedure Code, 1973, Criminal Law Amendment Act, 2013.*

* Research Scholar @ P.G. Department of Law, Sambalpur University; Email: ashwinisahu0204@gmail.com

** Asst. Professor @ L.R. Law College, Sambalpur University; Email: laxmikantadas69@gmail.com

INTRODUCTION

The recognition and protection of the rights of victims have gained significant importance in the Indian judicial system. Traditionally, the focus of the legal system was primarily on the accused and the administration of justice.¹ However, in recent years, there has been a growing realization that victims also deserve attention, support, and justice. The rights of victims are now being acknowledged as an integral part of a fair and effective criminal justice system. The rights of victims in India are rooted in principles of justice, equality, and human rights.² They aim to address the physical, emotional, and psychological harm suffered by victims and provide them with avenues for seeking justice, restitution, and support.³ Recognizing the unique position of victims and the impact of crime on their lives, the Indian judicial system has made efforts to incorporate victim-centric measures into its legal framework. The Constitution of India guarantees certain fundamental rights to all citizens, including the rights to life, dignity, and equality.⁴ These rights extend to victims as well, and they form the foundation for the protection of victim rights within the Indian legal system. Additionally, the Criminal Procedure Code (CrPC) and other legislations have provisions that specifically address the rights and interests of victims in criminal cases.⁵ While progress has been made in recognizing and safeguarding the rights of victims, there are still challenges and gaps that need to be addressed. This includes issues such as lack of awareness about

¹ Upendra Baxi, *The crisis of the Indian legal system. Alternatives in development: Law, Stranger Journalism* (1982)

² M. Bajaj, "Human rights education: Ideology, location, and approaches" *Human Rights Quarterly*, 481 (2011)

³ Ibid.

⁴ The Constitution of India, 1950.

⁵ The Criminal Procedure Code, 1973, § 357A, Act No. 2 of 1974

victim rights, delays in justice, victim blaming, and limited access to support services. Efforts are being made to bridge these gaps and ensure that victims are provided with a fair and inclusive legal process that respects their rights and interests. In this comprehensive exploration of the rights of victims in the Indian judicial system, we will examine the legislative framework for victim rights, key rights afforded to victims, challenges in implementing these rights, recent developments and reforms, the role of non-governmental organizations (NGOs) and support services, international perspectives on victim rights, and areas for further improvement. By understanding and advocating for the rights of victims, we can contribute to a more just and compassionate society.

A. Historical perspective on victim rights in India

The concept of victim rights in India has evolved over time, reflecting the changing societal and legal perspectives on the treatment of victims within the judicial system. Historically, the focus of the legal system was primarily on punishing the offender rather than recognizing and safeguarding the rights of the victim.⁶ However, with the passage of time, there has been a gradual shift towards acknowledging and addressing the needs and rights of victims.⁷ In the past, victim rights were often overshadowed by the emphasis on the accused and the determination of their guilt or innocence. Victims, who were directly affected by the crimes committed against them, often faced numerous challenges in accessing justice, support, and redress.⁸ Their voices were frequently marginalized, and their rights were not

⁶ B. C. Feld, “The juvenile court meets the principle of offense: Punishment, treatment, and the difference it makes”, *68 BUL Rev.* 821 (1988)

⁷ Ibid.

⁸ D. W. Van Ness, “New wine and old wineskins: Four challenges of restorative justice” *4(2) CLF* 251 (1993)

accorded the attention and importance they deserved. However, in recent decades, there has been a growing recognition of the significance of victim rights in India. This transformation can be attributed to various factors, including changes in societal attitudes, advancements in legal frameworks, and international human rights developments.

One significant milestone in the recognition of victim rights in India was the amendment to the Criminal Law in 2008, which introduced provisions to safeguard the rights and dignity of victims during the investigation and trial stages.⁹ This amendment marked a notable departure from the traditional focus solely on the accused and highlighted the importance of recognizing and protecting the rights of victims within the criminal justice system. Furthermore, the Criminal Law (Amendment) Act of 2013 brought about significant changes by expanding the definition of sexual offenses, strengthening provisions relating to the protection of victims, and establishing guidelines for the speedy investigation and trial of cases involving crimes against women.¹⁰ Additionally, India has taken inspiration from international human rights instruments and conventions that emphasize the rights and needs of victims. The United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted in 1985, has served as a crucial reference point in shaping victim rights discourse in India.¹¹ Overall, while the historical perspective on victim rights in India may have been characterized by neglect and marginalization, there has been a gradual shift towards recognizing and addressing the rights

⁹ The Code of Criminal Procedure (Amendment) Act, 2008 No. 5 of 2009.

¹⁰ The Criminal Law (Amendment) Act, 2013 No. 13 of 2013.

¹¹ G. Melander, G. Alfredsson & L. Holmström, Declaration of basic principles of justice for victims of crime and abuse of power: Adopted by the General Assembly of the United Nations on 29 November 1985. *The Raoul Wallenberg Institute compilation of human rights instruments* 53 (2004)

and needs of victims. The evolving legal frameworks and changing societal attitudes have played a crucial role in ensuring that victims receive the necessary support, protection, and justice they deserve within the Indian judicial system.

LEGISLATIVE FRAMEWORK FOR VICTIM RIGHTS IN INDIA

The legislative framework for victim rights in India provides a foundation for recognizing and safeguarding the rights of victims within the judicial system. The Constitution of India, as the supreme law of the land, ensures the protection of fundamental rights, including the rights of victims. Additionally, the Criminal Procedure Code (CrPC) contains provisions that specifically address the rights and entitlements of victims. These provisions include the right to be heard, the right to be informed about the progress of the case, the right to be present during proceedings, and the right to seek compensation. Other relevant laws, such as the Protection of Children from Sexual Offenses (POCSO) Act, the Domestic Violence Act, and the Motor Vehicles Act, also contribute to the legislative framework by addressing specific forms of victimization and providing additional protections. Together, these legislative measures aim to empower victims, ensure their participation in the legal process, and protect their rights within the Indian judicial system.

A. *Constitution of India and victim rights*

The Constitution of India serves as the supreme legal document that lays the foundation for the rights and protections of all individuals within the country, including victims. While the Constitution does not explicitly enumerate specific victim rights, it encompasses fundamental principles and

provisions that indirectly safeguard the rights and interests of victims in the Indian judicial system.

1. Right to Life and Personal Liberty: The Constitution of India, under Article 21, guarantees the right to life and personal liberty. This broad-ranging right encompasses the physical, mental, and emotional well-being of individuals, including victims. It implies that victims have the right to live with dignity and security, free from any form of harm or violence.¹²
2. Right to Equality: Article 14 of the Constitution ensures the right to equality before the law and equal protection of the law. This provision implies that victims should be treated fairly and without discrimination based on factors such as gender, caste, religion, or socioeconomic status. It ensures that victims have an equal opportunity to seek justice and have their rights protected.¹³
3. Right to Remedies and Justice: The Constitution guarantees the right to remedies and justice through various provisions. Article 32 provides for the right to constitutional remedies, enabling victims to approach the Supreme Court of India directly in case of violation of their fundamental rights.¹⁴ Additionally, Article 39A promotes equal access to justice by emphasizing free legal aid and ensuring that justice is not denied due to economic or other barriers.¹⁵

¹² The Constitution of India, art. 21.

¹³ The Constitution of India, art.14.

¹⁴ The Constitution of India, art. 32.

¹⁵ The Constitution of India, art. 39A.

4. Right to Privacy: Although not explicitly mentioned in the Constitution, the Supreme Court of India has recognized the right to privacy as a fundamental right derived from the right to life and personal liberty. This right ensures that victims have control over their personal information and can safeguard their privacy during legal proceedings.¹⁶

B. *Criminal Procedure Code (CrPC) provisions for victims*

The Criminal Procedure Code (CrPC) is a significant legislation in India that governs the procedural aspects of criminal cases. It outlines the rights and responsibilities of various stakeholders involved in the criminal justice system, including victims. The CrPC incorporates provisions that specifically recognize and protect the rights of victims, ensuring their participation, support, and access to justice. Some key provisions related to victim rights under the CrPC include:

1. *Right to be Informed*: The CrPC mandates that victims be informed about their rights, the progress of the investigation, and the date and time of court proceedings. This provision ensures that victims have access to timely and accurate information regarding their case, enabling them to participate effectively in the legal process.
2. *Right to be Heard*: Victims have the right to be heard during court proceedings, particularly at critical stages such as bail hearings, plea bargaining, and sentencing. This provision allows victims to express their views, concerns, and demands, enabling their voices to be heard and considered by the court.

¹⁶ Supra note 12.

3. *Right to Assistance:* The CrPC provides victims with the right to legal representation and assistance. Victims have the option to engage a lawyer to represent their interests and protect their rights throughout the criminal justice process. In cases where victims cannot afford legal representation, the state may provide free legal aid.
4. *Right to Compensation and Restitution:* The CrPC recognizes the right of victims to seek compensation and restitution from the offender. Victims may claim compensation for the injuries, losses, and damages suffered as a result of the crime. The court is empowered to order the offender to pay compensation to the victim, ensuring financial redress and support.
5. *Right to Protection:* The CrPC includes provisions to ensure the safety and protection of victims and their witnesses. This can involve measures such as keeping the identity of the victim confidential, providing security arrangements, and granting protection orders to prevent intimidation or harassment.
6. *Right to Participate:* The CrPC acknowledges the right of victims to participate in the criminal proceedings, including the examination and cross-examination of witnesses. Victims can present their evidence, question witnesses, and provide inputs to the court regarding the appropriate sentence or punishment for the offender.

C. Other relevant laws protecting the rights of victims

In addition to the Constitution of India and the provisions within the Criminal Procedure Code (CrPC), several other laws have been enacted in

India to protect and uphold the rights of victims within the judicial system. These laws aim to provide comprehensive support, assistance, and justice to victims of various crimes. Some notable legislations that safeguard the rights of victims include:

1. *The Protection of Women from Domestic Violence Act, 2005*: This act is specifically focused on addressing domestic violence against women and provides a legal framework for victims to seek protection, assistance, and remedies. It recognizes the rights of women to live a life free from violence and ensures the provision of protection orders, shelter, medical support, and counseling services.¹⁷
2. *The Protection of Children from Sexual Offences (POCSO) Act, 2012*: The POCSO Act is aimed at protecting children from sexual abuse and exploitation. It defines various offenses against children and outlines the procedures for reporting, investigating, and prosecuting such crimes. The act emphasizes the rights of child victims, including the provision of support services, witness protection, and special courts for speedy trials.¹⁸
3. *The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989*: This act provides protection and safeguards against crimes committed against members of the Scheduled Castes and Scheduled Tribes. It recognizes the rights of victims from marginalized communities and includes provisions for compensation, rehabilitation, and special courts to ensure expeditious justice.¹⁹

¹⁷ The Protection of Women from Domestic Violence Act, 2005.

¹⁸ The Protection of Children from Sexual Offences (POCSO) Act, 2012.

¹⁹ The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989.

4. *The Juvenile Justice (Care and Protection of Children) Act, 2015:* This act focuses on the care, protection, and rehabilitation of children in conflict with the law, as well as children in need of care and protection. It incorporates provisions to ensure the rights and well-being of child victims, including their participation in legal proceedings, access to support services, and rehabilitation measures.²⁰
5. *The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013:* This act aims to prevent and address sexual harassment at workplaces and ensures a safe and conducive environment for women. It mandates the establishment of Internal Complaints Committees, provides for the redressal of complaints, and emphasizes the rights of victims to seek justice, support, and remedies.²¹

KEY RIGHTS OF THE VICTIM IN THE INDIAN JUDICIAL SYSTEM

The Indian judicial system recognizes several key rights of victims that are essential for their fair treatment and participation in the legal process. Firstly, victims have the right to be treated with dignity and respect throughout the proceedings, ensuring that their voices are heard and their experiences acknowledged.²² Secondly, victims have the right to be informed about the progress of their case, including relevant court dates,

²⁰ The Juvenile Justice (Care and Protection of Children) Act, 2015.

²¹ The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013.

²² The Code of Criminal Procedure, 1973 Act No. 2 of 1974.

decisions, and developments.²³ They also have the right to actively participate in the legal process, such as providing evidence, presenting arguments, and seeking legal remedies.²⁴ Additionally, victims have the right to protection and safety, including measures to prevent intimidation, harassment, or retaliation.²⁵ Furthermore, victims have the right to compensation and restitution, which includes the possibility of receiving financial support for the harm they have suffered.²⁶ Lastly, victims have the right to legal assistance and representation, ensuring that they can effectively navigate the complexities of the legal system and access justice.²⁷ These key rights collectively aim to empower victims, restore their dignity, and promote their active involvement in seeking justice and redress.

CHALLENGES AND ISSUES IN IMPLEMENTING VICTIM RIGHTS

Despite the progress made in recognizing victim rights in the Indian judicial system, several challenges and issues persist in their effective implementation. One significant challenge is the lack of awareness and understanding among victims themselves, as well as the general public, about their rights and the available support mechanisms. Inadequate infrastructure and resources further hamper the provision of timely and comprehensive support services to victims. Lengthy legal proceedings and delays in justice delivery pose another challenge, often causing frustration and discouragement for victims seeking resolution. Additionally, victim blaming and social stigma continue to exist, hindering the willingness of

²³ Ibid.

²⁴ Ibid.

²⁵ Ibid.

²⁶ Ibid.

²⁷ Ibid.

victims to come forward and report crimes. Moreover, limited access to support services, especially in remote areas, creates barriers for victims in receiving the necessary assistance and rehabilitation they require. Addressing these challenges requires concerted efforts from all stakeholders, including the government, legal authorities, NGOs, and the society at large, to raise awareness, strengthen support systems, streamline legal processes, and combat societal attitudes that impede the effective implementation of victim rights.

A. Lack of awareness and understanding of victim rights

One of the significant challenges in implementing victim rights within the Indian judicial system is the lack of awareness and understanding among various stakeholders, including victims themselves, legal professionals, and law enforcement agencies. This lack of awareness contributes to several issues that hinder the effective implementation of victim rights. Some of these challenges include:

1. *Limited Knowledge among Victims:* Many victims may not be aware of their rights within the legal system. They may not know the specific rights they are entitled to or how to exercise them. This lack of knowledge can result in victims being unable to assert their rights effectively or seek appropriate remedies.
2. *Inadequate Training of Legal Professionals:* Lawyers, judges, and other legal professionals may have limited training or awareness about victim rights. This can lead to a lack of sensitivity and understanding when interacting with victims, potentially resulting in their rights being overlooked or not adequately addressed.

3. *Insufficient Information Dissemination:* There is a need for improved dissemination of information regarding victim rights. This includes creating awareness campaigns, distributing informative materials, and conducting educational programs to inform the public, victims, and relevant stakeholders about the rights available to victims.
4. *Language and Literacy Barriers:* Language and literacy barriers can pose challenges in accessing and understanding victim rights. Victims who do not understand the legal terminology or who are not proficient in the official language of legal proceedings may struggle to comprehend their rights and effectively participate in the legal process.
5. *Cultural and Social Factors:* Cultural and social factors can influence the awareness and understanding of victim rights. In some cases, societal norms, biases, and stigmas may prevent victims from asserting their rights or seeking help. Cultural sensitivity and awareness are crucial in addressing these challenges and ensuring that victims are aware of their rights.
6. *Inconsistent Implementation:* The implementation of victim rights may vary across different jurisdictions or among different law enforcement agencies. Inconsistencies in the application and enforcement of victim rights can lead to unequal access to justice and undermine the overall effectiveness of victim protection measures.

B. Inadequate infrastructure and resources

Another significant challenge in implementing victim rights within the Indian judicial system is the inadequate infrastructure and resources available to support victims. Insufficient infrastructure and resources contribute to various issues that hinder the effective implementation of victim rights. Some of these challenges include:

1. *Lack of Victim Support Services:* There is a shortage of dedicated victim support services, such as counseling, crisis intervention, and rehabilitation programs. Victims often face difficulties in accessing the necessary support and assistance they require to cope with the physical, emotional, and psychological consequences of the crime.
2. *Limited Shelter and Safe Housing Facilities:* Adequate shelter and safe housing facilities for victims, particularly in cases of domestic violence, trafficking, or sexual assault, are often lacking. This poses a significant challenge as victims may be forced to return to unsafe environments or may not have access to appropriate accommodations.
3. *Insufficient Funding:* Inadequate funding for victim support programs and initiatives poses a significant hurdle in providing comprehensive services to victims. Limited financial resources hinder the development and maintenance of victim support infrastructure, including the establishment of victim support centers and the availability of trained professionals.
4. *Overburdened Legal System:* The Indian judicial system is often overburdened with a high volume of cases, resulting in delays and lengthy legal proceedings. This can adversely affect victims who may

experience prolonged uncertainty, frustration, and difficulties in obtaining timely justice and accessing their rights.

5. *Limited Training and Capacity Building:* The training and capacity building of professionals involved in victim support, including police officers, prosecutors, and judges, is often insufficient. Lack of specialized training may result in inadequate understanding of victim rights, improper handling of cases, and a lack of sensitivity toward victims' needs.
6. *Geographical Disparities:* There are significant geographical disparities in the availability of victim support services and resources. Remote areas and marginalized communities may have limited access to necessary infrastructure, making it challenging for victims in these regions to access their rights and seek appropriate assistance.

C. Lengthy legal proceedings and delays in justice

One of the significant challenges in implementing victim rights within the Indian judicial system is the issue of lengthy legal proceedings and delays in delivering justice. This challenge affects victims in multiple ways and poses obstacles to the effective realization of their rights. Some key issues related to lengthy legal proceedings and delays in justice include:

1. *Prolonged Trauma for Victims:* Lengthy legal proceedings can subject victims to prolonged trauma, as they are continuously reminded of the crime and its aftermath. The extended wait for justice can have severe emotional and psychological consequences for victims, further exacerbating their suffering.

2. *Reduced Confidence in the Legal System:* Delays in justice erode victims' confidence in the legal system. When justice is not delivered in a timely manner, victims may feel discouraged, disillusioned, and lose faith in the effectiveness of the system, which can impact their willingness to actively participate in the legal process.
3. *Impact on Testimonies and Evidence:* As time passes, witnesses' memories can fade, and evidence may become less reliable or difficult to obtain. Delayed justice may result in challenges in presenting a strong case, as crucial testimonies and evidence may become compromised, affecting the overall outcome of the legal proceedings.
4. *Inequality in Access to Justice:* Lengthy legal proceedings disproportionately affect marginalized and economically disadvantaged victims. They may face additional barriers in navigating the complex legal system and may lack the financial resources to sustain their pursuit of justice over an extended period.
5. *Burden on Victims:* Lengthy legal proceedings can impose a significant burden on victims, who may have to bear the costs associated with attending court hearings, providing necessary documentation, and managing the logistical aspects of their case. This can place additional stress on victims who are already coping with the aftermath of the crime.
6. *Backlog of Cases:* The Indian judicial system faces a backlog of cases, leading to significant delays in the resolution of legal matters. This backlog further contributes to the delays in justice and affects

victims who are waiting for their cases to be heard and decided upon.

D. *Limited access to support services for victims*

Limited access to support services for victims presents a significant challenge in implementing victim rights within the Indian judicial system. Access to comprehensive support services is crucial for victims to recover from the physical, emotional, and psychological impact of crimes and to effectively participate in the legal process. Some key issues related to limited access to support services for victims include:

1. *Insufficient Availability of Support Services:* There is a lack of adequate support services, such as counseling, medical assistance, crisis intervention, and rehabilitation programs, specifically tailored to meet the needs of victims. This scarcity hinders victims' ability to access the necessary resources for their recovery and well-being.
2. *Geographical Disparities:* Limited access to support services is often more pronounced in rural and remote areas, where the availability of specialized support facilities is scarce. Victims residing in these regions face additional barriers in accessing the support they require, including financial constraints and limited transportation options.
3. *Lack of Coordination among Stakeholders:* The lack of coordination and collaboration among different stakeholders, including government agencies, non-governmental organizations, and community support groups, can contribute to limited access to support services. Fragmented efforts and insufficient integration of services result in gaps in service delivery for victims.

4. *Financial Constraints:* Victims may face financial constraints that prevent them from accessing support services. Many victims, especially those from economically disadvantaged backgrounds, may struggle to afford the costs associated with medical treatment, counseling sessions, or other support services.
5. *Language and Cultural Barriers:* Language and cultural barriers can further impede access to support services. Victims who do not speak the official language or who belong to marginalized communities may encounter difficulties in seeking help and understanding the available resources.
6. *Lack of Awareness about Available Services:* Many victims may be unaware of the support services available to them. Limited awareness and information dissemination prevent victims from accessing the necessary support and resources, further exacerbating the challenges they face.

RECENT DEVELOPMENTS AND REFORMS IN VICTIM RIGHTS

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In recent years, there have been notable developments and reforms aimed at strengthening victim rights within the Indian judicial system. One significant reform is the amendment to the Criminal Law (Amendment) Act, 2013, which introduced provisions to enhance the safety and security of women and address issues related to sexual offenses.²⁸ This amendment expanded the definition of sexual offenses, increased penalties for certain crimes, and introduced new offenses such as acid attacks and stalking. Additionally,

²⁸ Supra note 10

there has been a focus on establishing victim compensation schemes, which aim to provide financial support to victims for medical expenses, rehabilitation, and loss of earnings. These schemes recognize the importance of addressing the financial repercussions faced by victims and provide them with a pathway towards recovery and restoration. Such developments highlight the commitment of the Indian government and legal authorities to continually review and update laws and policies to better protect and support victims within the judicial system.

A. Amendment to the *Criminal Law (Amendment) Act, 2013*

In recent years, significant developments and reforms have taken place in the realm of victim rights within the Indian judicial system. One notable reform is the amendment to the Criminal Law (Amendment) Act, 2013, which introduced several provisions aimed at enhancing the rights and protection of victims.²⁹ The key aspects of this amendment relevant to victim rights are:

1. *Definition and Recognition of Victims*: The amendment expanded the definition of victims to include not only individuals directly affected by the crime but also their relatives and dependents. This broader definition recognizes the ripple effects of the crime on the victim's immediate circle and ensures their rights are considered and protected.
2. *Right to Privacy and Confidentiality*: The amendment recognized the right to privacy and confidentiality for victims, especially in cases of

²⁹ Ibid.

sexual offenses. It prohibited the disclosure of the victim's identity, ensuring their protection from social stigma and potential harm.

3. *Right to be Heard:* The amendment emphasized the right of victims to be heard during various stages of the legal process. It ensured their participation in the trial proceedings, allowing them to present their views, concerns, and demands, thus enabling a more inclusive and victim-centric approach to justice.
4. *Special Courts and Fast-track Trials:* The amendment introduced the establishment of special courts and the provision for fast-track trials in cases of sexual offenses against women. This measure aimed to expedite the legal process, reduce delays, and ensure timely justice for victims.
5. *Compensation and Rehabilitation:* The amendment strengthened the provision for compensation and rehabilitation of victims. It mandated the establishment of a victim compensation fund and recognized the right of victims to receive adequate compensation for their physical, mental, and emotional trauma.

6. *Enhanced Punishment for Offenders:* The amendment increased the severity of punishments for certain offenses, particularly those related to sexual offenses against women and children. This was intended to serve as a deterrent and to provide a sense of justice to victims.

B. Establishment of victim compensation schemes

In recent years, the establishment of victim compensation schemes has been a significant development in the realm of victim rights within the Indian judicial system. These schemes aim to provide financial assistance and support to victims of crime, recognizing their right to compensation for the physical, emotional, and financial hardships they have endured. Key aspects of the establishment of victim compensation schemes include:

1. *Provision of Financial Assistance:* Victim compensation schemes provide financial assistance to victims to help them cope with the immediate and long-term consequences of the crime. The schemes recognize that victims may face medical expenses, loss of income, rehabilitation costs, and other financial burdens, and aim to alleviate their financial distress.
2. *Coverage for Various Crimes:* Victim compensation schemes encompass a wide range of crimes, including but not limited to sexual offenses, acid attacks, trafficking, domestic violence, and child abuse. This ensures that victims of different types of crimes have access to financial support, irrespective of the nature of the offense.
3. *Streamlined Application Process:* Victim compensation schemes simplify the application process for victims to access compensation. They establish clear guidelines, forms, and procedures to facilitate victims' access to financial assistance. These measures aim to ensure a victim-friendly process that reduces bureaucratic hurdles and delays.
4. *Compensation Determination:* The schemes typically outline the criteria for determining the compensation amount based on various factors such as the severity of the crime, nature of injuries, loss of income, and psychological trauma. Compensation boards or committees are

established to assess the claims and determine the appropriate compensation amount.

5. *Rehabilitation and Support Services:* In addition to financial assistance, victim compensation schemes often provide access to rehabilitation services, including counseling, medical support, vocational training, and other forms of assistance to aid victims in their recovery process.
6. *State and Central Schemes:* Victim compensation schemes are implemented at both the state and central levels in India. While the central scheme provides guidelines and financial support to the states, individual states have the flexibility to establish their own schemes based on their specific needs and requirements.

C. Introduction of victim impact statements

One significant development in recent years concerning victim rights within the Indian judicial system is the introduction of victim impact statements. Victim impact statements provide victims with the opportunity to express the physical, emotional, and financial impact of the crime on their lives, as well as their views on the appropriate punishment for the offender. Key aspects of the introduction of victim impact statements include:

1. *Empowering Victims:* Victim impact statements empower victims by giving them a voice in the legal proceedings. It allows them to share their personal experiences, emotions, and the consequences they have faced as a result of the crime. This inclusion recognizes victims as active participants in the justice process.

2. *Informing Sentencing Decisions:* Victim impact statements provide judges and other relevant authorities with valuable information about the impact of the crime on the victim and their families. This information helps in determining appropriate sentences and considering the overall impact on the victim's life when deciding on the punishment for the offender.
3. *Enhancing Transparency and Accountability:* Victim impact statements contribute to transparency and accountability within the justice system. They provide a clearer understanding of the harm caused by the crime and highlight the personal consequences experienced by victims. This transparency promotes public trust and confidence in the justice system.
4. *Emotional and Psychological Healing:* Allowing victims to express their feelings and experiences through impact statements can contribute to their emotional and psychological healing. It provides an outlet for victims to share their trauma, gain a sense of closure, and potentially aid in their recovery process.
5. *Limitations and Safeguards:* While victim impact statements are a valuable addition to victim rights, certain limitations and safeguards need to be in place to ensure fairness and prevent abuse. These may include guidelines on the content and scope of statements, ensuring they are factual, relevant, and free from inflammatory or prejudiced language.

ROLE OF NON-GOVERNMENTAL ORGANIZATIONS AND SUPPORT SERVICES

Non-Governmental Organizations (NGOs) play a crucial role in promoting and protecting the rights of victims within the Indian judicial system. These organizations work tirelessly to provide a range of support services to victims, including counseling, legal aid, shelter homes, rehabilitation programs, and advocacy. NGOs often bridge the gap between victims and the formal justice system by raising awareness about victim rights, assisting victims in understanding their legal options, and facilitating their access to justice. They also work in collaboration with government agencies, legal professionals, and other stakeholders to influence policy reforms, address systemic issues, and ensure the inclusion of victim-centric perspectives in decision-making processes. The efforts of NGOs and support services are instrumental in empowering victims, providing them with the necessary assistance and resources, and creating a more compassionate and effective system for victim rights protection in India.

CONCLUSION

In conclusion, the recognition and protection of victim rights within the Indian judicial system are crucial for fostering a just and compassionate society. The legislative framework, including the Constitution of India and laws such as the Criminal Procedure Code, lays the foundation for safeguarding the rights of victims. Key rights, including dignity and respect, information and participation, protection and safety, compensation and restitution, and legal assistance, contribute to empowering victims and ensuring their active involvement in the legal process. However, challenges such as lack of awareness, inadequate infrastructure, delays in justice, victim blaming, and limited access to support services persist. Recent developments and reforms, along with the role of NGOs and support services, have made significant strides in enhancing victim rights. To further

improve victim rights, there is a need for continuous reforms, awareness campaigns, improved infrastructure, streamlined legal proceedings, and combatting societal attitudes. By addressing these challenges and working towards a victim-centric approach, India can create a more equitable and supportive judicial system that respects the rights and well-being of victims.



COMPARATIVE ANALYSIS BETWEEN MITAKSHARA AND DAYABHAGA: ANCIENT SCHOOL OF INDIAN JURISPRUDENCE

- Rahul Jain*

Abstract

Hindu law developed from Shruti, Smriti, traditions, and digests. These comments spawned Hindu law schools that oversee family affairs like inheritance and succession. Based on Smriti and local norms, Mitakshara and Dayabhaga are the two main Hindu law schools. Vijnaneshwar's Mitakshara commentary on Yajnavalkya's code is read across India excluding Bengal and Assam. Mitakshara is the highest authority even when the two schools agree. Jimutvahana's compilation of leading Smritis founded Dayabhaga School. Dayabhaga, Dayatatra, and Daya-Sangraha run the school. Due to regional norms and practises in India, numerous Hindu law schools have developed. The Smritis' interpretations have incorporated local customs into each region's legal system. All Hindu law schools derive from the Smritis, regardless of their customs. All Hindu schools acknowledge the ancient Smritis. Commentaries on ancient texts developed the schools. Commentators interpreted old writings, and some Indian schools accepted them while others rejected them, resulting in competing doctrines. This paper compares these two ancient Hindu legal schools and examines whether present Indian law creates a common rule of conduct. Both schools use Smriti, although their customs differ.

Keywords: Indian Jurisprudence, Mitakshara School, Dayabhaga School, Ancestral property, Rights of Succession.

* Research Scholar @ School of Law, Bennett University; Email: gjrj239@gmail.com

INTRODUCTION

Hindu Law is a body of standards or rules called '*Dharma*'. In Hindu philosophy, *Dharma* is regarded as the law that regulates Society, family, and individual obligations. Hindu law has its possession in history and as well as in the present-day period. *Dharmasastras* are the foundation of Hindu philosophy and have been used as a tool for justice. Hindu law has been considered on the premise of schools i.e. *Mitakshara* school and *Dayabhaga* school. These schools have a distinctive concept of property. The ancient or primary sources of Hindu law are *Shruti*, *Smriti customs, commentaries, and digest*, whereas legislation, precedent, and other similar works are considered modern sources of law. The development of Hindu law was influenced by all these sources such as commentaries like *Shruti, Smriti, Customs, usages, and digest* that specifically dealt with Hindu law. These commentaries governise to different schools of Hindu law that govern family matters such as the will of the deceased, inheritance of property, and intestate succession. These schools define the rules related to these matters. *Dayabhaga* and *Mitakshara* schools of Hindu law were established when the *Smriti* (Hindu religious texts) were interpreted differently based on the customs in different parts of India.¹ In the case of *Rutcheputty v. Rajendra*² the Privy Council stated that the various local customs of India led to the development of these law schools. The commentators who wrote about the *Smritis*, which are ancient Hindu texts about law and morality, had to consider the customs and traditions of the various regions of India. This means that the legal principles that follow in each region of India are shaped by the specific customs and circumstances of that region. This article discusses the differences between

¹ Ankita Koirala, "Hindu Concept of Law" (April 30, 2020) available at: <http://dx.doi.org/10.2139/ssrn.3589070> (last visited on: 10.06.2023)

² 1837 2 MIA 132

these two legal schools of ancient Hinduism and considers whether current Indian law mitigates these differences by creating a common code of conduct. Both schools have their origins in different customs, but they have the same source of Smriti.³ The Privy Council in the case of *Madras v. Mootoo Rantalinga*⁴ stated that the ancient texts of Hindu Law, known as *Smritis*, are common to all the different schools of Hindu Law. The development of these schools involved the process of subsequent commentaries (*Tika* or *Bhashya*) on the universally accepted texts, where commentators added their interpretations. The authority of these commentators was accepted in some parts of India and rejected in others, leading to the emergence of conflicting doctrines in different schools of Hindu Law.

RESEARCH OBJECTIVE

The objective of the research paper is to present a detailed study of the topic “Comparative analysis between Mitakshara and Dayabhaga Ancient School of Indian jurisprudence” creating a substantial informational summary of it and offering an understanding of its significance in Indian culture.

SIGNIFICANCE AND BENEFIT

The codified Hindu Laws provide uniform laws for all Hindus, and in this codified area, there is no room for different schools of thought. However, these schools of thought are still relevant in the un- codified areas of Hindu law. The purpose of the research paper is to provide a better understanding of this concept.

³ Ramesh Chandra Nagpal, “Modern Hindu Law” 29 (2) *JILI*, 276 (1987)

⁴ 1 (1968) 12 *MIA* 397

RESEARCH METHODOLOGY

The research methodology used here is descriptive and explanatory doctrinal in nature. In this study, secondary data sources were used. Secondary sources such as scholarly articles, books, and court precedents will be reviewed for a comprehensive understanding of the school's principles and their interpretation over time.

BACKGROUND OF THE SOCIETY

Shruti

The first ancient source of Hindu law is called “*Shruti*”, which implies “to hear.” It alludes to the four Vedas and their Brahmanas. These texts were originally based on the Opinions of individual sages and were passed down orally.⁵ They were preserved and added to by the Sages’ families and disciples. The Vedas and Brahmanas date back to a time when Vedic culture was transitioning to the Brahmanism mode of thought and social order. Vedas are the ancient Hindu text that is divided into two parts: Samhita and Brahma. Samhita is a collection of hymns or mantras praising God, while Brahma is a theological explanation of Samhita.⁶ The Brahmanas are ritual treatises that prescribe and explain the meanings of sacrifices. They explain where these actions came from and give instructions on how to perform them.⁷ In addition, the Brahmanas specify when mantras should be chanted, sometimes providing examples, justifications, and mystical and philosophical speculations. The thoughts of ancient saints that were focused

⁵ Paras Diwan & Peeyusi Diwan, *Modern Hindu Law* 27 (Allahabad Law Agency, Faridabad, 2003)

⁶ Ibid

⁷ Ibid

on the divine light that enlightens the deepest corners of the human mind are referred to as Mantras. Mantras were either prayers or invocations or hymns praising the Almighty. Rig-Veda, Yajurveda, and Samaveda were the original three Vedas.⁸ Atharvaveda was included afterward. Even though Rig-Veda has an abundance of holy mantras, Samaveda and Yajurveda have acquired unreservedly from them. The Rig Veda is a tree, whereas the other two Vedas are its branches. However, all three Vedas are highly respected.⁹

Yajurveda is divided into two schools which are referred to as Black and White Yajurveda. Black Yajurveda is connected to the Taittiriya Brahmana, while the White Yajurveda is connected to the Satapatha Brahmana. The Atharvaveda is linked to the Gopatha Brahmana.¹⁰

While the Vedas do not contain any legal statements, their factual statements are sometimes referred to in the Smritis and commentaries as conclusive evidence of local customs.¹¹

Smritis

Smritis, a collection of manuals on Hindu Law, is the second source of Hindu Law after the Vedas. These manuals were written by medieval authorities on Hindu Law known as Sages or ‘Rishis’. The Smritikars were neither kings, nor religious heads, nor legislators¹², they were philosophers, social thinkers, and teachers. From spiritual to temporal, how the code of conduct for life, in the form of Dharma, was taught by spiritual leaders and

⁸ Ibid at 28

⁹ Dr. Poonam Pradhan Saxena, *Family Law-II* 28 (Lexis Nexis, Gurgaon, 2011)

¹⁰ Ibid

¹¹ Ibid

¹² A. M. Bhattacharjee, *Hindu Law and the Constitution* 17 (2nd Ed. 1994)

covered a wide range of topics including behavior and relationships within families, rules for marriage, punishment for sexual misconduct, rituals for birth, death, and marriage, philosophy of Karma and rebirth, social behavior between people of different castes, duties of individuals at different stages of life, rules for governance and punishment, and financial matters such as contracts, property devolution, mortgage, and interest rates. Some of the rules in ancient times were either mandatory or recommended as appropriate conduct. The legal rules were called ‘vyavahara’ while personal, religious, or moral rules were called ‘ahara’. Since writing was not common at that time, knowledge was passed down orally from a teacher to his student. This led to modifications and additions to the rules over time as per the customs and traditions of each generation.¹³

Dharma Sutras: Dharmasutras, which are ancient Indian texts written in prose and short maxims (Sutras). They were written between 800 to 200 BC and were intended to be training manuals for sages to teach their students about the duties of men in various relationships. Some of the well-known authors of Dharmasutras include Gautama, Baudhayan, Apastamba, Harita, Vashistha, and Vishnu. The text also mentions that the Dharmasutras contain both prose and verses.

Dharmashastras: Dharmashastras are texts that discuss principles of Hindu law and ethics. They are written in poetry form called Shlokas and are based on an earlier text called Dharmasutras. However, the Dharmashastras are more systematic and clearer than the Dharmasutras.¹⁴

¹³ Supra note 5 at 29

¹⁴ Supra note 5 at 32

Manusmriti: Manusmriti is a significant text in Classical Hindu law and is essential for studying law in India. It is the oldest Smriti, or religious text based on memory, and was originally written by Manu. However, it was supplemented by later generations because the writing was not yet invented and it was transmitted orally. In the society of that time, Brahmins held a high position, while Women and Shudras did not have any rights.¹⁵

Yajnavalkya Smriti: The Yajnavalkya Smriti is a legal text written between the period of Budha and Vikramaditya in India. It was more systematically arranged and concise than the Manu Smriti. The Yajnavalkya Smriti recognized women's right to inherit and hold property and provided a better position for Sudras. It contains 1010 slokas and is divided into three books: Acara or ecclesiastical and moral code, Vyavahara or civil law, and Prayascitta, or penal code.

There are several commentaries written on this text by different authors such as Apararka, Visvarupa, Vijfanesvara, Mitra Misra, and Sulapani.¹⁶

Narada Smriti: Narada was a Nepali Sage who was known for his broadmindedness and progressive views on certain aspects of Hindu law. He supported widow re-marriage and advocated for women's rights to hold property. Narada believed in the supremacy of king-made law and established rules for pleading, evidence, and witnesses that were not mentioned in previous smritis (ancient Hindu texts on law and morality). Narada's approach to the law was more advanced and exhaustive than that of his predecessors, but he was also more conservative in some respects.¹⁷

¹⁵ Bilmoria Purushottama, "The idea of Hindu law" 43 *JSA* 106 (2011)

¹⁶ Ibid

¹⁷ Ibid

Digests and Commentaries

Initially, there were Shrutis, which were the original texts. Later, commentaries (Tika or Bhashya) and digests (Nibandhs) were written over a period of more than a thousand years from the 7th century to 1800 A.D. In the early part of this period, most commentaries were written on the Smritis (texts dealing with social and religious laws), but later works were in the form of digests that synthesized various Smritis and explained and reconciled their contradictions. The development of various schools of Hindu law was made possible by the writings of different scholars who provided commentaries on the original source of Hindu law, which was common to all Hindus.¹⁸ However, over time, people began to follow different schools of thought for various reasons. Digests were created to address the fact that the rules mentioned in the Smriti (one of the Hindu sacred texts) were not always clear and did not cover all possible situations. The need of interpreting ancient texts was fulfilled by writers of digests and commentaries. In the legal case Atmaram Abhimanji v. Bajirao Janrao¹⁹, the Bombay High Court ruled that if there is a disagreement between an ancient text writer and a commentator, the opinion of the commentator (known as a Tika) will be considered more important.

Custom

Hindu law is derived from custom, which is regarded as the third source and the highest level of justice. The Judicial Committee defines custom as a rule

¹⁸ Abhishek Raj, Sources of Hindu law available at: <https://www.legalserviceindia.com/legal/article-8549-sources-of-hindu-law.html> (last visited on: 12.06.2023)

¹⁹ (1935) 37 BOMLR 553

that has become law because it has been followed consistently by a specific family, class, or region.

After the Shrutis and Smritis, custom is a significant source of law. However, custom takes precedence over the Smritis. Written law is viewed as subordinate to custom. Certain requirements must be completed for a custom to be legitimate.²⁰ The custom must be ancient and have been in practice for a long time and be accepted by common consent as a governing rule of a particular society. The custom must be clear and unambiguous, without any technicalities. The custom must be reasonable and not against any existing law. It must not be immoral or against any public policy. The custom must have been continuously and uniformly followed for a long time.²¹

There are three types of customs recognized by Indian courts. The first type is the local custom which refers to customs that are prevalent in a particular region or locality. The second type is class custom which refers to customs that are followed by a particular class of people. An example given is the custom among a class of Vaishyas where desertion or abandonment by the husband abrogates the marriage and the wife is free to marry again during the lifetime of the husband. The third type is family custom which refers to customs that are binding upon the members of a family. An example given is the custom in ancient Indian families where the eldest male member of the family inherits the estate.²²

²⁰ Supra note 15

²¹ Harikumar Pallathadka, “Relevance of Customs under Modern Hindu Law” 7 (6) *EJMCM* 3224 (2020)

²² P. H. Pendharkar, *Customary Personal Law of Adiwasis in Nandurbar District A Critical Analysis* (2012) (Unpublished Ph.D. dissertation, North Maharashtra University)

MITAKSHARA SCHOOL OF LAW

Mitakshara is a commentary on the Yajnavalkya Smriti, which was written in the latter half of the eleventh century by Vijananeshwara.²³ The commentary was told to Vijananeshwara by his Guru Visvarupa.²⁴ Mitakshara is also known by other names such as Riju Mitakshara Tika, Riju Sam Mitakshara, or Parmitakshara. Vijananeshwara wrote a commentary on the Code of Yajnavalkya. He explains that his Guru Visvarupa had explained the code to him in a difficult and scattered manner, so he abridged it in a simpler and more concise style.

The term Mitakshara means ‘a brief compendium’. The scope of the work goes beyond just a single commentary and includes the essence of the Smriti law along with its principles and commands, presenting it in the form of a comprehensive summary. Vijananeshwara analyzed the Yajnavalkya Smriti, which is a text that contains laws and regulations. He explained difficult passages in the text, filled in missing information, and resolved inconsistencies by referring to other old experts in the field.²⁵ He also classified different legal topics with accuracy and avoided unnecessary or irrelevant discussions. This treatise had an inherent value that motivated others to write explanations on it from a legal perspective.²⁶

In the 11th century, the country was divided into strong and autonomous states that frequently competed. In some cases, specific customs and traditions were acknowledged as more influential than the Medieval law.

²³ Supra note 7 at 34

²⁴ Raj Kumar Sarvadikari, “The Principles of Hindu Law of Inheritance” *Tagore Law Lectures* 331 (1880)

²⁵ Supra note 7 at 34.

²⁶ *Bhugwandeep Doobey v. Myna Baee*, (1867) 11 MIA 487, 507, 508

The legislators in each state interpreted old laws in a way that would fit the current needs of their society so that the laws could be enforced by the authorities. They made sure to keep the fundamental principles of the laws intact while adapting them to fit the unique customs and traditions of the people. This is how the different schools of law originated which are now divided into five sub-schools or branches. The term “school” came into use later, with the word “sampradaya” previously used to refer to region-based variations. The five sub-schools are Mithila, Benaras, Dravida, Maharashtra, and Bengal.²⁷ The Mitakshara school of Hindu law was followed in Mithila, Benaras, Dravida, and Maharashtra, whereas the Dayabhaga law was introduced by Jimutavahana in the Bengal school. Mitakshara School had four sub-schools, all of which shared a common primary source and general principles. All these schools of Hindu law recognize the Mitakshara as the ultimate authority, but each school gives preference to specific treatises and commentaries that interpret passages from the Mitakshara differently. This results in differences between the schools. Yajnavalkya created a set of laws called the Code at Mithila. Mithila and Dravida were cities that existed before Benaras, which was a school of law. Mitakshara was the main text used in the Benaras school and was also used as a reference by other schools and writers, including Jimutavahana.²⁸ The doctrine of Vijananeshwara and the teachings of the Mithila School were popular in Bengal. Jimutavahana attempted to disprove their doctrine and demonstrated that the principles of Benaras and Mithila were not applicable in Bengal. Jimutavahana tried to prove that the interpretations of laws in the northern region were wrong. Despite facing criticism, he stood by his reasoning and used logical arguments instead of relying on authorities to

²⁷ Supra note 5 at 56

²⁸ Supra note 15 at 410

support his viewpoint. Therefore, his work called Dayabhaga is highly regarded as a great example of legal reasoning. As a result, Mitakshara remained the dominant legal authority throughout India except in Bengal, where Dayabhaga prevailed.

The Benaras School of law, which focuses on several primary works and commentaries. The primary work is Mitakshara by Vijananeshwara, which is a text on Hindu law. This is followed by a commentary on Mitakshara and Madan Parijata called Subodhini, written by Visvesvara Bhatta. Madhava Acharya's commentary on Parasara Smriti is also studied. Other texts studied in this school include Kalpataru by Lakshmidhara, Vivada Tandava by Kamalakara, Keshava Vaijayanti, Vira Mitrodaya by Mitra Mishra, and a commentary on Mitakshara by Nanda Pandita known as Balam Bhatta. The Mitakshara holds the highest authority in the Dravida School, followed by commentaries such as Smriti Chandrika by Devananda Bhatta, Saraswati Vilasa attributed to Pratapa Rudra Deva, and Vyavahara Nirnaya by Varada Raja. Similarly, in the Mithila school, the Mitakshara is also of supreme authority and is accompanied by commentaries like Vivada Ratnakara by Chandesvara, Vivada Chandra by Misaru Misra or Lakshmi Devi, and Vivada Chintamani by Vachaspati Mishra.²⁹ In Maharashtra, Mitakshara is followed by Vyavahara Mayukha by Nilkantha and a commentary on Parasara Smriti by Madhava Acharaya. In Bengal, Dayabhaga by Jinutavahana is considered very important and is followed by other texts such as Dayatatwa by Raghunandana and Dayakrama Sangraha by Srikrishna Tarkalankara. There are several commentaries on Dayabhaga,

²⁹ Ibid

including those by Srinatha, Achyuta, Raghunandana, Mahesvara, Srikrishna, and Ragmbhadra.³⁰

The Mitakshara System

The Hindu law has a common primary source that all Hindus follow, which has been interpreted and commented upon by multiple commentators. Due to this, the finished works of different commentators differ from each other. Additionally, certain works are accepted as more authoritative or superior in certain regions, while others are rejected comparatively.³¹ Mitakshara, which is a commentary on Yajnavalkya Smriti written by Vijananeshwara, became the primary source of authority for the entire country of India except for certain areas in Punjab and Bengal. In Bengal, Mitakshara was also considered a high authority except when it contradicted the Dayabhaga, which is considered the most important source of authority in Bengal. Even Mitakshara is a text that was open to different interpretations, which led to it being divided into several schools of thought. However, these divisions were minor and did not fundamentally change the principles of the text. The divergences were primarily due to different interpretations by individual commentators, but they did not replace or invalidate the original text.³²

³⁰ Manjeet Yadav, “Mitakshara and Dayabhaga School” available at: <https://thelawmatics.in/mitakshara-and-dayabhaga-school-of-law/> (last visited on: 12.06.2023)

³¹ Sujit Kumar, “Mitakshara School of Hindu Law” available at: <https://legalserviceindia.com/legal/article-8984-mitakshara-school-of-hindu-law.html> (last visited on: 12.06.2023)

³² Saimy Eliza Abraham, “Short Note on Hindu Joint Family- under Mitakshara and Dayabhaga” 2 (1) *IJLMH* 1-7 (2018)

During the British regime, European judges would often ask Pundits (Hindu scholars) for their opinions to help them make decisions about Hindu law. However, it is uncertain whether the Pundits who were consulted had access to all the important sources of information at that time. Moreover, regional differences in the use of language affected the understanding of sub-divisions within a certain field (presumably law or jurisprudence). As people became more knowledgeable about the language (Sanskrit), these strict sub-divisions became less important. For example, in some cases where questions about Hindu law needed to be settled and the authorities of all schools were examined to find a common answer. It was found that the basic concepts of a Hindu undivided family were the same across all schools.³³

The Benaras School, school is described as the most orthodox and is prevalent in northern India, including Orissa and the central province. However, it is not followed in Punjab where customary law, modifying the Mitakshara school of Hindu law, still prevails.³⁴ Maharashtra or the Bombay School of Law, which is known for being the most liberal of all schools of law covers the entire Western region of India, including the island of Bombay, Gujarat, North Konkan, and Berar.³⁵ In other areas such as the island of Bombay, Gujarat, and North Konkan, the authority of Vyavahara Mayukha on certain points is considered to be even superior to Mitakshara in the event of a conflict between the two. However, the 'Mayukha' is regarded as being equal to the Mitakshara in terms of authority in Poona,

³³ Tanya Gupta, "Formation and Incident under the Coparcenary Property: Mitakshara and Dayabhaga School" available at: <https://lexpeeps.in/formation-and-incident-under-the-coparcenary-property-mitakshara-and-dayabhaga-school/> (last visited on: 12.06.2023)

³⁴ Infra note 40

³⁵ Virendra Kumar, "Crucifying the concept of Mitakshara coparcenary" 53 (3) *JILI*, pp. 413-436 (2011)

Ahmednagar, and Khandesh. The High Court of Bombay often referred to other works such as Subodhini and Kaustubha, but their approach was to interpret them in a way that was consistent and avoided any disputes. The Mithila Covers Tirhoot and other parts of Bihar, while the Dravida School covers the southern parts of India.

Property Rights Under Mitakshara School of Law

In Mitakshara School, the Doctrine of Propinquity operated which was related to nearness in the blood relationship. This means that one who was nearer to the deceased by consanguinity would succeed the further one in getting the property. Property devolves through either the rules of succession or survivorship.

The doctrine of survivorship states that the property devolves to the surviving coparceners of the deceased and not the legal heirs while according to the doctrine of succession, the property devolves to the legal heirs. Although according to the Hindu Succession (Amendment) Act, 2005, property in a Mitakshara coparcenary devolves through survivorship. Members of the family acquire a right to the property by birth. Although their share is not definite and keeps on fluctuating the share increases on the death of any member and decreases on the birth of a member. Since the share is not definite or ascertainable, coparceners (Those having shares in the joint family property) cannot transfer their shares to the third party. It is a narrower concept of a joint family which consists of Four Generations of Hindu males who are eligible to inherit the property. If a coparcener dies, his widow cannot demand a division of his share of property from his brothers.

In the Mitakshara coparcenary, only male heirs can inherit property. A woman cannot become a coparcener under this system. However, the Hindu Succession (Amendment) Act, of 2005, changed this by allowing women to become coparceners in ancestral property. This change was influenced by Western ideas.

According to this school, the property is of two types of namely ancestor's property and separate property. Here ancestral property is partitioned according to the rules of survivorship while separate property goes to descendants only. In default of close heir, brother, and immediate survivors shall inherit, the wife does not inherit. This school recognizes three classes of heirs viz. (a) Gotraja Sapindas, (b) Samanodakas, and (c) Bandhus.

Concept of Marriage Mitakshara School of Law

Under the Mitakshara school of Hindu law, marriage is considered a sacrament and is a binding social contract between a man and a woman. The Mitakshara school recognizes eight forms of marriage, including Brahma, Daiva, Arsha, Prajapatya, Asura, Gandharva, Rakshasa, and Paishacha.

Under the Brahma form of marriage, the bride's father gives her away to the groom after receiving a dowry. In the Daiva form, the bride is given as a sacrificial offering to a priest. In the Arsha form, the groom offers a cow and a bull to the bride's father as a symbol of his commitment. In the Prajapatya form, the groom marries the bride after seeking her consent.

The Asura form of marriage involves the groom paying a price to the bride's father for her hand in marriage. In the Gandharva form, the couple marries out of love and mutual consent. The Rakshasa form is where the

groom abducts the bride against her will. Lastly, the Paishacha form of marriage is where the groom seduces an unwilling woman.

Overall, under the Mitakshara school, marriage is considered a sacred union between a man and a woman that involves various forms and rituals.

DAYABHAGA SCHOOL OF LAW

Dayabhaga is a legal system followed in West Bengal and parts of Assam, India. It is a compilation of all the codes related to inheritance and succession and is based on a commentary written in the 12th century by Jimutavahana. It is a digest of all relevant codes, not a commentary on a specific work. Inheritance, succession, and joint family structures are all discussed in the Dayabhaga. It was a part of the Dharmaratna. Jimutavahana approaches the topic of inheritance and succession straightforwardly and directly, treating it as an unbiased science, without relying on the propositions put forth by other commentators.³⁶ He relies on reason and logic rather than relying solely on rules, past examples, or assumptions. Through exploring different perspectives and delving into the core of the topic, he develops principles that are grounded in practicality and rational thinking. It rejects the concept of joint family and coparcenary, emphasizing individual ownership and inheritance rights.³⁷

Unlike Mitakshara School, it does not have any sub-divisions. Other commentaries adopted in the Dayabhaga School include-Dayatatyā, Dayakram-Sangrah, Virmitrodaya, and Dattaka Chandrika.

³⁶ Dayabhaga School of Law, available at: <https://aishwaryasandeep.com/2021/09/16/dayabhaga-school-of-law/> (last visited on: 12.06.2023)

³⁷ Ibid

Property Rights Under Dayabhaga School of Law

The doctrine of religious efficacy operated in this school which states that the person who gave more religious benefits to the deceased was preferred over others in the devolution of the property. It arises from the practice of making an offering of rice balls to ancestors who have passed away. This practice is known as “Pinda Offering.” Under the Dayabhaga school presently, the property devolves through the doctrine of succession. A son becomes the owner of the property only after the death of his father. Each heir has a definite share in this school. So, one can easily transfer his share. A father can make, a testamentary disposition on the whole of the property without the son objecting to it.³⁸

The Dayabhaga school recognizes two types of property: joint property and separate property. In both cases, descendants are entitled to inherit the property. If a coparcener dies, their widow will inherit the property if there is no closer heir. However, she cannot sell or transfer the property to anyone else. If there are no male descendants, the widow has the right to inherit her husband's share and can demand a division of property. After her husband's death, she becomes a coparcener with her brothers-in-law and has the same right to partition her share of the property. So, women in families ruled by Dayabhaga School have equal rights with that of the male heirs.

³⁸ Debarati Halder & K Jaishankar, “Property Rights of Hindu Women: A feminist Review of Succession Laws of Ancient, Medieval, and Modern India” 24 (2), *JLR* 663 (2008-2009), available at: <https://www.jstor.org/stable/pdf/25654333.pdf> (last visited on: 21.07.2023)

The concept of coparcenary does not exist in this school. It was held in the case of *Badrinarayan Shankar Bhandari v. Omprakash Shankar Bhandari*³⁹ that Dayabhaga School is a branch of Hindu law that deals with the inheritance of property. Unlike other schools of Hindu law, the property is passed down through succession rather than survivorship. This means that each individual member of a Hindu family has their own property right and can dispose of it as they see fit through gift or will. This school recognizes three classes of heir viz. (a) Sapindas, (b) Sakulyas, and (c) Bandhus.

Concept of Marriage under Dayabhaga School of Law

Under the Dayabhaga school of Hindu law, marriage is a sacrament and is regarded as a religious duty that must be performed by every individual. In this school of law, marriage is a civil contract between the bride and the groom, and it is not necessary to have the consent of the parents or guardians. This school recognizes two types of marriage- (i) Brahma Marriage and (ii) Asura Marriage. Under Brahma Marriage the groom is expected to offer a Gift or 'Dakshina' to the bride's father as a token of appreciation for allowing him to marry his daughter. Asura Marriage is a Marriage where the bride is obtained by the groom through payment of consideration to

her father. Under Dayabhaga School Husband has complete control over the property of the wife and she has no right to it during her lifetime. However, she is entitled to maintenance from her husband and can inherit his property in case of his death.

³⁹ 2014 SCC OnLine Bom 908

LEGISLATIVE PROVISION WHICH BROUGHT MODIFICATIONS IN HINDU LAW

It is evident historically, women have struggled to inherit property, especially their fathers' ancestors' property. Initially, women did not have the right to be "coparceners," which means having an equal share in the inheritance of an estate. This was due to the belief that women belonged to another family. However, over time, women's property rights have gradually evolved.

In the Mitakshara School of Hinduism, it is believed that women did not have the same inheritance rights as men. As a result, only male heirs were eligible to inherit the property, and women were only permitted to claim Stridhan - a limited number of gifts given to them at marriage, such as jewellery and clothing as their own. Women were consequently afforded fewer privileges and opportunities than men.

Indian constitution's emphasis on equality, despite the need for positive discrimination. Article 14 ensures that everyone is equal before the law and subject to equal treatment. Article 15 strengthens this provision by allowing the government to take affirmative action to protect the interests of women and other oppressed groups. Article 21 guarantees the right to life with dignity.⁴⁰

Hindu Succession Act 1956

⁴⁰ Tanisha Maheshwari, "Women's Property Rights- Hindu Succession Act" <https://articles.manupatra.com/article-details/Women-s-Property-Rights-Hindu-Succession-Act> (last visited on: 14.06.2023)

The legislative provision that brought modifications in Hindu law is the Hindu Succession Act, of 1956. This act amended the Hindu law of succession and made significant changes to the inheritance rights of women and other family members. The act applies to Hindus, Buddhists, Jains, and Sikhs. The Hindu Succession Act, of 1956 made a huge change in the inheritance rules of Hindus and this part tells about such changes. This Act has abrogated the difference between these two schools and has created a uniform code of conduct. It mainly deals with the devolution of the property of a person dying intestate but also deals with testamentary succession and coparcenary laws. Firstly, this school has a uniform application over both the schools and applies to some southern parts which were governed by some other schools and states that all other laws relating to Hindu law shall cease to exist after the commencement of this act. This act disqualified the previous classes of heirs and now the property devolves on firstly the class-1 heirs, then to class-2 heirs, then to agnates⁴¹, and lastly to the cognates of the deceased. This act has increased the status of women in inheritance and included daughters in Class-1 heirs. Earlier women didn't have absolute ownership over the property but now Sec. 14(1) made them the full owner of the property possessed by her.

It was decided in the case of *Bhimacharya v. Ramacharya*⁴² that the husband will be given preference to the stridhan of the woman dying without any issue over others. But now according to the Hindu Succession Act, of 1956, the husband is not given preference first and now the property of a woman devolves in such criteria. The first beneficiaries are her sons, daughters,

⁴¹ Prakash Chand Jain, "Women's Property Rights Under Traditional Hindu Law and The Hindu Succession Act, 1956: Some Observations" 45 (3/4), *JILI* 527 (2003), available at: <https://www.jstor.org/stable/pdf/43951878.pdf> (last visited on: 21.07.2023)

⁴² (1909) I.L.R. 33 Bom. 452

grandchildren, and husband. If the woman did not have any children or grandchildren, her property would then go to the heirs of her husband. If there are no heirs of the husband, the woman's property would then go to her mother and father. If they are no longer alive, the property would go to the heirs of the father and then, lastly, to the heirs of the mother.

Hindu Succession Amendment Act 2015

This act brought some monumental changes in the history of women's right to inherit property. Under the act provisions of Section 6⁴³ were amended whereby women were entitled to equal coparcenary rights as sons. They would be able to claim partition and possession of ancestral and self-occupied property of their father. One of the milestone cases along this line was the *Prakash v. Phulvati*⁴⁴ case where the respondent (according to the Supreme Court case) documented a request in 1992 in the preliminary Court of Belgaum where she guaranteed her entitlement to acquire the property of her father who died in the year 1988. The preliminary court mostly permitted her suit. Distressed by the decision she pursued and appealed in the High Court looking for her right to legacy under the amendments of the Hindu Succession Act. Since the sole reason for the amendment was to eliminate the current inconsistencies among sons and daughters regarding their coparcenary freedoms she will be qualified for her father's tribal and self-involved property since birth. The High Court ruled in favor of applying the amended provisions. Notwithstanding, the apex court

⁴³ Rishabh Shroff & Tanmay Patnaik, "Supreme Court rules that daughters have equal rights in their father's property" available at: <https://www.lexology.com/Commentary/private-client-offshore-services/india/cyril-amarchand-mangaldas/supreme-court-rules-that-daughters-have-equal-rights-in-their-fathers-property#%3A~%3Atext%3DDaughters> (last visited on: 14.06.2023)

⁴⁴ AIR 2016 SC 769

overruled the request for the High Court expressing that until and except if it has been explicitly expressed in the statute the act will have a planned and prospective application.

In the case of *Masammat Dilraj Kuari v. Rikheswar Ram Dube & Ors.*⁴⁵ insanity was considered a ground for disqualification in the interest in the intestate and many more such cases are there. But now according to Sec. 28 of this act, no such ground of disqualification exists and is held to be invalid. The act brought some gender-neutral changes. Entitled women with coparcenary rights since birth like a son of a Hindu Joint family. Some other sections along with Section 6 were amended and repealed concerning women's right to seek partition and possession of the dwelling house or a widow's right to inherit her husband's property upon remarriage, Section 4(2) was omitted, Section 30 there was the substitution of words in order to enhance gender-neutrality. Further Section 24 dealing with the inheritance of a husband's property by a widowed woman upon her remarriage was repealed along with Section 23 concerning the partition of a dwelling house.

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The position of women's coparcenary rights has been switched in a new judgment called "*Vineeta Sharma v. Rakesh Sharma*"⁴⁶ articulated on the 11th of Aug 2020. For this situation, it was held that women will be qualified for coparcenary status and freedoms like sons regardless of whether they were born before or after the amendment. The condition that fathers should be alive on the date of passing of the act that is (09.09.2015) isn't required. The court gave the act a "retroactive" application. The verdict given by the

⁴⁵ 151 Ind Cas 419

⁴⁶ (2020) 9 SCC 1

bench in *Prakash v. Phulvati*⁴⁷ case was overruled subsequently giving women equality. The court gave a choice on the two positions, first and foremost giving women equivalent coparcenary freedoms since birth and inconsequentiality of the father being alive upon the date of the amendment. At present, any confusion or disorder surrounding women's right to inherit property or titles has been resolved.

CONCLUSION

Hindu law is one of the world's oldest and most extensive legal systems, having existed for approximately 6000 years. It was established by the people as a guide for individuals to follow to attain salvation rather than as a means of preventing crime or wrongdoing. Initially Hindu law was established to meet the needs of the people and for their welfare. In the past, Hindus only followed the laws that they believed came from their deities; today, they also follow man-made laws. The ancient Schools of Hindu law are mentioned above. Schools of Hindu law are the reason for the establishment of Hindu law and have played a significant role in its improvement. These schools are moreover alluded to as commentaries and digestives of the Smritis, which are old Hindu texts. These schools have contributed to the development of Hindu law and expanded its scope.

The modern laws of the country are abrogating the difference between the two schools of the Hindu law and a uniform code of conduct is on its way in the form of amendments taking place in the Hindu Succession Act. However, decisions laid down before the amendment of the act cannot be opened again and stand decided. But the laws regarding intestate succession have changed completely from what they were and what they are at present.

⁴⁷ AIR 2016 SC 769

ECONOMICS OF COMPETITION LAW IN INDIA: PREVENTION OF EXPLOITATION IN THE GENERAL MARKET

- Debarun Mukherjee*

Abstract

Indian markets are primarily non-monopolistic, with several players in each market category. It is impossible to classify the Indian market as a single sort of market. As a mixed economy, it has a wide range of market segments that are not necessarily monopolized, but rather many players (cartel, firm, or person) of varying sizes freely operate in the markets. Another challenge derives from the multitude of enterprises, as they all tend to fight for the same pool of customers. At first glance, corporate rivalry does not appear to be a threat; rather, it should be encouraged to raise the general standard of goods and services given and to benefit society. The large players dominate their presence with a larger customer base and creating a sense of monopoly. This article delves into the economic character of competition control and its importance to prevent exploitation of producers, suppliers as well as consumers across the general market.

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Keywords: Monopolistic practice, Trade practice, Dominating position, Exploitation Conglomerate Mergers.

* Student, B.B.A.LL.B. @ Bharati Vidyapeeth University Pune; Email: debarun.mukherjee-nlc@bvp.edu.in

INTRODUCTION

It is impossible to categorically characterize the Indian market as a single type of market. As a mixed economy, it features a variety of market segments not necessarily controlled by monopoly but rather a huge number of players' (cartel, enterprise, or person) disregarding their size freely operate in the marketplaces. Another difficulty stems from the abundance of businesses, as they all tend to compete with one another for the same pool of customers. *Prima facie*, competition between businesses does not appear to be a threat at all; rather, it should be encouraged to raise the general standard of goods and services and to benefit society as a whole.¹ To keep the competition among the businesses fair and establish reasonable restrictions The Competition Control of India was established to maintain fair competition among enterprises, impose appropriate limitations, arbitrate, and settle disputes involving unfair competition. The Monopolies and Restrictive Trade Practices (MRTP) Act of 1969 established India as one of the first developing countries to have its own competition legislation. The Raghavan Committee was formed in 1999, and it suggested replacing the MRTP Act with the current competition law in order to facilitate market competition and reduce anti-competitive practices in the economy. Then, in June 2011, the Ministry of Corporate Affairs (MCA) established a committee on National Competition Policy, which declared that the competition policy should aim to facilitate competitive market structure in the economy in order to increase productivity and encourage inclusive growth.

¹ The Constitution of India, Art 38, 39

The Supreme Court of India ruled in *Competition Control of India v. Steel Authority of India Ltd and Another* (2010)² that the government of India made³ the decision to liberalize the economy with the goal of removing obstacles and enacting legislation to create checks and balances in the free market. The primary reasons that the rules had to be passed were to prevent anti-competitive agreements and abuses of dominance, as well as to control mergers and takeovers that skew the market. The case also established deficiencies in the earlier MRTP Act⁴ to be inadequate and outdated.

While deciding in the *Competition Commission of India v. Co-ordination Committee or Artists and Technicians of W.B film and television & Ors*⁵ the Supreme Court of India ruled that the CCI's schemes are intended to safeguard fair competition by prohibiting trade practices that have a significant negative impact on competition markets within India. CCI has been tasked with reducing the negative sides of competition.

The Competition Act of 2002 was passed to serve the primary purpose to maintain market competition, safeguard consumer interests, and guarantee the freedom of trade for market participants. The Competition Commission of India (CCI) was set up to ban business practices that restrict market competition. The Act forbids three types of anti-competitive behavior: the abuse of dominant positions, mergers, and acquisitions (combinations), and anti-competitive agreements. The essential criteria for anti-competitive behavior management are that it should not seriously harm competition within India. The Act prohibits businesses from making anti-

² (2010) 10 SCC 744

³ GR Bhatia, "Institutional Framework under the Indian Competition Act, 2002" ILJ (2018)

⁴ Monopolies and Restrictive Trade Practices Act, 1969, ss. 3

⁵ Civil Appeal No. 6691 of 2014.

competitive arrangements that would significantly harm Indian competition or misuse their dominating position. Additionally, neither individuals nor companies are allowed to collaborate in a way that materially reduces competition in the relevant Indian market. Anti-competitive agreements are defined in Section 3 of the Act and are divided into two categories: horizontal agreements and vertical agreements⁶. It states that any anti-competitive agreements that could significantly undermine competition in India are void and unenforceable, with the exception of a few situations outlined in Section 3(5)⁷.

Indian marketplaces have expanded tremendously since the Competition Act went into effect. With the rise of digital internet-based businesses and new age markets integrating technology, there have also been changes in how firms operate. The Competition Law Review Committee was established by the Ministry of Corporate Affairs in 2018 to make sure that the Competition Act is consistent with India's economic fundamentals. The Committee acknowledged throughout its discussions that the current regulatory system does not sufficiently address certain market activities. In its 2019 report, the Committee made several recommendations for reforms to the Act and to the regulatory framework governing market competition. Reviewing the suggestions made by the Competition Law Reform Committee⁸ led to the introduction of the Competition (Amendment) Bill, 2022. The Bill aims to widen the definition of anti-competitive agreements, provide for the value of transactions to be taken into account when evaluating combinations, shorten the approval period for combinations, and

⁶ Competition Act, 2002, ss. 3

⁷ Ibid

⁸ Law Commission of India, “Report of the Competition Law Review Committee”, (PRS Legislative Research, April 2020)

provide a framework for settlement and commitment to help avoid litigation. The amendments to the existing provisions of the Act emphasize the regulation of mergers and acquisitions and amalgamations of enterprises. The Act also provides scope for control and managerial influence.

RECENT INSTANCES OF JUDICIAL INTERVENTION IN COMPETITION CONTROL

The economics component of competition law is primarily concerned with market analysis with the goal of ensuring that there is rivalry among suppliers on any given market and that this rivalry benefits the consumer, hence promoting economic growth and development. Competition control laws in India operate with a clear objective of preventing monopoly or monopolistic practices in the market. Competition law's everyday function is to identify markets and determine whether the competition is equitable and fair in those markets. It also entails determining how the company's decisions may impact clients and rivals. These are the principal economic concerns. It is a well-established fact in today's society that lawsuits of any kind are injurious to any person or business.

In the case of *XYZ(Confidential) v. Alphabet Inc.* (2020)⁹, The CCI noted that the prohibitions outlined in Section 4 of the Competition Act are clear-cut, and it is forbidden to misuse a dominating position by imposing unfair conditions, denying access to the market, using leverage, imposing supplemental responsibilities, etc. According to the CCI, Google cannot claim that it had no anti-competitive intent after enforcing unfair terms and participating in other actions that violated Section 4 of the Act. The Act's

⁹ *XYZ(Confidential) v. Alphabet Inc.* Case No. 7 of 2020 & 32 of 2021

requirements must be followed by the dominating undertakings. As a result, Google's argument was dismissed as being without validity.

In *Together we fight Society v. Apple Inc.*¹⁰, According to the CCI, it is unlawful to abuse a dominant position by enforcing unfair terms, restricting access to the market, employing leverage, imposing additional obligations, etc. The prohibitions listed in Section 4 of the Competition Act are unambiguous. Then, Apple limits app developers' ability to select a payment processing system of their choosing, especially as Apple charges a 30% commission while other payment processing solutions charge a substantially lesser rate for processing payments. To offer digital in-app content to their users, app developers must use Apple's in-app payment mechanism, i.e., In-App Purchase ("IAP"). According to the Commission's initial assessment, Apple has breached the provisions of sections 4(2)(a), 4(2)(b), 4(2)(c), 4(2)(d), and 4(2)(e) of the Act, and as a result, a thorough inquiry is necessary. CCI ordered the Director-General to conduct an investigation into the situation in accordance with Section 26(1).

In *Robit Arora v. Zomato (P) Ltd.*¹¹, The Informant claimed that Zomato had exploited its dominating position by increasing food delivery fees and by charging its customers for delivery services that were unfair, discriminatory, and extortionate. Furthermore, it was claimed that Zomato was preventing food delivery from unfavorable eateries by vertically preventing them from doing so and by failing to assign delivery executives. According to CCI, Zomato attempted to contradict the three alleged personal incidences of abuse by the Informant with evidence already on file, but the Informant did not seriously contest the facts, so the Commission determined that no abuse

¹⁰ *Together we fight Society v. Apple Inc.* Case No. 24 of 2021

¹¹ *Robit Arora v. Zomato (P) Ltd.* Case No. 54 of 2020

case had been established against the Zomato. According to the facts and circumstances of the case, the Commission believed that there was no evidence to support a *prima facie* case of the OP violating the Act's provisions. As a result, the Information submitted has been ordered to be immediately closed in accordance with Section 26(2) of the Act.

CCI has the power to adjudicate over instances when companies make obscure efforts to gain unfair advantage of their dominant position. It is necessary for companies to understand the consequences of their actions to prevent lawsuits. For businesses of any size, the sheer amount of resources needed to defend a name or organization in court may be taxing. Large companies are not always more prone to be sued, but when their cases make headlines, they are more likely to suffer a loss of public reputation. Working with a business that has recently been served with a lawsuit can be unsettling for many clients. The business might lose some of its current customers as word of the case spreads, and prospective customers who are doing research on the business will eventually find out about the lawsuit.

ECONOMICS OF COMPETITION AS A BASIS OF SOCIAL WELFARE AND JUSTICE 2394-997X

The growth of industries is essential for a nation like India that is predominately agrarian. In actuality, the country has experienced significant industrial progress since gaining independence. There is a compelling argument for industrializing nations with enormous populations, abundant and diverse natural resources, and continental sizes like India. The primary justification for industrialization is that it increases money. The main justification is that industrial development alone can offer a stable foundation for swift economic expansion. The use of constantly evolving

technology is essential for the development of industries. According to actual data, there is a strong correlation between a high level of income and industrial development. Beyond a certain point, the general public only wants industrial products. After the demand for food has been satisfied, the majority of the population's income is spent on non-food products. The amount of natural raw materials in finished products has increased with industrial advancement, creating a need for natural raw resources. Additionally, industrialization aids in bridging differences in import and export elasticity. The imbalances in the trade balance make it difficult to get enough foreign currency. Therefore, the only way to address the situation marked by differences in the elasticities of foreign commerce is through industrialization. India's economy is distinguished by a workforce surplus and a fast-expanding population. The issue of workers being rendered unnecessary in the agriculture industry due to rapid technological advancement has been added to this dilemma. It is vital to industrialize the nation swiftly in order to absorb the excess manpower internally. To do this, we must create more jobs at a rate proportional to the growth in the work force. The creation of new industries is the only factor that can speed up the creation of new jobs. Additionally, industrialization offers the components it needs to be strengthened. Additionally, it is necessary to ensure the security of the nation.

According to Article 38 of the Indian Constitution, the government must specifically focus its policies on securing equal rights for citizens to adequate means of subsistence, ownership distribution, the avoidance of wealth and resource concentration, equal pay for equal work for all citizens, as well as other socialist ideals. Social justice is justice that is in the best interests of society. To ensure that income is distributed as evenly as possible to ensure

citizens' right to life, social justice works to remedy the injustice of uneven birth and opportunity. The Monopolistic and Restrictive Trade Practice Act (MRTP Act) of 1969, the Industrial (Development Regulation) Act of 1951, the Equal Remuneration Act of 1976, and other laws have been incorporated by the state. These enactments serve the purpose of Article 38, however a question must me asked is whether these enactments too repressive for the expansion of industrialization. The idea of "welfare economics," in which welfare is applied to such tools for specific economic situations to maximize economic wellbeing, is modified to maintain harmonious relations between the general public and industries. However, this theory is not complete and is not helpful in the complex geopolitical environment of today. The welfare of its population has long been a concern for the government. As a result, the idea of a welfare state differs between industrialized and developing nations. In developing nations, welfare states promote labour welfare through a variety of measures that are either directly or indirectly aimed at raising the general standard of living for the less fortunate members of society, in addition to maintaining services like social insurance and steps to lessen extreme income and wealth disparities.

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COMPETITION CONTROL FROM A MATHEMATICAL PERSPECTIVE

In the advanced market countries, economics now plays an unduly large role in the study and enforcement of competition legislation and policy. This assignment intends to provide a non-technical introduction to three economic methods: (i) vertical arithmetic, (ii) upward pricing pressure, and (iii) critical loss analysis. These approaches have become widely used in competition law enforcement in general and in the study of proposed

mergers in particular. The role of economics in analyzing and enforcing competition law and policy has grown significantly in recent years¹² in developed market economies. Competition law itself has only existed for twenty to twenty-five years at most, and in some cases much less. CCI intends to safeguard the interests of every aspect of a market from producers to consumers, by ensuring fair operations and preventing non-competitive agreements. For the sake of clarification and demarcation of jurisdiction Section 2(r) of the Act distinguishes ‘relevant markets’ on the basis of geography and product.

In younger and developing market countries, economic techniques that have aided competition law enforcement in developed market economies focus investigations and assist decision-makers in differentiating between primary and secondary issues are ineluctably less understood. Cost push and demand pull inflation is one of the most common forms of inflation which arises within the domestic economy¹³. Any agreement relating to the production, supply, storage, or control of products or services that have the potential to significantly harm competition in India is considered an anti-competitive arrangement under the Act. This step is crucial to avoid inflation in the prices of goods due to excessive hoarding or buffer stock manipulation by large producers.¹⁴ Any agreement between organizations or individuals operating in the same or similar industries will have a negative impact on competition if it fits specific requirements. Usually, they include (i) setting purchase or sale prices directly or indirectly, (ii) managing production,

¹² Louis Kaplow and Steven Shavell, *Economic Analysis of Law*, Harvard Law School and National Bureau of Economic Research, (1999)

¹³ Ibid

¹⁴ Chris Sagers, *Antitrust Law as a Problem in Economics*, Cleveland-Marshall College of Law, Oxford Research Encyclopedia of Economics and Finance, (2018)

supply, markets, or service delivery, or (iii) directly or indirectly encouraging collusive bidding. The Act further states that businesses or individuals who are not operating in the same or a related industry shall be deemed to be parties to such agreements if they take an active role in advancing such accords.

Critical Loss Analysis

Critical loss analysis is becoming increasingly important in the subject of competition law. The quantity of output or sales necessary to render a certain price increase unprofitable is known as a “critical loss”; as a result, it specifies the volume of substitution required to extend a preliminary definition of a relevant market. The current definition of market, which overemphasizes product features and absolute price discrepancies while ignoring the profitability of hypothetical price hikes, has a number of faults that critical loss analysis corrects. It is a relatively simple calculation that more precisely captures the market definition test and fills a gap in the approach used to determine market definition. This exam is also known as the Hypothetical Monopolist exam (HMT).

The profit margin denoted as the group of businesses proposing to raise prices is the only factor taken into account in the calculation used to determine the critical loss.

The critical loss is expressed in its simplest form as $Y / (Y + CM)$ (100%) where Y is denoted as the hypothesized price increase expressed as a proportion and CM is the contribution margin.

When the critical loss is compared to company, industry, and general market data to determine whether substitution effects greater than or less than the

critical loss seem plausible and reasonable, the critical loss provides important information on the magnitude of the output effects needed for market definition purposes. The first instance of the term “critical loss” in American law was in *FTC v. Occidental Petroleum Corp*¹⁵. Cost projections are a part of this strategy. The margin between pricing (or, occasionally, marginal revenue) and marginal cost is the foundation for the profit maximization derivations used in SSNIP tests to examine the motivations of either individual businesses or the hypothetical monopolist. Yet, in the normal course of business, business enterprises typically compute “variable cost” rather than “marginal cost.” Variable cost changes depending on industrial production and costs. A marginal cost emerges when the total cost of production changes. Since fixed costs are constant, they have no impact on variations in the total cost of production. Marginal cost, the first derivative of total cost, at the very least indirectly includes the rental value of capital. This phrase might start to mean more and more as business and/or industry production approaches its limit. We will go deeper into the rising pricing pressure as a different tactic.

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- a. *Upward Pricing Pressure:* Upward pricing pressure¹⁶ refers to a market force that drives prices higher. It is typically caused by an increase in demand for a product or service, a decrease in supply, or a combination of both. When there is upward pricing pressure in a market, sellers have an incentive to raise prices to maximize their profits, which can result in higher prices for consumers. Conversely,

¹⁵ *United States v. Occidental Petroleum Corporation*, SEC 873 F, 2d 325

¹⁶ Jan Peter van der Veer, *UPP- Frequently Asked Questions*, Wolters Kluwer Competition Law Blog, (December 2012)

when there is downward pricing pressure, sellers may be forced to lower prices to remain competitive, which can benefit consumers. For instance, merger between A and B may have unilateral consequences because consumers who would have switched from A to B in reaction to a price increase are now “internalized” by the combined company. The price-cost margin for the output of good b was successful.

- b. *Vertical Agreements:* This economic strategy is crucial when vertical agreements are involved. The issue of how pricing will change and how competition will be affected when two companies with established market positions and complementary products merge emerges. This comprises vertical mergers involving businesses at various supply-chain levels as well as conglomerate mergers involving vendors of goods that customers incorporate into a single system. The two most applicable neoclassical economics models, the twofold marginalization problem and the free-rider dilemma, will need to be reviewed in this context.

CONCLUSION

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Competition law promotes economic efficiency by ensuring that firms operate in a competitive market environment. This encourages firms to innovate and improve their products and services, leading to lower prices, better quality products, and more choices for consumers. A competitive market environment encourages entrepreneurship and innovation as new players enter the market and challenge established players. This creates a more dynamic and innovative business environment, leading to new

products, services, and business models¹⁷. Competition law prohibits firms from abusing their dominant position in the market. This prevents dominant firms from engaging in anti-competitive practices, such as predatory pricing, tying and bundling, exclusive dealing, and refusal to deal, which can harm consumers and restrict competition. A competition law's implementation and enforcement are two very different things. It cannot be denied that the Indian economy is currently experiencing a period of stark disparity between those who have and those who do not. The stark gap between various groups of people from the bottom of the economic ladder to the top is a dreadful reality. There is a sense of desperation at one end of the continuum because we don't know where the next meal will come from, while at the other end, there is an almost indecent display of wealth. Of course, there are many reasons for this discrepancy, but with the implementation of legal safeguards against anti-competitive behavior, the focus has shifted from battling monopolies and unfair trade practices to promoting competition for the good of common people. The executive and those tasked with carrying out and realizing the purposes of the Competition Act, 2002, are assigned in a way that serves the general welfare and ensures the operation in order to fulfil the Constitution's mandate to ensure fairness in social, economic, and political matters as well as the ownership and control of the material resources of the society.

¹⁷ Altamas Kabir, "Competition Laws and the Indian Economy" 23 (1) NLSIR (2011) 1-8 available at: <https://www.jstor.org/stable/44283735>

JUDICIAL ACTIVISM & PROTECTION OF RIGHTS OF PEOPLE IN INDIA: AN OVERVIEW

- Dr. Krishna Mohan Malviya* & Dr. Sushim Shukla**

Abstract

The preamble to the Constitution of India levies certain obligations to ensure justice, liberty and equality. This draws our attention towards a well-known saying that, "Justice must not only be done, but also seen to be done." This enables state to consider that everyone has easy access to justice. They mark the edge to prevent any wings from encroaching on the domain of others' works. This paper attempts, to highlight judicial activism as an important phenomenon dealing with assuring the rights of people. However, it also memorizes the Emergency period in India, and attempts to puts focus on control over the courts attempted in this period. This paper also highlights the different aspects of Public interest litigations gave the courts the idea to speak with the public directly and pay attention even though the litigant might not be the victim. It enables the courts to automatically take such instances under consideration. This trend has received both support and opposition.

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Keywords: Justice, Judicial Activism, Legislative, Executive, and Judiciary.

* Asst. Professor @ College of Law & Legal Studies, Teerthanker Mahaveer University, Moradabad, Uttar Pradesh

** Asst. Professor @ College of Law & Legal Studies, Teerthanker Mahaveer University, Moradabad, Uttar Pradesh

INTRODUCTION

An obligation to uphold justice, liberty, and equality for all citizens of the nation is spelt out in the preamble of the Indian Constitution. This suggests the well-known adage, "*Justice must not only be done, but also seen to be done.*" This forces the legislature, executive branch, and judiciary to consider ensuring that everyone has easy access to justice because it is their duty to enact, carry out, and interpret the law correctly. Ignorantly, they carry out this duty with a just heart for the wellbeing of the people and the utmost faith in the welfare of the nation.

It is excellent that everyone is performing their assigned duties. It eliminates conflict between two or more groups and increases work diligence. Additionally, it is evident in our constitution i.e., the division of powers.¹ Any such conflicts were known to the constitution's creators. As a result, they split the government's duties into three categories and the legislative, executive, and judicial branches into three groups. Additionally, they mark the perimeter to prevent any wings from encroaching on the domain of others' works.

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However, a dilemma occurs and a broader public interest in the shape of fundamental and other rights suffers if one wing is unable or neglects to carry out its own role. It is referred to as judicial activism when the judiciary steps in to address the matter in question by any method of judicial review and goes above and beyond what is required under the law to safeguard social interests more broadly.

¹ A. K. Thiruvengadam, *The Constitution of India: A Contextual Analysis* (Bloomsbury Publishing, 2017)

However, if one wing is unable or unwilling to carry out its own responsibility, a problem results, and the wider public interest—in the shape of basic and other rights - suffers. In such a situation, judicial activism is defined as when the judiciary takes action to settle the matter at hand using any means of judicial review and goes beyond the scope of the applicable laws to safeguard society interests more broadly.

Judicial activism is a relatively recent phenomenon in India. However, it arose following the Emergency² in India, and attempts were made by the Government to exert control over the court. Public interest litigation gave the courts the idea to speak with the public directly and pay attention even though the litigant might not be the victim. It enables the courts to automatically take such instances under consideration. This trend has received both support and opposition.³

Judges in India have extensive authority and a long history of judicial activism, which is practically unheard of in the United States. Judges have recently ordered the conversion of Delhi's auto-rickshaws to natural gas to reduce pollution, shut down a large portion of the nation's iron-ore mining sector to reduce corruption, and decided that candidates facing criminal charges could not run for office. In fact, the Supreme Court of India and the Parliament have been in open conflict for many years, with the Parliament making numerous constitutional revisions in response to different Supreme Court decisions.

² *Kesavananda Bharti v. State of Kerala*, AIR 1973 SC 1461

³ Rekha Kumari R Singh, *An analytical and critical study on judicial activism vis vis judicial overreach with respect to legislative function of the Indian parliament* (2015) (Unpublished Ph.D. thesis, Veer Narmad South Gujarat University) available at: <http://hdl.handle.net/10603/32340> (last visited on: 20.06.2023)

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After extensive analysis, it has been determined that the fundamental rights outlined in Part III of the Indian Constitution⁵ include the right to privacy, the right to a living, the right to an education, among other things. In *Kesavanand Bharati v. State of Kerala*⁶, the Supreme Court declared that the “basic structure” idea of the Constitution cannot be changed, despite its authority. Nations like Bangladesh, Pakistan, and Malaysia have accepted this idea as part of their legal systems. Important examples involving the application of this theory in other nations, including Singapore and Uganda, have been reported in those nations. In the case of *State of Uttar Pradesh v. Raj Narain*⁷, where Indira Nehru Gandhi's candidature was denied by the Allahabad High Court in 1973, the present tendency of judicial activism had its start. Justice V. R. Krishna Iyer reintroduced and broadened the public interest litigation. Among the other instances cited is the directive to the

⁴ “Judicial Supremacy v. Parliamentary Supremacy in India” available at: <https://www.lloydlawcollege.edu.in/blog/judicial-supremacy-v-parliamentary-supremacy.html> (last visited June 21, 2023)

⁵ Arun K Thiruvengadam, *The Constitution of India: A Contextual Analysis* (Bloomsbury Publishing, 1st Ed. 2017)

⁶ Supra note 2

⁷ *Uttar Pradesh v. Raj Narain*, 1968 AIR 960

Delhi government to convert the auto rickshaw to CNG, which is thought to have decreased Delhi's formerly severe smog issue (which is now claimed to come back) and contrasted with Beijing's.

Judicial Activism: Judicial activism is the judiciary's aggressive role in defending citizens' rights. The USA is where judicial activism first emerged and developed.

The Supreme Court and/or the High Court in India have the authority to review the constitutionality of any law, but the lower courts lack this authority. If any law is found to conflict with any provision of the Indian Constitution, it may be declared unconstitutional by the Supreme Court and/or the High Court.⁸ In India judicial activism is pioneered by Justices V.R. Krishna Iyer, P.N. Bhagwati, O. Chinnappa Reddy, and D.A. Desai.

Judicial Restraint: The concepts of judicial restraint and judicial activism are diametrically opposed. The doctrine of judicial restraint encourages judges to restrict the use of their own authority through judicial interpretation. That is to say, the courts should interpret the law rather than get involved in shaping policy.⁹

CASES SHOULD BE DECIDED BY COURTS ON THE BASIS OF

⁸ Jeremy Cooper, *Poverty and Constitutional Justice: The Indian Experience*' XLIV MLR (1993)

⁹ "Courts can declare, interpret law but cannot entrench upon legislation: SC judge" The Economic Times, 14 July 2021 available at: <https://economictimes.indiatimes.com/news/india/courts-can-declare-interpret-law-but-cannot-entrench-upon-legislation-sc-judge/articleshow/84417571.cms> (last visited on: 16.06.2023)

1. The main intent of those who wrote the constitution.
2. Precedent - past decisions in earlier cases.
3. Also, the court should leave policy making to others.

Judicial Over-reach: Judicial Overreach is the term used to describe judicial activism when it crosses the line and turns into judicial adventurism. When the court begins to obstruct the proper operation of the legislative or executive branches of the government, this is known as judicial overreach.

Generally judicial overreach is undesirable in democracy as it violates the rules of separation of powers. However, judiciary responds this criticism by asserting that it has only intervened when the legislative or executive branch fails in performing their own duties towards the citizens.

Judicial Activism: Legal activism has developed mostly as a result of the inaction of lawmakers and the executive. There's no question that the legislative and executive branches haven't succeeded in producing the anticipated objectives. It occurs as a result of the system's widespread inefficiency and inactivity. The abuse of fundamental human rights has also served as a catalyst for judicial activism. The exploitation and abuse of certain provisions of the Constitution, judicial activism has gained more significance.

NECESSITY OF JUDICIAL ACTIVISM

It is quite important to understand the factors responsible behind judiciary playing a significant role in order to comprehend the rising role of the judiciary. The executive many times lost interest in their own work and fail to produce the necessary results. The legislative responsibilities of

Parliament have become slack. Democracy's fundamental tenets were steadily deteriorating. Public Interest Litigations brought up public issues.

The judiciary was compelled to take an active part in such a situation. It was only made feasible by a system like the court, which has the authority to right a variety of social wrongs. The Supreme Court and High Courts took on the task of addressing these issues.

For instance, Justice Gajendragadkar decided in *G. Satyanarayana v. Eastern Power Distribution Company of A. P.*¹⁰ that a mandatory investigation should be carried out if a person is fired for wrongdoing and that he should be given the chance to defend himself. This decision added rules to labour law that the law had been ignoring. Like this, the significant case of *Vishaka v. State of Rajasthan*¹¹ serves as a reminder of the necessity of judicial activism. Here, the SC outlined rules that must be adhered to to ensure proper treatment of women in the workplace. It further declared that until Parliament passes laws enforcing gender equality, these principles should be regarded as law.

In the *Kesavananda Bharati case*¹², the Indian Supreme Court ruled that the executive branch lacked the authority to interfere with the constitution's fundamental principles. In case of *Sheela Barse v. State of Maharashtra*¹³ A letter by a journalist to the Supreme Court on the abuse of female inmates while they were incarcerated. The court took notice of the letter and regarded it as a writ petition.

¹⁰ 2016 SCC OnLine Hyd 552

¹¹ (1997) 6 SCC 241

¹² Supra note 2

¹³ (1983) 2 SCC 96

In case of *I. C. Golaknath & Ors v. State of Punjab & Anrs*¹⁴ Hon'ble Apex Court ruled that Fundamental Rights are impervious to legislative amendment and cannot be changed. In 1979 case of *Hussainara Khatoon (I) v. State of Bihar*¹⁵, The newspaper articles reflected the inhumane and savage treatment of the detainees awaiting trial. The Supreme Court accepted it and held that the right to a quick trial is a basic right under article 21 of the Indian Constitution. In *A.K. Gopalan v. State of Madras*¹⁶, the Indian Supreme Court rejected the claim that in order to deny someone their life or freedom, both the legal process and the requirements of fairness, reason, and justice must be followed.

Judicial Restraint: Judicial restraint may help in preserving a balance among the three branches of the government- i.e.

1. Judiciary
2. Executive and
3. Legislative.

To uphold the law established by the government in the state legislature, it is of utmost importance:

1. To show respect for the separation of governmental issues.
2. Also, to permit the legislature and the executive to follow their duties by not interfering in their arena.
3. Also, to show respect for the democratic form of government by leaving the policy decisions with the policymakers.

¹⁴ AIR 1967 SC 1643

¹⁵ AIR 1979 SC 1360

¹⁶ AIR 1950 SC 27

Tendency behind Judicial Restraint: In case *S.R. Bommai v. Union of India*¹⁷ judiciary used the restraint. According to the ruling, if the issue is political judicial review is not imaginable. The court refused to conduct judicial review due to the authority of article 356 was a political matter. The court said that if judicial principles were applied to political issues, it would be invading the political sphere and should be avoided.

However, in case of *Almitra H. Patel v. Union of India*¹⁸, Hon'ble Apex Court refused to instruct the Municipal Corporation that who would be responsible for maintaining the cleanliness of Delhi and said that it could only appoint authorities to carry out legal obligations.

The concept of Judicial Overreach: Legislative and executive carelessness or incapacity results “Judicial overreach”. It means these both wings of governments are weak and rash, both in the creation of legislation and in their implementation.

Many legal experts, attorneys, and judges have criticised the Indian judiciary for taking too activist positions and overreaching.

JUDICIAL ACTIVISM: BY SEVERAL MEANS

Judicial Review: By judicial review, the judiciary examines the activities of legislative and executive. Judicial review plays as a role of check and balance on the actions of the legislative and executive under the present system. This rule of judicial review has been taken from the American Constitution by the Indian legal system. Under this rule the Supreme Court has the power to review the constitutionality of any legislatively enacted law.

¹⁷ AIR 1994 SC 1918

¹⁸ 1999 (7) SCALE 376

Public Interest Litigation: Public Interest litigation was propounded by Hon'ble Justice P.N. Bhagwati and V.R. Krishna Ayer. By this any legal action for the benefit of the public is brought. This rule has been made so liberal that any person can bring the attention of Supreme Court by a letter also. If by any means Supreme Court takes notice that there is interest of public at large in any matter and this matter is not brought to the notice of court, then Supreme Court can take notice suo- motto.

Precedent: The past decision in an earlier case is precedent. Judges who follow judicial restraint must adhere to the idea of stare-decisis or must uphold previously decided cases.

Leaving the legislature and executive to decide policies: Judicial Restraint is followed when the court leaves policy making to others.

Constitutional Interpretation: Constitutional interpretation court tries to resolve the disputes and problems of the people and gives the original legislative intent of the constitution which was intended by the Constitution makers. The possible source of the interpretation can be divided in two parts primary source and secondary source.

Access to international statutes for ensuring constitutional rights: The court refers many types of international statutes in its judgements. This reference by the Supreme Court is only for the protection of the rights of the common people because there is no any value of international statutes in municipal Law but if court has to protect the rights of common people then it interpret according to it.

CONCLUSION

The Indian judiciary has played a significant role in the improvement of society because of judicial activism. By this, the Supreme Court has tried to make the path of the court very easy. Everyone can approach the court for the protection of ones right as well as for the right of others also. If someone approach the court for the protection of the right of others this is public interest litigation. By this the Supreme Court and the High Courts have many times supported progressive social programmes, and the public has high regard for the judicial system.

However, it is very crucial to maintain the separation of power between all the three wings of the government. It may be possible only when all the three wings of the government take their active role for their own works. No one will remain depend upon others. Neither wing go and work upon the works of others.

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UNDER COOKIES' COMMAND: SURVEILLANCE CAPITALISM AND THE RIGHT TO PRIVACY

- Vedanti Singhal*

Abstract

Author recently purchased winterwear from a well-established American brand and now my social media feed is swamped with woollen apparel ads. This happens due to 'surveillance capitalism,' a term coined by the scholar, Shoshan Zuboff. With the perks of digitization comes unwelcomed surveillance where users are used to commodify their data in a capitalist society. This paper attempt to elucidate on the concept of surveillance capitalism and the resultant, breach of privacy. For the sake of structure, this paper adopts a trace approach and discusses legislative initiatives and other company initiatives to uphold web privacy. In its last segment, a rather unheard solution is provided to ensure anonymity in dating sharing without impacting the end result.

Keywords: Big Data, Surveillance, Marketing, Data Protection, Contextual

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* Student @ O.P. Jindal University; Email: vedanti_singhal@hotmail.com

INTRODUCTION

Big data refers to large, diverse sets of information that are constantly growing and its primary source is consumer's online activities.¹ By consolidating data, companies can optimize consumer demand, increase their product/service's efficiency in line with these demands and convert these consumers into prospective customers. Although analyzing big data for marketing purposes is not new, it does vest advertisers with powerful ways of understanding and predicting consumer preferences. Surveillance capitalism uses a business model based on big data for commercial purposes. *What is surveillance capitalism, then?* It can be understood as a market-driven process where the users' personal data is the commodity for sale.² This data is produced by mass surveillance of the internet carried out by big tech companies which provide free online services like search engines Google and other social media platforms.³ In this process, the companies collect and scrutinise the user's online behaviour to condense the relevant data to create a marketing database. The Big Five, Google, Amazon, Facebook and Apple, collectively collate unmatchable quantities of data related to user behaviours, which they convert into products and services as explained in the following segment. More often than not, layperson is unaware of the extent of such surveillance. The process of data tracking and profiling is used in the form of surveillance capitalism to legally micro-target

¹ Saksham Malik, "Indian Merger Control Thresholds: effects of Recent Amendments on Digital Markets" Kluwer Competition Law Blog, available at: <http://competitionlawblog.kluwercompetitionlaw.com/2022/01/10/indian-merger-control-thresholds-effects-of-recent-amendments-on-digital-markets/> (last visited on: 20.01.2023)

² Donell Holloway, "Explainer: what is surveillance capitalism and how does it shape our economy?" *The Conversation*, June 14, 2019

³ Ibid

consumers, but this commercial incentive is resulting in a constant breach of right to privacy. This paper attempts to highlight the inept initiatives taken by companies and the guidelines issued by the EU while providing a potential solution.

CONTEXTUAL ADVERTISING: SOCIAL MEDIA EAVESDROPPING

The initial intent behind big data analysis was to reduce future uncertainties by predicting future behavioral patterns of data consumers. But now, the aim is to commercially monetize this data. The process of contextual surveillance is based on interlinked systems or “surveillant assemblages” of bureaucracies and social connection, embedded in our everyday lives.⁴ There was an upshot of contextual advertising or behavioral advertising in 2000s with the launch of Google’s AdSense where users would receive more personalized and relevant ads.⁵ For instance, if X ran a food critic blog, AdSense might serve contextual ads like restaurant recommendations. As early as 2004, Google launched Gmail and acknowledged that it had scanned private correspondence for personal information.⁶ This was

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⁴ Ian Brown, “The International Encyclopedia of Digital Communication and Society, Ch Social Media Surveillance”, available at: <https://onlinelibrary.wiley.com/doi/pdf/10.1002/9781118767771.wbiedcs122> (last visited on: 10.03.2023)

⁵ Brian Platz, “New Digital Advertising is Rising from the Ashes of Surveillance Capitalism” *Forbes*, June 17, 2021, available at: <https://www.forbes.com/sites/forbestechcouncil/2021/06/17/new-digital-advertising-is-rising-from-the-ashes-of-surveillance-capitalism/?sh=22a3a14556dc> (last visited on: 10.03.2023)

⁶ Joanna Kavenna, ‘Shoshana Zuboff: “Surveillance Capitalism is an assault on human autonomy”’ *The Guardian*, October 4, 2019, available at: <https://www.theguardian.com/books/2019/oct/04/shoshana-zuboff-surveillance-capitalism-assault-human-autonomy-digital-privacy> (last visited on: 12.01.2023)

supposedly a give-and-take relationship where users were served with relevant ads and companies would have a better grasp of users' tendencies. A widespread digital advertising industry grew around this model based cross-site third-party⁷ cookie tracking. Users regularly disclose their personal information when they "accept all cookies" granting the site to track their online activities.

LOCATION-BASED MARKETING

Users of social media consider it to be an interactive platform meant for communication, sharing media and other information. But social media platforms use this information to create personalized profiles of individuals to later show them targeted ads.⁸ WPP advertising company, for example, has built over 500 million personalized profiles globally.⁹ To achieve greater precision in the consumption interest of the users, companies maintain a dossier of browsing information and analyse which potential interest matches.¹⁰ This organisation, classification and sorting of collated data is called profiling. Targeting advertising is a practice of pairing viewers with advertisers on a real-time basis.¹¹ Profiling and targeting help in hyper-personalizing ads. Well received content is contextual, timely and relevant and pro-active and predictive marketing does exactly that.

With every swipe, tap, click on the screen, the user is tracked and targeted. Consider the following scenario where two people have a real-time

⁷ Usually marketing companies external to the domain visited.

⁸ Supra note 4

⁹ Supra note 4

¹⁰ Jiahong Chen, "Data Protection in the Age of Big Data" *Edinburgh Research Archive* (2018) available at: <https://era.ed.ac.uk/handle/1842/33149?show=full> (last visited on: 03.11.2022)

¹¹ Ibid

conversation regarding a product and an ad of that product pops up on their screen while scrolling Facebook. Many of these apps ascertain the user's geolocation based on GPS tracking and then sell this data to digital marketers.¹² Facebook and other social media platform surveil online behavior. So, in the abovementioned conversation, Facebook is privy to the knowledge that one of the friend's previously looked up that product on Google as it shadows the data trails he leaves, and by geo-location tracking it is aware that both the friends are together and thus, it targets the other friend with an ad of the same product. This is how websites compare interests based on the footprints. Geo-targeted mobile marketing is the fastest growing forms of advertising and one of the most controversial, instigating privacy advocates.¹³

The marketing industry persistently claims that targeted advertising based on behavioral data surveillance helps in serving internet users with interest-based tailored ads and enhance their overall online experience.¹⁴ Contextual advertising is a business model based on persistent and invasive data collection. The problem arises when data is tracked not just to analyze and predict consumer behavior, but to change it. These companies wish to expropriate as much information as possible based on predictive algorithms and mathematical calculations to ensure certainty of user's future behaviour in order to intervene with it.¹⁵ To alter future behaviour aimed at maximizing revenue, companies identify individual's behaviour of interest.

¹² Janella Nanos, "Every Step You Take: How Companies Use Geological Location to Target You" *The Boston Globe*, available at: <https://apps.bostonglobe.com/business/graphics/2018/07/foot-traffic/> (last visited on: 10.01.2023)

¹³ Ibid

¹⁴ Supra note 10

¹⁵ Supra note 6

Like E-commerce brands track not just individual's purchasing preference or behaviour but also see the time they spend on a product before making the decision to purchase in order to target special offers and influence purchasing patterns.¹⁶ These predictive analytics helps marketers design advertisements to elicit unconscious and impulsive responses from its viewers.¹⁷ This 'ubiquitous computing' has become a pervasive phenomenon that has faded in the backdrop of everyday lives where individuals unknowingly share detailed information.¹⁸ Users allow companies to cash out their personal data because the enormity of surveillance is not that obvious to them. This has enabled expansion of data collection capacities since amount of personal data users share is unknown to them or has been normalized.

IMPACT OF SURVEILLANCE: PUPPETRY

Surveillance capitalism negatively impacts the individuals and the society, as a whole, thereby outweighing its benefits. It leaves humans as hackable entities and encroaches on individual autonomy and decision-making rights.¹⁹ It dehumanizes people and sees them as objects evaluated in terms of how beneficial their response may be to their marketing strategies. Additionally, one is exposed to a "filter bubble"²⁰ where the internet is so personalized, tailored by tech-companies that it creates an impression the

¹⁶ Supra note 4

¹⁷ Comment on Petition for Rulemaking by Accountable Tech, available at: <https://www.democraticmedia.org/sites/default/files/field/public-files/2022/childrens%20coalition%20survadv%201-26-22.pdf> (last visited on: 10.01.2023)

¹⁸ Supra note 4

¹⁹ Amakiri Welekwe, 'What is surveillance capitalism and how can it affect you?' *Comparitech*, July 21, 2020, available at: <https://www.comparitech.com/blog/vpn-privacy/surveillance-capitalism/> (last visited on:03.02.2023)

²⁰ Internet Activist Eli Pariser

internet is limited to their narrow self-interest.²¹ An example of this bubble is personalized video recommendations on YouTube or even personalized feed on Facebook or Instagram. At face value, it may seem advantageous but in actuality, limited access to only personalized internet has the potential to undermine civil discourse and make users vulnerable to propaganda and manipulation.²² This side of the internet could isolate individuals in their own cultural ideologies without attracting an educating or challenging dialogue. Since, data trails are permanently recorded, it confers unmatchable control to tech giants over its users. The subsequent consequence of this control is declaration. Online marketers simply declare its users' future.

Children and teenagers at the receiving end of online surveillance are more susceptible to its posited risks of behavioral and emotional manipulation. Young people consist of the significant audience of online experiences making them highly valuable for surveillance advertisers. Children are unaware that their personal data is commoditized to customize ads for them. Research suggests that children and teens are more easily influenced by advertising.²³ Commercial appeals to children makes it difficult for them to distinguish between programming and advertising, facilitating the intended effects of targeted advertising. Unfettered exposure to marketing is the leading cause of health concerns in young children including childhood obesity,²⁴ substance abuse and dependence,²⁵ mental health issues,²⁶ and

²¹ Ibid

²² Supra note 19

²³ Report of the APA Task Force on Advertising and Children (2004) *available at:* <https://www.apa.org/pi/families/resources/advertising-children.pdf> (last visited on: 21.07.2023)

²⁴ Robinson, T. N., Banda, J. A., Hale L., Lu, A. S., Fleming-Milici, F., Calvert, S. L., Wartella, E, Screen media exposure and obesity in children and adolescents. *Pediatrics* (2017)

eating disorders among others.

Online surveillance also leverages insecurities of children against them. In 2014, in a memo drafted for advertisers, Facebook showed how they share psychological insights on its users, especially young people, with advertisers.²⁷ Facebook, by tracking its users' shared media in real-time, can recognize when they are feeling 'insecure' or 'need a boost of confidence.'²⁸ This was the largest known leak in Facebook's history. Alongside monitoring these emotions, Facebook can also identify how they fluctuate during the week. While youngsters, or people in general, are unloading their emotions online to seek support, Facebook is collecting these emotions and analyzing them to relay them to marketers. Even though Facebook claims that the emotional data aggregated was not used for any campaigns, sentiment analysis is not new on the internet.

The indiscriminate monitoring of personal data of adults and children alike is worrisome because children are not equipped to understand the process behind data mining and how it is used against them. In their formative years when children are impressionable, being exposed to online surveillance can potentially limit their opportunities. They are shown what marketers want

²⁵ Huang, J., Duan, Z., Kwok, J., Binns, S., Vera, L. E., Kim, Y., Szczypka, G., & Emery, S. L. (2019). Vaping versus JUULing: How the extraordinary growth and marketing of JUUL transformed the US retail e-cigarette market. *Tobacco Control*, 28(2), 146-151 available at: <https://doi.org/10.1136/tobaccocontrol-2018-054382> (last visited on: 12.02.2023).

²⁶ Report of the APA Task Force on the Sexualization of Girls, American Psychological Association (2007), available at: <https://www.apa.org/pi/women/programs/girls/report> (last visited on: 11.12.2023)

²⁷ Sam Levin, "Facebook told advertisers it can identify teens feeling 'insecure' and 'worthless'" *The Guardian*, May 1, 2017, available at: <https://www.theguardian.com/technology/2017/may/01/facebook-advertising-data-insecure-teens> (last visited on: 11.12.2023)

²⁸ Ibid

them to see. So, if the marketers have profiled and labelled children/teens as gamers or impulsive shoppers, they will be shown more related ads thus, tapering their interests and limiting their options of venturing out. Even if children and teens are able to recognize targeted advertisements, they are unable to resist them. This instinctive behaviour is not exclusive to young children. The movie, Social Dilemma, for instance, highlights how employees of these big tech companies, who are aware of the extent of surveillance, continue to fall prey to these manipulative techniques.

CAMBRIDGE ANALYTICA DATA THEFT: CAUTION LIGHT

Persistent and intrusive data collection was first recognized in the Cambridge Analytica scandal in 2018. Cambridge Analytica, a political consulting firm, worked for Trump's campaign and broke Facebook's own rules by collecting and on-selling private data of over 80 million users, under the pretence of academic research.²⁹ The data was acquired using a Facebook-based quiz which was a personality test. The data was used to grasp the users' political views and personality traits and they were then targeted with Trump campaigns. Facebook was fined for breach of privacy terms and Mark Zuckerberg was summoned before the US senate. Facebook faced worldwide backlash and criticism and users deleted their account. The hashtag #DeleteFacebook began trending on Twitter. To redeem itself, the company undertook some modest initiatives like a system of third-party fact checkers to ensure more transparency and opted for a policy to limit inauthentic coordinated behaviour. Cambridge Analytica's

²⁹ Nicholas Confessore, "Cambridge Analytica and Facebook: The Scandal and Fallout So Far" *New York Times*, April 4, 2018, available at: <https://www.nytimes.com/2018/04/04/us/politics/cambridge-analytica-scandal-fallout.html> (last visited on: 10.01.2023)

findings set way for the privacy awakening and ways in which data can be misused. In the following year, Mark Zuckerberg stated the need of an active role of the government and regulators for updating internet rules.

The scandal was a turning point which had significant implications on other tech giants. Apple recently launched App Tracking Transparency which gives its users the option of opting out of sharing their data with third-party marketing domains.³⁰ Later Safari blocked cookies by default and so did Mozilla in Firefox.³¹ Google also claimed to limit cross-site tracking in Chrome by default by 2022.³² However, Google has pushed the deadline to late 2024.³³ Some of these tech giants can offset revenue losses while others like Facebook, Twitter and third-party advertisers may face an economic burden. Like Google, despite limiting cross-site tracking in Chrome, can gather a lot of data through YouTube, Google Docs, Google Maps and other linked apps. Apple can also make up for losses through hardware sales.

PERSONALIZATION V. PRIVACY: LEGISLATIVE ROUTE

Social pressure coupled with the introduction of new regulations have posed challenges to the existing ad revenue model. In the backdrop of regulatory oversight and relational power dynamics between surveillance capitalists and internet users, Europe implemented the first rousing data privacy policy,

³⁰ Supra note 5

³¹ Supra note 5

³² Supra note 5

³³ "Google now delays blocking 3rd party cookies in Chrome to late 2024" *The Economic Times*, July 28, 2022; available at: <https://economictimes.indiatimes.com/tech/technology/google-now-delays-blocking-3rd-party-cookies-in-chrome-to-late-2024/articleshow/93189036.cms?from=mdr> (last visited on: 11.03.2023)

General Data Protection Regulation (GDPR), 2018. Although it is EU regulation, it also governs non-EU organizations that have offices in EU countries or that store and process data of EU users.³⁴ This means that the physical presence of a company in EU is not a pre-requisite for it fall under the scope of GDPR. GDPR is the latest legal response which affords paramountcy to individual privacy while curbing corporate commodification of personal data. It has set global standards pertaining to data collection, storage, and use.³⁵ The main of this policy is to enhance the control an individual has on their personal data and its dissemination. Provisions under GDPR lay down right to notification and require users to be informed how their data would be used and give them an option to opt out from giving their data.³⁶ It emphasizes on the importance of consent, given freely, before transmitting data to third-party marketers or those outside EU without prior agreement.³⁷ A distinctive and worth mentioning provision is the right to be forgotten. It says that any personal data stored by an online marketing domain must be erased as per the user's request, subject to certain conditions.³⁸ Throughout the legal framework, it is reinforced that an individual as an active agent in determining what is to be done with their data and it transgresses beyond mere passive "data protection." GDPR in some of its provision recognizes that data should not be used in any manner not permitted by its subjects, but, it fails to address the issues with data collection itself. So, a major shortcoming is that while it raises awareness

³⁴ Article 3, GDPR Territorial Scope of the Law

³⁵ Brett Aho & Roberta, "Beyond Surveillance Capitalism: Privacy, Regulation and Big Data in Europe and China" Taylor & Francis (2020), available at: <https://www.tandfonline.com/doi/pdf/10.1080/03085147.2019.1690275> (last visited on: 11.01.2023)

³⁶ Article 13 & 14, General Data Protection Regulations

³⁷ Supra note 35

³⁸ Article 17, General Data Protection Regulations

amongst online consumers regarding data protection and violation of their privacy, it still neglects those that the policy was enacted to protect. This is not to undermine a major stride in the direction of combating privacy concerns in data collection. Since it is an EU specific regulation, other jurisdictions can inspiration to curate their own data protection policies.

MULTI-PARTY COMPUTATION: A PANACEA

A likely solution with an untapped potential to have a sweeping effect on the advertising technology data collection is Secure Multi-Party Computations (“MPC”). MPCs are procedures or a type of encryption that protects the security of private inputs.³⁹ It has been in existence since the 1980s but is only gaining prominence now. The search giant, Google, is already using this technology. Google Cloud has added a feature of Confidential Space which is based on this encryption where organizations get exclusive space to perform collaborative tasks without divulging private data.⁴⁰ In other words, MPC allows data sharing without leaving a trail of its origin. It uses blockchain technology where when one party enters data, it is broken down and encoded with numbers. The intended receiver of this data has to use a key to see it, which is decoupled from the user.⁴¹ It is a zero-knowledge approach where the end result remains undisrupted. Advertisers can see all important data like how many people bought a product based on the new ad, or the number of rides shared during peak hours, but without

³⁹ Seung Geol Choi, “Secure Multi-Party Computation Minimizing Online Rounds” Springer (2009), available at: https://link.springer.com/chapter/10.1007/978-3-642-10366-7_16 (last visited on: 15.12.2022)

⁴⁰ Nancy Liu, “Google Cloud Creates Confidential Space for Multi-Party Computation” Sdx Central, Oct. 12, 2022, available at: <https://www.sdxcentral.com/articles/news/google-cloud-creates-confidential-space-for-secure-multi-party-computation/2022/10/> (last visited on: 06.01.2023)

⁴¹ Supra note 5

mining data in an invasive manner to affect individual's privacy. This enables statistical modeling and analysis without having access to the origin of the data.⁴² MPC is a solid example of how technology evolves outside archaic business models with privacy consolidated in the process.



⁴² Supra note 5

JUSTIFICATION FOR PROTECTING FOLK DANCE PERFORMERS AND THEIR PROTECTION UNDER INTERNATIONAL COPYRIGHT LAW

- Shreeya*

Abstract

Folk dance is a type of dance where the performance reflects tradition, religion, culture, etc. Such dances depend heavily on their performers to continue existing. They pass on its legacy in inventive ways from generation to generation. India is renowned for its numerous varieties of climate, linguistic attire, way of life, eating habits, and tails, all of which are mirrored in their own music and dance. Folk dance performers bring the past to life, which is undoubtedly beneficial for preserving our culture. Additionally, it might be a beneficial way to combine dancing and exercise. The world praises and admires Indian folk dances, which can also make their performers famous and wealthy. Although there are different international and national effort for protecting performers covering folk dance performers under the definition, technology innovation has significantly altered our world. In our digital age, artists can be quick and current. Performers actually have relatively little control over their own work, which leads to rights violations. The paper defines the term performers of folk dance and the justification for the protection. Several International instruments which support the protection.

Keywords: Folk Dance Performers, Copyright, Intangible Cultural Heritage, Folklore, Folk Dance.

* Research Scholar @ Department of Law and Governance, Central university of South Bihar, Gaya

INTRODUCTION

A folk dance is one that depicts the way of life of the citizens of a certain nation or territory. When highlighting the cultural origins of the dance, the labels “ethnic” and “traditional” are utilised. Nearly all folk dances are ethnic dances in this sense.¹ According to logic, the adjective folk should modify the noun dance to denote a particular type of dance and dancing, as well as possibly the style or another unique aspect of the dance or performance.

India has a diverse range of customs and cultures. The Indian culture is quite distinctive because of its diversity in all areas. Indian folk and tribal dances are a result of various socioeconomic conditions and long-standing traditions. In India, we celebrate and have festivals almost every day, and dances are performed to show joy and enjoyment. Indian culture is now more diverse as a result of this. Since festivities are a part of every event, folk dances are a crucial part of our social milieu. There are numerous tribal and folk dances, and almost all of them have experienced continuous evolution and improvisation.

Folk dances are done for every conceivable event, including weddings, festivals, the beginning of a new season, and the birth of a child. The folk dances have very few steps and very little movement. Indian folk dances are vibrant and full of life. Men and women dance together in some shows while they do some dances separately. Most of the time, musicians play instruments, and the dancers sing for themselves. Folk dances all have

¹ The Editor of Encyclopaedia Britannica, available at: <https://www.britannica.com/summary/folk-dance#:~:text=folk%20dance%2C%20Dance%20that%20has,those%20of%20the%20aristocracy> (last visited on: 29.07.2022)

distinctive costumes and rhythms. The majority of the outfits used for folk dances are vibrant and feature elaborate designs and jewelery.

More controversially, others describe folk dancing as dancing for which there is neither a regulating organisation nor any professional or competitive institutions. Folk dance is a type of dance that is frequently done for fun and is a common representation of a previous or current culture. The terms “folk dance” and “folklore,” both of which have been in use since the late 19th century, are not as descriptive or undisputed as they might first appear to be.² Folk dance is not a global genre of dance, which is a point of considerable relevance and one that is essential to understanding it. Folk dances from different cultures cannot be compared because they do not have any common movement, figure, shape, style, or function. Furthermore, a dance cannot be classified as a folk dance based on a single movement, figure, form, style, or purpose. Saying that folk dances are those dances associated with and performed by folk dancers is perhaps the simplest way to define them. Folk dancers are defined as people who perform folk dances by the same logic. India is a country with many different customs and civilizations. Folk art is something that a community or specific location has in common. Although the creators’ identities are lost to time, the aesthetic has survived. India is renowned for its voluminous cultural legacy and customs. From earliest times to the wealthiest cultures, dance has been a component of daily life. Indian dance styles are typically divided into two groups: classical dance and folk dance. According to regional custom, these dancing styles have their roots in different regions of India.

² Joann W. Kealiinohomoku The Editor of Encyclopaedia Britannica, “Folk Dance” available at: <https://www.britannica.com/art/folk-dance> (last visited on: 30.12.2022)

The following characteristics may apply to some or all folk dances:

1. People with little to no formal training typically hold dances at folk dance meetings or social events, frequently to traditional music.
2. Dances that aren't typically meant to be performed in front of an audience or on stage, however they occasionally get set up and staged that way.
3. Despite the fact that folk traditions evolve over time, execution is controlled by inherited practices from diverse worldwide cultures.
4. New dancers frequently pick up their skills on the spot by watching others or asking for assistance.

Indian folk and tribal dances are typically straightforward and performed to express excitement at the change of seasons, a child's birth, marriages, and festivals. Folk art is something that a community or specific location has in common. Although the creators' identities are lost to time, the aesthetic has endured.³

Folk dances in Bihar **Lex Revolution**

When we consider culture, music, art, and religion, an image of the sacred region of Bihar immediately forms in our minds. The history of Bihar goes all the way back to the dawn of civilization. A simultaneous fusion of culture, music, art, and religion, Bihar's folk dance, folk songs, and many dance forms serve as a depiction of the people's emotional upheavals as well as their values, hopes, beliefs, and traditions. Some of the Folk dances of

³ Shikha Goyal, "List of Folk Dances of Different States in India", *Jagran Josh*, Jan 03, 2022 available at: <https://www.jagranjosh.com/general-knowledge/lists-of-states-and-folk-dances-of-india-1466770456-1> (last visited on: 28.07.2022)

Bihar are:

1. **Jat Jatin:** The most well-liked folk dance in North Bihar, particularly in the Mithila and Koshi region, is Jat-Jatin. Man and woman perform it in tandem. A folk dance called Jat-Jatin was created by the same emigrant couple's husband and wife. This dance depicts a rainbow of the pleasant and emotional arguments additionally some grievances between husband and wife, aside from poverty and grief.
2. **Karma:** The Karma tree, which represents luck and fortune, is the source of the name of the traditional Karma Dance. The tree is planted first, and then the dance begins with circular forms all around it. Usually, there are an equal number of men and women dancing in this group dance. The movements of the dancers, who are arranged in a two-tiered structure, are often backward and forward, towards and away from one another. The dancers move to the beat of the drum and the women's clapping. Later, as the formation is broken, these dancers' thread in and out while bending their knees and waist. The dancers form semicircular rows by wrapping their arms around the waists of their neighbours. To the music of the Mandur and Timki, each row of dancers alternates between singing and dancing. Drums beat loudly and quickly as the dance comes to a joyful conclusion.
3. **Kajari:** Kajari is a dance about the wet weather. When heard with the rhythmic note of rain, the well-known beautiful tune of Kajari songs induces a delightful sensation in the body and is first heard at the beginning of the Shravan month.
4. **Jhumar:** Jhumar is a Bihar folk dance that is traditionally performed by rural ladies. This lovely dance style has no set season; it is a dance

that is done constantly with its stunning descent, spring fills the world with love and gladness.

5. Maghi Jhumar: The Magahi Jhumar dance is typically performed as a duet, in which a man and a woman dancer assume the roles of a husband and wife. They dance together, expressing their goals and desires. The lady requests from her husband nice clothes and lovely accessories. The wife is promised anything she wants by the husband. A lively folk dance is performed while soothing music plays in the background.
6. Jharni: The Julaha community performs the Jharni Dance as part of their tradition during Muharram. The bamboo sticks are split at one end by the dancers. Each dancer strikes his partner's stick as they travel around in a circular pattern. The dance's beat is provided by the sound that is created.
7. Jhijhi: The Indian subcontinent's Mithila region is known to the cultural dance known as jhijhiya. Most commonly, Jhijhiya is performed during Dusshera in honour of Durga Bhairavi, the goddess of victory. Women put clay lanterns on their heads and balance them while dancing in jhijhiya performances. When ladies execute this dance, it is said that negativity cannot affect them or their loved ones.

“Cultures are dying out faster than the people associated with them,” according to the IUCN Inter-Commission Task Force on Indigenous People. In less than a century, it is predicted that half of the world’s languages—the repositories of peoples’ intellectual legacies and the foundation for their distinctive ways of perceiving life—will be lost.⁴ In

⁴ Anurag Dwivedi & Monika Saroha, “Copyright Laws as a Means of Extending Protection

traditional cultures, knowledge, culture, and biological resources constitute a triad that makes up their heritage.⁵ Folk dancing is the culmination of human creativity and contributes to the survival of our culture. These folk dances are impromptu emotional outpourings from the common people of a place; they rarely consist of rigid, formal dance-form training and practice-derived steps and movements.⁶ By displaying the culture and social history of the community, these performers help individuals connect with their own culture and religious practises. To maintain the distinctiveness of the community identity, they must be protected from misappropriation and misuse. They aid in recognising the society.

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to Expressions of Folklore”, 10 *JIPR* 308 (2005)

⁵ T.C. James & Deepika Yadav, “ Protection of Traditional Cultural Expressions in India”, available at: <http://ris.org.in/fitm/sites/default/files/Scooping%20Paper%20No%203.pdf> (last visited on: 27.09.2022)

⁶ All about Why Indian Folk Dances are Important Now, available at: <https://www.learnpick.in/blog/indian-folk-dances#:~:text=Folk%20Dances%20can%20bring%20harmony,love%20their%20land%20deeper> (last visited on: 21.02.2023)

⁷ Ibid

⁸ All about Why Indian Folk Dances are Important Now, available at: <https://www.learnpick.in/blog/indian-folk-dances#:~:text=Folk%20Dances%20can%20bring%20harmony,love%20their%20land%20deeper>. (last visited on January 29, 2023).

to maintain the distinctiveness of the community identity, they must be protected from misappropriation and misuse. They aid in recognising the society.

JUSTIFICATION FOR THE PROTECTION OF FOLK DANCE PERFORMERS

Indigenous cultures' values, traditions, and beliefs are expressed through traditional cultural expressions, often known as folklore. They can be categorised as works that incorporate distinctive components of the traditional cultural heritage that have been created and preserved by a community or by individuals, reflecting the traditional creative expectations of that community, according to the WIPO view.⁹

The following is a discussion of some theoretical bases for the defence of folk-dance performers:

Labour Theory

The theory of Locke, according to which an individual has a natural right to the products of his labour in transforming raw materials (viewed as including, for example, facts and concepts) that are “held in common” into a finished good of enhanced value, and the state has a duty to enforce the natural right that derives from the labour, provides the first justification for the protection of folk dance performers’ rights.¹⁰ A person must have ownership rights over the results of their labour, he argued. The requirement for substantiation of performances as ones coming from creative or intellectual labour is the essential requirement that must be met

⁹ Intellectual property and traditional cultural expressions/folklore, WIPO Booklet 1, pp 6.

¹⁰ Neil Wilkof, “Theories of intellectual property: Is it worth the effort?”, 9 *JIPLP* (2014)

to assert intellectual property rights for the performers' creative labour.¹¹ A folk dance performer could put in many years of practise to hone his or her performance skills. Through unauthorized adaptation, the community frequently benefits from this effort and expertise. They have very little influence over how, by whom, and how unauthorised fixations of their performances are commercialised and profitably enjoyed by others without them sharing in the advantages.

Natural Entitlement

Everyone has an inherent right to their own life, liberty, and property, according to Robert Nozick. This may also include the rights to the products of his labour or the ability to dispose of his own property, as well as the appropriateness of retribution for those who violate these rights. His approach is based on three key principles, including the "Principle of Justice in Acquisition," which explains the holder's original rights. According to this view, a person who justly acquires a holding is entitled to that holding, explaining how something might be gained by an individual that was previously not possessed by anyone.¹² The 'Principle of justice in transfer' follows, and it deals with a person's ability to give away, swap, or transfer any of his or her legally acquired possessions. This theory explains how possession and ownership of property may be afterwards transferred from one person to another, given that the transfer is fair and the recipient is entitled to the property (through a purchase, gift, etc.).¹³ The third and final principle of Nozick's entitlement theory is the "Principle of rectification of

¹¹ Richard Arnold, "Performers' Rights", 6 *Sc&M, London*, 1 (2021)

¹² Thomas C Grey, "Property and Need: The Welfare State and Theories of Distributive Justice", 28(5) SLR 877 (1976), available at: <https://doi.org/10.2307/1228147>

¹³ Eric Rakowski, "Transferring Wealth Liberally", 51 *Tax LR* 419 (1995)

injustice,” which deals with previous injustices that can be repaired due to improper application of the first two principles, i.e., failure to apply principles (a) or (b).¹⁴ This principle discusses people who violate the rights of others and how the victims may be compensated. Folk dancers have no idea how to safeguard their ownership interests in any property created with their labour, skill, and creativity. They are unable to transfer their property so they can receive financial rewards since they lack knowledge.

Creative Incentives

Copyright is granted because it encourages people to produce and businesses to spend in making things available. Unquestionably, one of the best institutional frameworks for promoting the development of a commercial creative economy, particularly in developing nations, is copyright. Incentives are routinely used through copyright laws to encourage the creation of new works for public use. The government rewards new works by granting the creators a temporary monopoly on them before allowing the general public to enjoy them. In the area of copyright, innovation and creativity are getting more attention. Originality and creativity are inextricably linked. Despite the fact that any item can easily show a component of uniqueness, a work that lacks originality is not protected by copyright. In folk dance, originality is determined by the physical set up, the composition, and the execution of the work. Folk dance performers’ originality and ingenuity are displayed in the way various motions are blended to create combinations, which is typically but not always accompanied by music. These motion combinations make up the choreography of these dances.

¹⁴ Judith J. Thomson, “Some Ruminations on Rights” 19 *Ariz. L. Rev.* 45 (1977)

Personality Theory

Personality theory is an intellectual property notion that highlights the viewpoint of the individual inventor, author, or artist over that of society at large when analysing intellectual property rights. According to some, self-actualization in the form of personal expression gives the author inalienable moral rights to his or her works. The act of creation bearing the stamp of his individuality justifies the grant of the inalienable right to the folk dance artists' name and the right to decent treatment of their work, which is the product of their labour. A new framework that safeguarded the commercial interests of the artists was created as a result of the theory's influence on a change in contractual presumptions.

Human Rights

Folk dancers actively participate in preserving our culture by educating and delighting the audience with their valuable originality and talent. According to Article 27¹⁵ of the Universal Declaration of Human Rights (UDHR), people have the right to express their creativity. By displaying the culture and social history of the community, its performers help individuals connect with their own culture and religious practises. Folk dancers entertain us by displaying the history and culture of our nation, but their talent is exploited for another's financial gain. According to the UDHR, everyone who is a member of society, including folk dance artists, is protected by this law.

Constitution

Individuals' lives and personal liberties are safeguarded by Article 21¹⁶ of the

¹⁵ The Constitution of India, Art. 27

¹⁶ The Constitution of India, Art. 21

Indian Constitution. As their performance is the foundation of their survival, folk dance performers are likewise protected under the scope of this provision of the basic law of the land. The dancers are not specifically protected by the Constitution, but Article 29¹⁷ acknowledges the protection of minority cultures with unique languages, scripts, or cultures. The bulk of folk dances are, however, misapplied in India since it is hard to define their limits of creativity and exploration. Examples include using folk dancers' dancing gestures in computer games or using photographs of them frozen in mid-air in publications. The other clause of the Constitution is found in Article 51(A)(f)¹⁸, which imposes a fundamental obligation on every citizen to respect and safeguard the rich cultural heritage of our composite society. Folk dancers entertain us by displaying the history and culture of our nation, but their talent is exploited for another's financial gain.

PROTECTION OF FOLK DANCES UNDER INTERNATIONAL COPYRIGHT LAW

Folk dancers in particular and performers in general were not initially covered by copyright law. Before, people who helped authors communicate their work to the public were not rewarded. The journey starts in 1967 with an attempt to grant copyright protection for folklore on a global scale at the Stockholm Diplomatic Conference for the Reform of the Berne Convention for the Protection of Literary and Artistic Works.¹⁹ Folklore is described as a dynamic phenomena that changes over time; a fundamental component of our culture that reflects the human spirit; a window into the

¹⁷ The Constitution of India, Art. 29

¹⁸ The Constitution of India, 51 (A)(f)

¹⁹ Claude Masouye & Wallace William, *Guide to the Berne Convention for the Protection of Literary and Artistic Works (Paris act, 1971)* (World Intellectual Property Organization, Geneva, 1978) available at: <https://doi.org/10.34667/tind.28751>

cultural and social identity of a community; and its standards and values, which are passed down orally, through imitation, and other means.²⁰ Rather than being written down in books, folklore is often handed down by word of mouth and actions.

The Berne Convention was revised in Stockholm (1967) and Paris (1971), and one of the provisions which is Article 15(4)²¹ for the protection of unpublished works whose authors' identities are unknown. It's important to keep in mind that folk dancing has no creator. Through the performers of these dances, it simply develops from the culture and is transmitted down the generations.²² With the advancement of protection of rights of performers, their rights were recognized under Rome Convention, 1961 as Neighbouring Rights. The Rome Convention three categories of beneficiaries who are not technically called authors. These beneficiaries are performing artists, phonogram producers, and broadcasting organization. In accordance with the performers' rights, which include the right to stop others from communicating to the public via means other than broadcasting without their permission, Article 7²³ protects the performers. Additionally, it grants the right to stop anyone from recording their live performance without permission and from fixing their live performance without getting their permission. The Convention also recognises the right to prohibit the commercial use of their performance without their consent and for any

²⁰ Cathryn A. Berryman, Cabaniss Johnston, Gardner Dumas & O' Neal, "Towards More Universal Protection of Intangible Cultural Property", 1(2) *JIPL* 293 (1994), pp. 293.

²¹ The Berne Convention, 1886, art. 15(4) reads as: In the case of unpublished works where the identity of the author is unknown, but where there is every ground to presume that he is a national of a country of the Union, it shall be a matter for legislation in that country to designate the competent authority which shall represent the author and shall be entitled to protect and enforce his rights in the countries of the Union.

²² Supra note 2

²³ The Rome Convention, 1961, Art. 7

other purpose. According to Article 19²⁴ of the Convention. According to this convention, performers' rights were protected for at least 20 years following the end of the year in which the performance took place. If the performer consents to the use of his performance in any audio-visual or visual production, these restrictions will not be applicable.

The TRIPS Agreement of the WTO, which spells forth the basic standard for protection of various forms of intellectual property, further strengthens the requirements of the Convention. Article 14²⁵ of Agreement gives right to the folk-dance performers to protect their work from broadcast and communication to the public by wireless means, to prevent reproduction of their live performances, to prevent the fixation of their live performance on phonograms.

In the post-TRIPS era, the WIPO Performance and Phonograms Treaty, 1996 (WPPT) supplements the Rome Convention, 1961 in terms of performers' rights. Particularly in the digital sphere, the WPPT deals with the rights of two groups of beneficiaries: first, performers, such as musicians, actors, and singers; and second, producers of phonograms, such as individuals or legal entities that take the initiative and are in charge of fixing sounds.²⁶ Unfortunately for the artists, discussions were only successful with regard to their audio performances. With respect to audio performances, the Treaty provides artists and manufacturers of phonograms with stronger rights than those provided under the Rome Convention. Both moral and economic rights of performers were recognized through WPPT

²⁴ The Rome Convention, 1961, Art. 19.; Art. 7 shall have no further application.

²⁵ The TRIPS Agreement, 1995, Art. 14.

²⁶ WIPO, available at: <https://www.wipo.int/treaties/en/ip/wppt/> (last visited on: 29.07.2022)

but, this was only provided to the performers of audio performance. Performers should be compensated for their work, and they are also entitled to royalties if the material is utilised for reasons other than those for which an agreement has been made. This Treaty plays a very important role for the protection for performers but audio-visual performers are not protected. Folk dance and folk music seem to go together and traditional definitions of dance frequently depict it as a rhythmical activity involving a set of moves performed to music which make the performance of folk dance as audio visual character.

The Beijing Treaty, 2012 provides protection to audio-visual performers. Contracting governments debated ways to preserve the rights of performers in films, television shows, and short films, among other things. This treaty is concerned with audio-visual performers and protects their fixed as well as live performances. It protects folk dance performers of fixed audio-visual performance and gives rights including right to reproduce²⁷; right to distribution²⁸; Rental Right²⁹; right to make available³⁰; and right to communication to public.³¹ As to *unfixed (live) folk dance performances*, the Treaty gives performers three kinds of rights which are right of broadcasting (except in the case of rebroadcasting); right of communication to the public (except where the performance is a broadcast performance); and right of fixation.³²

²⁷ The Beijing Treaty, 2012, Art. 7

²⁸ The Beijing Treaty, 2012, Art. 8

²⁹ The Beijing Treaty, 2012, Art. 9

³⁰ The Beijing Treaty, 2012, Art. 10

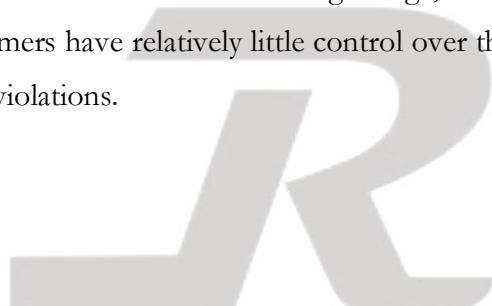
³¹ The Beijing Treaty, 2012, Art. 11

³² Summary of the WIPO Performances and Phonograms Treaty (1996), *available at:* https://www.wipo.int/treaties/en/ip/wppt/summary_wppt.html (last visited on: 17.07.2022)

CONCLUSION

Even though folk dances are becoming less appealing, Indian folk dances are still quite important. Folk dancers must be protected because if they are gone, cultural assets will be lost, and people will lose their identities, it will be impossible to resurrect different tribes' folk dances.

The world praises and admires Indian folk dances, which can also make their performers famous and wealthy. Although there are different international and national effort for protecting performers covering folk dance performers under the definition, technology innovation has significantly altered our world. In our digital age, artists can be quick and current. Performers have relatively little control over their own work, which leads to rights violations.



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SHORT COMMENTS ON ENVIRONMENTAL GOVERNANCE

- Priyanka*

Abstract

Environmental governance has become an important dimension at the global level for the conservation of bio-resources in the present era. However, it is also a complex and challenging issue for humanity and its governing institutions that are affected by human activities in both rural and urban areas. The above issue is presented not only by debate and academic research on the separation between sustainable use, conservation and economic development of the environment. Rather, in this context, a decisive attempt by the global community to address environmental governance is also known from the Stockholm Conference of United Nations Conference on the Human Environment (UNCHE) held in 1972. Therefore, it is fair to say that since this international initiative, environmental governance has become increasingly internalized on the global agenda at all levels. At the same time, great importance is also being given to the role of democratic institutions in environmental governance. Therefore, there is an urgent need to address all the policy processes and institutions related to it at every level of administration i.e., from global to national and local or sub-national level.

Keywords: Environmental Governance, Biodiversity, United Nations Conference on the Human Environment (UNCHE), National Environment Policy, Right to Life.

* Advocate @ Civil Court, Bettiah (Bihar), E-mail: priyankawalter007@gmail.com

INTRODUCTION

The environmental governance is basically comprehended in terms of a list of legal codes, statutes, case law, regulations and principles which denotes the relationship between humans and nature. In Indian context, these interventions address the protection, management and distribution of natural resources which make the competing realms. Such competition has been seen between the economic and the sociocultural, between ecological needs and livelihood requirements, between the human and non-human and between present and future uses.

In this regard, the Indian government adopted both points of competition and conflict in its environmental governance. It is important to note that many times the protective, managerial and distributive aspects of environmental legislation are considered to be a technical issue due to costs and benefits being assessed. However, the law fails to calculate many times that in fact nature provides a material basis for the existence and well-being of all.¹

INDIAN PERSPECTIVE OF ENVIRONMENTAL GOVERNANCE

India has always been considered as a very rich biodiversity country in the world. In our country, there are 12 mega centers of biodiversity. According to the data obtained from the Ministry of Environment and Forests, it includes 45,000 plant species and 81,000 animal species which represent 7%

¹ Kanchi Kohli & Manju Menon, *Development of Environmental Laws in India* (Cambridge University Press, United Kingdom, 2021).

of the world's flora and 6.5 % of its fauna.² It is an irony that due to the excessive burden of the growing population and industrial activities in the country, the Indian natural resources are being exploited day by day which creates threats to biodiversity in large.

In addition, like any other policies, Indian environmental policy is also the result of dynamic processes such as several environmental protests and movements (The Silent Valley and the Chipko Movement). This process of environmental policymaking in the country mainly reflects the broad perspective of constitutional values along with the underlying political theory and vision of the then government. In this context it will not be an exaggeration to say that often in view of these considerations every 'policy document' is influenced by both national and international issues in order to take into account the economy. Which the government should try to accommodate on the basis of votes in a democracy, the views of the general public and the key stakeholders concerned with the said policy. Therefore, various acts and rules have been included in the environmental policy-making process with the help of economic and legal interventions e.g., taxes, subsidies and judicial processes.³

Nature and natural resources have always been given sacred status in Indian tradition, which is the reason that the attitude of conservation towards the natural environment is strong in most of the local communities. The Constitution of India, affirming the protection of the environment, considers it as a "constitutional obligation of the state and fundamental

² Ministry of Environment, Forests and Climate Change, available at: <https://moef.gov.in/en/> (last visited on: 30.06.2023)

³ Kanchan Chopra, *Development and Environmental Policy in India -The Last Few Decades* (Springer Nature, Singapore,2017).

duties of citizens” as part of the Indian ethos under the constitutional initiatives. Therefore, it is a constitutional goal of the nation, under which tireless efforts are made to prevent climate change and conserve biodiversity while ensuring the protection of the environment and forests. Along with this, in the direction of environmental protection, the citizens of the country have also been appealed to follow the duty of co-existence in order to maintain biodiversity. This effort constitutes a sustainable practice oriented towards the conservation of biodiversity.

In other words, all these constitutional provisions reflect the concern of the state and the aspiration of the citizens. In addition, the seriousness of these provisions helps all states and citizens to fulfill their responsibilities towards the conservation of biodiversity. One such policy call has been publicized in the country in the form of “National Environment Policy, 2006”. The objective of the NEP is to determine a healthy and productive life for the sustainable development of human societies by striking a balance and harmony between biodiversity conservation and development.⁴ Apart from this, the Indian judiciary has also been interpreting these provisions related to environmental protection and conservation of forests in the country from time to time with various environmental litigation. In fact, all these efforts emphasize the importance of biodiversity while highlighting the state’s planning and individual’s attitude towards the environment.

Moreover, in our country more attention has been given to environmental conservation since the ancient period itself. At that period laws related to environment upliftment were simple and quite effective and people were also conscious about nature conservation. But nowadays legislations in

⁴ National Environment Policy, 2006.

terms of environmental governance are addressing the issue of urbanization and industrialization and are brought for those aspects only. It is an interesting fact that in India there are approx 500 central and state laws which to some extent talk about the issue of environmental protection directly or indirectly. Importantly, there are also the common law and constitutional provisions related to environmental governance in our country which present the role of the state truly⁵.

Additionally, India is one of the countries globally which denotes a strong commitment towards environmental protection and improvement through its constitution. Some legal provisions in the Indian constitution related to the quality of life are found from its inception in 1950. But in 1976 the introduction of the 42nd Amendment Act brought a wider picture of environmental conservation in the country which was undoubtedly influenced by the United Nations Conference on the Human Environment (UNCHE) held in Stockholm in 1972. Indeed, this conference gave a new dimension to governmental awareness regarding the need for a legal and organizational framework in environmental protection worldwide. This conference also introduced a new paradigm to public responsibility by making it obligatory for the central and state government along with every citizen to conserve and uplift the biodiversity at large.

The Indian constitution is amongst the few in the world which contains specific provisions on environmental protection. There were no provisions before 1976. The 42nd amendment to the Constitution was brought about in the year 1976 and two new Articles were inserted e.g., Article 48-A and Article 51-A (g). Indeed, the provisions mentioned in Article 48A of Part

⁵ Prakash Chand Kandpal, *Environmental Governance in India: Issues and Challenges* (SAGE Publications Pvt. Ltd, New Delhi, 2018).

IV⁶ and Article 51 A (g) in Part IV A⁷ of the Indian Constitution also suggested a policy paradigm to govern the environment.

In this context, the 42nd Amendment Act (1976) added two-way provisions in the constitution of India. Actually, on one hand this amendment directed an obligation to state through Article 48 for the protection of the environment. That's why in many cases related to environment protection, the Indian judiciary also has been guided by the language of this Article and interprets it as imposing provision on the government including courts. Similarly on the other hand, the above-mentioned amendment refers specifically to the fundamental duty of every Indian citizen to help in safeguarding the natural resources in Article 51A. Apart from this it is noticeable that the 42nd Constitutional Amendment also brought some changes in Seventh Schedule⁸ of the Indian constitution which is related to allocation of powers. Actually, it had transferred the power connected with Forest and Wildlife from the State list to Concurrent list which only reflected the strong commitment of the Indian legislature in terms of how they prioritize environmental protection as a national agenda. Here an interesting fact reveals that although Directive Principles of State Policy (DPSP) are non-enforceable⁹ by courts but despite that these are being cited

⁶ Article 48A of Indian Constitution: *Protection and improvement of environment and safeguarding of forests and wildlife. — The State shall endeavor to protect and improve the environment and to safeguard the forests and wildlife of the country.*

⁷ Article 51 A (g) of Indian Constitution: *to protect and improve the natural environment including forests, lakes, rivers and wildlife, and to have compassion for living creatures.*

⁸ The Constitution of India, VII Schedule: The seventh schedule under Article 246 of the constitution deals with the division of powers between the union and the states. It contains three lists- Union List, State List and Concurrent List.

⁹ Article 37 of Indian Constitution: *Application of the principles contained in this Part. —The provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.*

by the judiciary as complementary to the fundamental rights day by day.

In addition, Article 21¹⁰ the Indian Constitution at some extent also gives a permission to exercise the fundamental right in order to conserve the environment but keep in mind that it is not a direct constitutional provision. But nowadays the Judiciary has recognized the right to a sustainable environment as part of the Right to Life guaranteed in Article 21. In this sense, the judicial grammar of interpretation became a pivotal tool in guaranteeing the safeguard of fundamental rights. As it has broadened the scope and ambit of Article 21. Article 21 resolved many cases related to the right to life. That's the reason now Right to life includes the right to livelihood and right to clean environment (*M.C. Mehta v. Union of India*¹¹) which all addressed the issues related to biodiversity. The Right to Life described in Article 21 assimilates the conservation of natural resources in true sense because without this human life cannot be enjoyed. In this regard, Article 21 undoubtedly has been exercised as a mandate for safeguarding environmental governance.

Apart from all these, some other legislative and administrative measures have been also introduced by the Indian government for the conservation of the natural or biological resources in the country. Those are as follow as-

- **The Wildlife (Protection) Act, 1972:** The title of this legislation itself presents the main objectives related to protection of all wild animals, birds specially the rare species and extinct animals like lions. This act imposes a complete ban on wildlife hunting so that poaching,

¹⁰ Article 21 of Indian Constitution: *Protection of life and personal liberty.* - No person shall be deprived of his life or personal liberty except according to procedure established by law.

¹¹ AIR 1987 SC 1086

smuggling and illegal trade of all types of wild animals and species can be controlled in a comprehensive way. Also, this act gives authority to the central and state governments in deciding wildlife sanctuary, national park or closed area and facilitating the protection of wildlife in the country.

- ***The Forest (Conservation) Act, 1980:*** This act was mainly passed by the Indian Parliament on 25th October 1980 in order to preserve the forests. There are three main objectives in this act such as to check deforestation, to check diversion of forest land for ‘non forest’ purposes and afforestation of the waste lands.
- ***The Air (Prevention and Control of Pollution) Act 1981:*** Another important legislation which was enacted on 29th March, 1981 which tackles the environmental problems related to pollution. In this sense, this act has clear directions related to prevention, control and abatement of air pollution in the country and it follows a strong commitment in maintaining quality of the air.
- ***The Environment (Protection) Act 1986:*** This act is one of the most important legislations for the protection and improvement of the environment. It is based on the Stockholm Conference on United Nations Conference on the Human Environment (UNCHE) held in 1972. This act provides power to central and state governments to take all such necessary actions in order to conserve and betterment of the environment.
- ***The Scheduled Tribe and other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006:*** It is also known as Forest

Rights Act or the Tribal Rights Act which was passed on 18 December, 2006. It addresses specifically the rights of forest dwellers, local communities, and indigenous people and protects their land and other resources.

INTERNATIONAL PERSPECTIVE OF ENVIRONMENTAL GOVERNANCE

The international discourse on environmental governance is an outcome of the participatory approach between several institutional actors (For example- states, institutions, market, civil society organizations and the individuals etc.) from global to local and public to private. However, the discourse of international governance got numerous recognitions in the past half of a century but still there are some obstacles to international cooperation which demean the role of effective international environmental action. These obstacles can be marked on the basis of Conflict between the collective good and national interests, Tensions between developed and developing states, Economic obstacles and Ideological obstacles.¹²

This section describes those international environmental conventions which addressed major challenges of environmental governance globally. Actually, these conventions presented a better understanding on the legal approaches to deal with environmental issues like climate changes. This type of discussion of forums also addressed the issues of traditional knowledge and resources while strengthening accountable and transparent environmental institutions at global level. No doubt, all these conventions have been organized by the effort of the United Nations which always took major steps to tackle the common global challenges and manage shared

¹² Andrew Heywood, *Global Politics* (Palgrave Macmillan, China, 2011).

responsibilities.

As all these conventions bind to follow some agreements and protocols which direct specific actions. Some important conventions based on environmental governance are “the Kyoto Protocol of the United Nations Framework Convention on Climate Change (UNFCCC¹³), the Nagoya Protocol of the Convention on Biological Diversity (CBD), 1992” etc. Moreover, all conventions are governed by a secretariat which coordinates between subsidiary bodies and working groups. The secretariat also plays a role of negotiator for the commitments and collective action, before presenting in a conference of parties which is convened every two years in general.¹⁴

It is needed to discuss some of the international conventions and agreements with their chronological development so that a clear understanding can be established of climate change and biodiversity. There are a number of conventions such as:

- ***The Antarctic Treaty, 1959:*** The author Mehdi elaborates that “the Antarctic Treaty” is one of the oldest initiatives taken at global level to ensure the safety of the environment especially in the Antarctic region. The polar region is also getting majorly affected by climate change that brings physical, ecological, sociological and economic impact there. This treaty was signed by 12 countries¹⁵ on 1st December 1959 and got

¹³ The United Nations Framework Convention on Climate Change came into force on 21 March 1994 for the objective of preventing “dangerous” human interference with the climate system. The two significant treaties of the UNFCCC are the Kyoto Protocol (1997) and the Paris Agreement (2015).

¹⁴ Supra note 1

¹⁵ Those 12 countries are Argentina, Australia, Belgium, Chile, France, Japan, New Zealand, Norway, South Africa, the United Kingdom, the United States, and the Soviet Union.

enforcement in 1961. However, the treaty did not have a primary aim for preventing the damages related to climate change but it directed absolute protectional behavior to secure the environment in the Antarctica region.

It is an interesting fact that many countries have their eyes on the Antarctica continent for scientific purposes as it does not have a local population. This treaty plays a significant role in stopping the ecological exploitation on the basis of a variety of problems in this region. It is noticeable that the Antarctic Treaty also provides a complete framework for international relations related to this area which regulates an entire continent. Right now, approx 54 countries are parties of this treaty. They are all concerned for the wide access to ever-evolving technology for this region which is also a challenge for climate change.

However, some other countries also claim substantial stakes in the region but the Antarctic Treaty System (ATS) which strictly regulates international relations concerning Antarctica and tries hard to achieve the objectives of this treaty. In this sense, the treaty declared this region as a haven of scientific research with complete scientific autonomy and no military intervention. In addition, all human activities are also regulated by this treaty within Antarctica in terms of ensuring safe and environmentally friendly visits by travelers. In some recent years, a critical situation occurred regarding the possibility of mining activities which are now completely banned in this region. However, some predictions say that countries will try to lift this ban as there is a vital resource of oil.

Moreover, the Antarctic Treaty also covers the areas south of 60 degrees south latitude, including land and ice shelves. In this context, this treaty was a paradigm shift especially for the international relations concerning Antarctica which is a continent with no human population. This treaty gives assurance that Antarctica will always remain free of its territorial claim or sovereignty to minimize conflicts or disputes between nations. Similarly, the treaty is empowered with some legal provisions related to demilitarization and joint research and potential use within the continent. Apart from that this treaty also mentioned about the banning of nuclear testing and dumping of radioactive wastes which is undoubtedly a great precedent for environmentally friendly practices. In that way, through this treaty nations are encouraged to show values based on prudence and cooperation to prevent conflict from escalating which are inevitable steps for International environmental governance in this era.

Another interesting fact is that India became a party to this treaty in 1983 and showed its interest in the ecological, geographical, geological, and biodiversity of the region. In this regard, India's first scientific research base station named Dakshin Gangotri is the best example which was established in this region for various research facilities to investigate these fields. In the Indian context, this region is important for scientific research purposes which specifically pertain to global warming. Similarly, India's continuous support can be seen in the form of scientific advancement such as drilling holes into the cold ice sheets of Antarctica on a regular basis in this region. In other words, the Antarctic Treaty of 1961 always claims to ensure that the region remains free of any international sovereignty or dispute and it should

be used strictly for the benefit of mankind only¹⁶.

- **The Ramsar Convention, 1971:** This environmental convention is also recognized as one of the significant international agreements related to the environment which was organized at Ramsar, Iran, in 1971 and came into force in 1975. The Ramsar Convention took proactive steps in conserving the loss and degradation of wetlands. An interesting fact related to this Convention is that in India it got ratification on 11th February 1982 and the Wetland (Conservation and Management) Rules, 2017 of India also inspired extensively by this convention.

Importantly, the wetlands support in maintaining rich biodiversity as it provides a comprehensive list related to ecosystem services like water storage, water purification, flood management or mitigation, erosion control, aquifer recharge etc to humankind. Wetlands are also productive biological resources to habitats for birds and other species and it represents enormous economic, cultural and recreational value around the world. In this sense, the loss of wetlands is a major issue for policymakers because it brings various biological threats related to human safety and water security.

Moreover, if the Ramsar Convention is studied, it protects the ecological status quo in the form of specific sites. According to Article 3 of the Convention, it aims not only to prevent the loss of wetlands but also to promote its use wisely towards the conservation of wetlands. It is also worth considering that this convention does not

¹⁶ Ali Mehdi, “Climate Change and Biodiversity: India’s Perspective and Legal Framework” 52 *JIL* 351 (1998)

impose any specific restrictions on the ill-effects of climate change nor does it compel the member states to adopt any safeguards to negligible these climate hazards. Undoubtedly, this convention has proved to be effective in adapting to those protected systems of biodiversity which are badly affected by the climate crisis.

Therefore, a proof of the seriousness of this environmental protection initiative is that a separate working group has been set up in the Ramsar conference, which is the effort of its Scientific and Technical Review Panel on Climate Change. The importance of this convention is also gauged from its Articles ¹⁷ and 2, which give an important ground to the Parties through their definitions of “wetlands” and “dangerous” limits, respectively (Ramsar Convention Secretariat, 2006). In addition to all this, the Intergovernmental Panel on Climate Change (IPCC), Third Assessment Report (TAR) has also given its view that some wetlands are considered natural systems that are particularly sensitive to climate change due to their limited adaptive capacity, so it is extremely important to protect them.

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- ***The UNESCO Convention, 1972 - Convention Concerning the Protection of the World Cultural and Natural Heritage:*** This Convention was organized at Paris in 1972 which focused on the two separate objectives like the preservation of cultural sites and the conservation of natural sites. The aim of the convention was to promote cooperation among countries to protect heritage all over the world which is a universal value as it plays an exceptional role in nature

¹⁷ According to Article 1 of the Ramsar Convention, *wetlands are both coastal lands, with many marine living organisms, depending on them for their reproduction and nutrition, and inlands areas with connection to ground and other freshwater systems.*

conservation keeping in mind for current and future generations. A single document of this convention asserts an interactional relationship between nature and human beings.

According to Article 2 of this Convention Natural heritage refers to outstanding physical, biological, and geological formations, habitats of threatened species of animals and plants and areas with scientific, conservation, conservation, or aesthetic value.¹⁸

- ***Washington Convention on International Trade in Endangered Species of Wild Flora and Fauna, 1973 (CITES)***: The CITES was signed in Washington which has 183 parties. India is also a party to this agreement which ratified it on 20th July 1976. It covers 5,800 species of animals and 30,000 species of plants within its legal purview. Since its inception, this convention has always aimed for the protection of endangered species of wild animals and plants.

There are three categories given for the endangered species in this convention. According to the CITES, the first category explains species threatened with extinction, the second category is about species likely to be extinct if protection measures are not taken and the last category explains about the species that are subject to national legislation for the purpose of restricting exploitation.

This convention empowered through a regulatory framework to all signatory countries in reducing biological threats and maintaining the survival of extinct species. It also imposes trade prohibitions

¹⁸ Convention Concerning the Protection of the World Cultural and Natural Heritage, 1972, Art. 2

(international trade of wildlife), regulations and sanctions on those who over exploits the endangered species or biological resources. This convention plays a critical role globally because it not only protects the most threatened species in ecological order but also provides detailed guidelines in identifying all those dangerous interference with the climate change system¹⁹.

- **Bonn Convention on Conservation of Migratory Species of Wild Animals, 1979:** Bonn Convention on Conservation of Migratory Species of Wild Animals, 1979 is an important international treaty under the supervision of the United Nations Environment Programme which asserts the conservation of migratory species of wild animals (terrestrial, marine and avian). It is also known as the Bonn Convention or CMS which came into force on 1st November 1983. This convention is recognized as an important part for international environment conventions and protocols which aims to protect the migratory species of wild animals and their habitats.

There are two types of Memorandums of Understandings (MoUs) within the CMS such as legally binding agreements and non-legally binding which are framed on the basis of conservation needs. The Bonn Convention addresses two appendices such as “Endangered Species” those with a high risk of extinction in the wild in near future and those migratory species that need conservation through international agreements. In this sense, the CMS tries to include all those migratory species which cyclically and predictably traverse

¹⁹ Supra note 1

through the national boundaries²⁰.

- **Convention on Biodiversity, 1992:** The CBD explains about the rights and responsibilities of States at the national level related to the biological resources. If seen, these international obligations related to environmental policies are subject to the principle of common but differentiated responsibility. For instance, Article 3 of this Convention mainly deals with the principles that give states sovereign rights in matters relating to their environmental policies. To ensure that activities within the states do not cause any harm to the environment of other states or areas beyond the limits of the jurisdiction or control of other states or national jurisdictions. Under Article 7 states have been asked to identify the categories of processes and activities that affect the conservation or sustainable use of biological diversity. Whereas, Article 8 of this empowers the Contracting Parties to take national action to prevent the destruction of species, habitats and ecosystems²¹.

In addition, this convention also led to the development of other international protocols which are the Nagoya Protocol²² and the Cartagena Protocol²³. An interesting fact is that Indian Biological

²⁰ Supra note 16

²¹ Convention on Biological Diversity, 1992, Arts.7, 8

²² The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization (ABS) is a supplementary agreement to the UN Convention on Biological Diversity (CBD). This protocol is a legal framework for the implementation of one of the objectives of the Convention on Biological Diversity, which is the fair & equitable sharing of benefits arising out of the utilization of genetic resources.

²³ The Cartagena Protocol on Biosafety to the Convention on Biological Diversity is an international agreement on biosafety as a supplement to the Convention on Biological Diversity (CBD) effective since 2003. The Biosafety Protocol seeks to protect biological

Diversity Act 2002 inspired by this convention only shows India's commitment towards it.

WAY FORWARD

Undoubtedly, environmental governance and sustainable use of all the natural or biological resources is nowadays a prevalent discussion in terms of survival of the present and future generations. In this regard, it is the need of this hour that policymakers should pay more attention to incorporating the various initiatives at all levels of governance for both developed and developing countries to maintain biodiversity.²⁴



diversity from the potential risks posed by genetically modified organisms resulting from modern biotechnology.

²⁴ K. V. Raju, A. Ravindra, *et.al.*, *Urban Environmental Governance in India-Browsing Bengaluru* (Springer Nature, Switzerland, 2018).

GENDER RESPONSIVE PROGRAMMING IN JAIL A NORM IN 21ST CENTURY

- Rohit Sharma* & Prabhat Deep**

Abstract

Owing to our patriarchal and traditional society, women have been kept on a lower footing and when she alleged as offender her position becomes miserable as woman prisoner. Female criminality is rare subject of study in male dominated society. Though United Nations and its agencies are making rules, some NGOs, private groups are addressing these issues, but still there is so much gap that there is always a scope of research. This paper bids for gender programming of prison and measures for treatment of women offenders. The number of female crimes and inmates is on significant rise due to various socio-economic changes. Female offenders are in process of treatment brought to jail for rehabilitation. But old prison are still male cordial and female are forced to share the same jail which were once not programmed for them and spend their custodial days in acuteness. Jail a criminal justice agency is distress for female-prisoners which lacks women's particular basic needs. They have to compromise their dignity. Female are giving birth to babies behind the bars, raising them in filthy cell and setting up a perfect platform for medical tragedy. This hidden crisis is so much fatal that sometimes inmates die in jail without getting their day in court. This paper deals with problems which female offenders are expose of like young females' education, unemployment, violence, privacy and so on. Besides problems the paper analyses the rules made by United Nation, the measures

* Research Scholar @ Banaras Hindu University, Varanasi; Email: rohit.dbg2012@gmail.com

** Research Scholar @ Central University of South Bihar, Gaya; Email: deepprabhat96@gmail.com

taken by legislatures of states, judicial approaches, and reports by various governmental and non-governmental organisations on issues of female prisoners. The paper also throws some rays on manner of arrest of female offenders. At last, this paper comprises of conclusion and valuable suggestions in the criminal justice system.

Keywords: Women-Offenders, Prison-Administration, Women-Dignity, Privacy, Violence



INTRODUCTION

"The rule here is total silence, we make no pretense of rehabilitation. Here, we are not priests, we are processors. Meatpacker processes live animals into edibles one, we process dangerous mans into harmless ones. This we accomplish by breaking you. Breaking you physically, spiritually. And, here strange things happen to the head, put all hope out of your mind."¹

This is the decade of action as we have to achieve Sustainable Development Goals (SDGs hereafter) our shared vision by the year 2030. Gender equality is one of the 17 said SDGs. Gender equality is fundamental to building a just, sustainable, and peaceful society.² Gender equality is a value that the Indian Constitution enshrined in the Preamble, Fundamental Rights, Fundamental Duties, and Directive Principles. The Indian Constitution not only guarantees gender equality but also gives power to the state to make laws for the extra protection of women. There have been many remarkable signs of progress over the decades in this process but same time there are numerous gender discrimination challenges that are yet to be resolved. Discrimination on basis of gender in the criminal justice system is one of those challenges which needs to be addressed on an urgent basis.

Justice is the first virtue of social institutions³ and access to justice for all is a prerequisite for substantive equality, human rights, and sustainable development as well as the foundation of peaceful, just, and inclusive

¹ See Papillon movie, The warden in the reclusion cell of the infamous penal system in French Guiana

² Sustainable Developments Goals, available at <https://www.un.org/sustainabledevelopment/gender-equality/>, (last visited on June. 8, 2023).

³ Rawls John, *A Theory of Justice* 3, (Belknap Press, 2005)

societies. Access to justice for all is severely hampered by gender-based discrimination in the criminal justice system. Women are disproportionately impacted and face substantial difficulties in accessing justice as victims, alleged criminals, witnesses, or inmates.⁴

Prison is an integral part of a criminal justice system that upholds the rule of law by keeping convicts and alleged offenders and securing them justice. It also helps in the rehabilitation and reintegration of convicts and incarcerate them for several correction programs. Prison houses a good number of populations in their enclosed walls, so the administration of prison becomes important. Jail should be able to provide inmates with a humane experience and opportunities for assistance and an environment for rehabilitation.

Prison administration, a legacy of colonial rule, has no prior evidence in ancient and medieval India. There was a concept of detention and offenders were detained till trial. But for punishment, incarceration was a creation of British rule. The motive of imprisonment was terror and the theory of justice was retributive. After independence, the prison and its administration are made the subject of list II under schedule VII and attention shifted from confinement to training; punishment changed into reform and rehabilitation. Retributive theory is making way for the reformatory theory of justice.

The management of Indian prisons is nonetheless opaque, outdated, and rife with systematic abuses. Prisons are always overcrowded. And in the prison administration, the overcrowding makes the existing infrastructure and basic amenities inadequate. Because of the prison atmosphere and the

⁴ Gender in Criminal Justice System, available at <https://www.unodc.org/unodc/en/justice-and-prison-reform/cpcj-gender.html>, (last visited on: 08.06.2023)

treatment that inmates get, the goal of reformation and rehabilitation remains a utopia.

President Droupadi Murmu on celebration of constitution day gave the audience a brief account of her travels to many prisons in India and the conditions of the prisoners. As per the latest data available from 2015, Indian prisons shelter 17,834 women.⁵ A small minority of the prison. But a minority do have needs. Only 17% of women inmates live in special female prisons, whereas the majority are kept in ordinary prisons' female enclosures. They are denied their rights in prison designed for male prisoners.

Women in the prison are from poor economic backgrounds, marginalized sectors of communities, or from societies where women's education is not the norm, due to the failure in achieving the goals of culturally defined models imposed by the societal institutions, based on religion, region, caste, custom or stereotypical perceptions of women's position. The majority of detained women do not have enough money to go for bail or to hire a lawyer. Being illiterate and unaware of their legal rights make them prey. It puts women in a vulnerable position and more often open to coercion.

Women's offending more often depends on women's poverty. Situations like their inability to pay fines or to pay for bail by themselves, make them more prone to be detained. Most of the time being a victim of domestic violence and sexual abuse before imprisonment makes incarcerated women

⁵ Government of India "Report on Women in prison" (Ministry of Women and Child Development 2018).

suffer more likely than men from mental disabilities.⁶ This makes them deprived, discriminated and vulnerable.

Vulnerability urges additional protection. But very little consideration has been given to the gender-based needs and problems of women offenders. United Nations Human Rights Committee explained that states have “a positive obligation toward persons who are particularly vulnerable because of their status as persons deprived of liberty.” The United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems have some specific provisions on the implementation of the right of women to access legal aid.

Famous Mathura rape case in police custody. Rape of Saran teenage girl in police custody⁷, and of a woman by jail Jamadar in Sheikhpura⁸ are an example of few victims of poor jail security. Sori a prisoner charged as a Maoist conduit says “Adivasi prisoners are always the most vulnerable, we were made to clean the common toilets daily.”⁹ Byculla jail convict death.¹⁰ These punishments were not part of their sentence. Sir Alexander Paterson a prison reformer said a man is sent to prison as punishment and not for punishment. But here Paterson’s principle doesn’t seem to apply. Here women prisoner has to make the best of what they are offered otherwise

⁶ Atabay Tomris, *Handbook on women and imprisonment* 14 (United Nations Office on Drugs and Crime, Vienna, 2013).

⁷ Arrested for murder, girl raped in custody, available at <https://www.ndtv.com/patna-news/arrested-for-murder-girl-raped-in-custody-465369>, (last visited on: 10.06.2023)

⁸ Woman raped by jail staff in sheikhpura jail, available at <https://timesofindia.indiatimes.com/city/patna/woman-raped-by-jail-staff-in-sheikhpura-jail/articleshow/20129322.cms>, (last visited on: 12.06.2023)

⁹ Teesta Setalvad, “Woman prisoners recount jail horror stories”, *CJP*, Jan. 21, 2019.

¹⁰ On complaining about two eggs and five pieces of bread a convict named Manjula Shetye was murdered by jail staff.

they have to suffer more than what is written in the sentence. Some have to give birth in a filthy cell, behind the bars, while some have to die in waiting for medical assistance. The Prison food system denies people healthy choices. When one is stripped of her freedom and choice, it can be impossible to make the right decisions. Prison restricts their autonomy, breaches their privacy when women toilet, bath, sleep or undress and make them traumatized and hinders their rehabilitation and re-entry.

Violence is the norm in most of the prisons. Both prisoner on prisoner and officer on the prisoner. There is the frequent incident of abuse and brutality, abuses range from subtle humiliation to rape¹¹, most abuses go unreported. As most prisoner victims don't want to report due to shame and other issues, correctional staff remain silent in respect of code of silence. And third is the absence of reliable national or state statistics which provide an accurate statistical description of incidents of brutality and abuse in jail. So, what we get from the news are a handful of incidents. Wall of jails are an iron curtain for abuse of rights but not for privacy.

No period in the history of our republic is of more educative value than the period of national emergency. A Flood of political arrests was done. Top opposition leaders were send to jail. This incident of being incarcerated made them feel the hardships of prison life. Hereafter the political and judicial activism can be sensed in the prison reform. Three committees were formed in the chairmanships of Justice Mullah, R.K Kapoor, and V.R. Krishna Iyer. In the area of judicial activism, the cases like Sunil Batra¹² a decision against solitary confinement, Sheela Barse letter as a writ petition,

¹¹ Supra note 6 at 12

¹² *Sunil Batra v. Delhi Administration*, AIR 1980 SC 1579

Hussainara Khatoon¹³ the decision for free legal aid and procedural due process things, Veena Sethi¹⁴ decision charges were dropped against 16 unsound prisoners. Judicial intervention in the matter relating to prison was not known or frequently practiced before 1970. Before 1970 the courts, employed the “Hands-Off” doctrine¹⁵. It means courts abstained from interfering in prison affairs and declined the opportunity to hear prisoners’ claims.¹⁶ and, drew an iron curtain. The prison affairs were not touched by court. But from the case of *Morrissey v. Brewer*¹⁷ court extended the due process to prisoners. Dissent of justice Douglas was followed in the case of Sunil Batra in India and ruled that prisoners qualify for constitutional rights and its protection.

CONSTITUTIONAL PROTECTION FOR A WOMAN PRISONER

Indian Constitution doesn’t have any particular provisions for the treatment of women prisoners but it protects children and women from positive discrimination an example of the Aristotelian theory of justice. Rights owe their origins to basic value as autonomy, dignity, equality, and survival.¹⁸

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The preamble of the Indian Constitution assures the dignity of the individual. Article 14 talks about equality before the law or the equal

¹³ *Hussainara Khatoon & Ors v. Home Secretary, State of Bihar*, AIR1979 SC 1369.

¹⁴ *Mrs. Veena Sethi v. State of Bihar and Ors.* AIR 1983 SC 339.

¹⁵ Robert A. Surrette “Drawing the Iron Curtain: Prisoners’ Rights from Morrissey v. Brewer to Sandin v. Conner” 72 *Chicago-Kent L.R.* 923, 924 (1983)

¹⁶ Barry R. Bell, “Prisoners’ Rights, Institutional Needs, and The Burger Court”, 72 *V.A. L. REV.* 161, 162-63 (1986).

¹⁷ 408 U.S. 471 (1972)

¹⁸ Hass Michael, *International Human Rights a Comprehensive Introduction* 3 (2nd Ed. Routledge 2014)

protection of the laws.¹⁹ Article 15 prohibits discrimination on the ground of sex, but to bring women on equal footing with men, the state can make a special law for women.²⁰ Article 20 protects against conviction for offenses in case of ex-post facto law, double jeopardy, and self-incrimination.²¹ Article 21 one of the widest rights says “No person shall be deprived of his life or personal liberty except according to procedure established by law.”²² Article 22 protects against arrest and detention and says the arrested person must be informed about the ground of arrest and gives the right to consult and be defended by a legal practitioner of his choice.²³ Article 39A was added through the 42nd amendment to broaden the feather of social justice. It bids for free legal aid²⁴ to justice-seeking economically challenged people.

The Prisons Act 1894

Originally made on the principle of deterrent theory in the pre-independence era the Act envisages prison administration, health care, maintenance, bedding, clothing, employment of prisoners, etc. One good thing was that female prisoner were excluded from handcuffing. In the post-independence era, many of the act’s provisions become void as they were against the principles of fundamental rights.

Jail Manuals

It speaks for administration of jail and providing a good environment to prisoners. It gives place to work and education for better rehabilitation and

¹⁹ The Constitution of India, Art.14

²⁰ Ibid, Art. 15

²¹ Ibid, Art. 20

²² Ibid, Art. 21

²³ Ibid, Art. 22

²⁴ Ibid, Art. 39A

improves the chances better re-entry. For the employment of women convicts there is scope cleaning grain, cloth repair etc. training knitting, needle work, and domestic kind work. Which is a step towards the re-entry venture of female prisoner after the sentence and make them independent. For literate prisoner there is facility of books. For the pregnant women, it says child- birth should be refrained as much possible in the jail and if not, there will be facility of midwife.

Female convicts shall ordinarily be employed on repair of clothing cleaning grain etc. and shall whenever possible be given instruction in needle work, knitting and other domestic industries.

International Measures

Starting from the United Nations Charter's preamble which is determined to reaffirm the faith in fundamental human rights, in the dignity and worth of a human person, and the equal rights of men and women.²⁵ Article 1 set out its purposes and principles, which include respect for human rights and fundamental freedoms for all without distinction as to sex.²⁶ It further gives responsibility of protection and reaffirmation of faith in fundamental freedom to its organs to like General Assembly, The Economic and Social Council, and the International Trusteeship System.

Universal Declaration of Human Rights a customary international law, protects fundamental human Rights which under Article 3 lays that “Everyone has the right to life, liberty and security of person”²⁷ and Article 5 “No one shall be subjected to torture or to cruel, inhuman or degrading

²⁵ The United Nations Charter

²⁶ Ibid, Art. 1

²⁷ Universal Declaration of Human Rights, Art. 3

treatment or punishment.”²⁸ These model laws are gender neutral and protect the human rights of all. Other than this part of the international bill of rights, Article 7 of the International Covenant on Civil and Political Rights states that torture and other cruel, inhumane, or degrading treatment or punishment are prohibited²⁹ and as per Article 10, everyone who is deprived of their liberty must be treated with regard for their inherent human dignity and with humanity.³⁰

Article 2 of the Convention against Torture lays its objective to prevent acts of torture in any territory under its jurisdiction, each state party is required to implement appropriate legislative, administrative, judicial, and other measures.³¹

Principle 1 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment says all people subject to any type of detention or incarceration must be treated with humanity and respect for their inherent dignity.

Principle 2 of Basic Principles for the Treatment of Prisoners “there shall be no discrimination on the grounds of race, color, sex, language, religion, political or other opinions, national or social origin, property, birth or other status.” Whereas principle 6 “All prisoners shall have the right to take part in cultural activities and education aimed at the full development of the human personality.”

²⁸ Ibid Art. 5.

²⁹ UN General Assembly, *International Covenant on Civil and Political Rights*, GA Res 2200A (XXI), (Dec. 10, 1966), Art. 7.

³⁰ Ibid Art. 10.

³¹ UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, GA Res 39/46, (Dec. 10, 1984), Art. 2.

United Nations rules for the treatment of women prisoners and non-custodial measures for women offenders (Bangkok Rules). These Bangkok rules specifically apply to women prisoners and offenders, considering the need generally assembly adopted it in 2010.

Rule 4 talks about allocation to nearest prisons,³² rule 5 says personal hygiene,³³ rule 6 denotes health-care services and medical screening,³⁴ rule 19 says, while search effective measures shall be taken to ensure women prisoner's dignity and several other provisions regarding no close confinement to pregnant and breastfeeding mothers.³⁵ Rule 36 gives protection to juvenile female prisoners.³⁶ Rule 40 focuses on developing classification methods to address gender and circumstances specific needs of women prisoners and address them on an individual basis which will help them in early rehabilitation and reintegration into society.³⁷

According to the Eighth Amendment of the United States Constitution³⁸ People in prison have a right to basic and adequate health care. Attorney at Prison Law office Rita Lomio warns us and says “a prison sentence should never become a death sentence for people with treatable medical and mental health conditions,”³⁹ Supreme Court of the United States in *Estelle v. Gamble* said that holding government has an “obligation to provide medical

³² UN General Assembly, *United nations rules for the treatment of women prisoners and non-custodial measures for women offenders*, Rule 4, (Dec. 21, 2010).

³³ Ibid, Rule 5

³⁴ Ibid, Rule 6

³⁵ Ibid, Rule 19

³⁶ Ibid, Rule 36

³⁷ Ibid, Rule 40

³⁸ Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

³⁹ *Jensen v. Shinn* cv-12-00601-PHX-ROS

care for those whom it is punishing by incarceration”⁴⁰

SEVERAL COMMITTEES FOR BETTER TREATMENT OF PRISONERS AND PRISON ADMINISTRATION

Some of the important committees are made to assess the prison conditions. All India Jail Manual Committee (1957), Working Group on Prisons (1972), All India Prison Reforms Committee (1980-83) known as Mulla Committee, All India Group on Prison Administration, Security and Discipline known as R.K. Kapoor Committee (1986). And. One for women prisoners as National Expert Committee on Women Prisoners known as Justice Krishna Iyer Committee 1987

The Supreme Court/High Courts issued crucial directives then the Government of India introduced section 436A of the Cr. PC to liberalize the bail restrictions. inserted a plea-bargaining chapter in the Criminal Procedure Code. And, to decrease overcrowding, enhance hygienic conditions, and also give better facilities to inmates and prison staff, the Scheme for Prison Modernization was started in 2002.

National Expert Committee on Women Prisoners

In 1986 The National Expert Committee on Women Prisoners was made under the chairmanship of Justice Krishna Iyer. In 1987, the Committee submitted its report after assessing the situation of women in prisons and made many suggestions like, women in jail should know what their rights are. Women in jail should only be searched by female police officers. As soon as women are entering into prison, they should be given a medical

⁴⁰ *Estelle v. Gamble*, 429 U.S. 97, 103 (1976)

check-up by a woman doctor. Women in jail should be able to get in touch with their families and consult with their lawyers, social workers, and non-profit groups. Women who are in jail should be able to keep their kids with them. Women in prison should be more involved with voluntary organizations of women. Women prisoners should be kept in separate jails. Women in jail should have access to special prosecutors who can present their cases.

Other than this Justice V. R. Krishna Iyer's committee proposed a National Policy for Custodial Justice for Women. It placed specific emphasis on the requirement that a specialized approach is used in the processing, care, and rehabilitation of female convicts. Regarding the Justice Krishna Iyer Committee's other recommendations, one called for the establishment of a National Authority on Custodial Justice. He proposed that the National Authority on Custodial Justice, a single body that would consider all custody-related issues, including those involving women in mental hospitals or prisons.

The report inter-alia states that “women hood and childhood even in criminal wrappings and behavioural aberrations deserve to be nursed in dignity and restored to working normally, using all the material, moral and spiritual resources at the society’s command”. In his report, Justice Krishna Iyer had observed that the “existing malpractice and the delinquencies in the various forms of custody tend to affect women more adversely than men. This is since women are still a marginal group in the custodial population and tend to be less vocal, demanding, and violent in demonstrating against custodial or other injustices. With this in mind, specific and specialized interventions are necessary to restore the existing imbalance in the criminal correctional justice system vis-à-vis women”. But due to certain

departmental conflicts between the department of social justice and the department of women and child development then the part of the ministry of home affairs and human resource development the recommendations made by Justice V. R. Krishna Iyer's committee were not implemented. Currently, the department of women and child development is a separate ministry.

Recommendations of Ministry of Women & Child Development

Recommended the suitable implementations of existing rules. There should be a national commission for prisons. Routine and thorough inspections of prisons. Additionally, special procedure should be established at time of arrest in order to protect the interest of women and their children. At last, recommended amendment in national Model prison Manual, 2016.

Case Laws

*Sheela Barse v. State of Maharashtra*⁴¹ a letter by a public-spirited female journalist regarding custodial violence against female prisoners was considered a Writ Petition and the Supreme court as a constitutional obligation directed the State of Maharashtra to protect the female prisoner in lock-ups and opened the road of justice for deprived women.

In case of *Nilabati Behera v. State of Orissa*⁴², on the issue of the safety and security of prisoners, Supreme Court said that the state has to ensure the safety and security of the prisoner. And, in case any damage is inflicted upon the victim by the act of the state's officer then the repair shall be done.

⁴¹ AIR 1983 SC 378

⁴² AIR 1993 2 SC 746

In *R.D. Upadhyay v. State of Andhra Pradesh & Ors.*⁴³ Certain guidelines were issued. In the jail, there should be proper opportunities for education and recreation with the space of a creche and nursery. The female convict and her child should have separate utensils, clean water to drink, vaccination, medical care, and safe and clean places to sleep. A child in prison with a mother should not be treated as a convict. It further held for better conditions and accommodation for pregnant women and the option for parole or temporary release. And allowing the mother convict to keep her child till the attainment of the age of six years.

Post-release support and reintegration programs to help women prisoners successfully transition back into society is not a reality in India. Efforts on programs like assistance with job placement, access to social welfare schemes, provision of identity documents, and guidance in accessing healthcare and other service should be priority of jail administration.

CONCLUSION AND SUGGESTIONS

It is evident that there are adequate number of national and international laws to protect women prisoner in jail, to rehabilitate and reform. Presence of jail manual for prison administration. But implementation of existing laws is sheer failure. That's why influx of women in prison is hard to tackle. Instances of violation of prisoner's human rights and poor prison administration keeps haunting. From outside we can just observe and read the violations of prisoners' rights and sympathize to it and urge for better programming. But, what about who went through it. Therefore, it is very urgent to address this issue and to implement the recommendations of committees, the existing legislations, the guidelines and directions of cases

⁴³ AIR 2006 SC 1946

and to abide with the principle of international laws.

In Indian societies women are always subjected to exploitation and they have to face a lot of social stigmas. They are not even treated as citizens and most often their rights are also violated or overlooked. After all this, unfortunately if a woman commits any crime and is imprisoned for this, then its another misery for already miserable woman. Keeping the above discussed issues in mind, its pivotal that the environment and circumstances surrounding the women should be favourable both in and out of the jail. It is suggested that the women inmates should be kept in open jail. The authorities who provide for the administration of jail should ensure that the gender program laws should be implemented in a manner that are beneficial for women inmates.



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RIGHTS OF CHILDREN AND REQUIRED AMENDMENTS

- Sava Vishnu Vardhan* & Chejrala Sowmya Sree**

Abstract

Any country that wants to develop must prioritise certain criteria. First are a country's children's rights. A nation's kid rights and resources can indicate its growth. Children are the most vulnerable citizens. To protect children's freedom and rights, a nation must pass laws and provide services. Laws and rules protecting children are essential. To keep up with society, laws must be updated frequently.

In a developing country like India, where 25% of the population is under 18, extra emphasis must be given to implementing current child rights laws and writing new ones to strengthen them. The Geneva Declaration of 1924 requires that children be taught and protected against exploitation.¹ Governments, legislative bodies, and organizations that help children should stand firm on their rights. This study is based on extensive research on child protection and rights at the national and international levels. Researchers examine Indian child rights laws. Finally, the researchers recommend new child legislation and amendments.

Keywords: Child Rights, Vulnerable, Spiritual, Intransigent, Augment.

* Student @ Damodaram Sanjivayya National Law University, Visakhapatnam; E-mail: vishnuvardhansava@gmail.com

** Student @ Damodaram Sanjivayya National Law University, Visakhapatnam; Email: sowmyasree@dsnlu.ac.in

¹ Leila Seth, "The Rights of the Child" 20 *IICQ* 2 (1993)

INTRODUCTION

Rights of Children refer to the fundamental freedom and protections granted to children under the legal framework of the country. These rights are borrowed from international conventions, agreements and specific laws and policies within India. Improving Child rights contribute to the holistic development of the country. The basic rights which are to be given for a child include, right to Life, right to education, right to protection from discrimination, right to Identity, right to play and recreation etc.

One of the main international conventions which directs all the countries the framework of the skeleton legislation with regards to children is Convention on the Rights of the Child, 1989. In most of the countries, major part of Child laws is based on the Convention on the Rights of Child. In the context of India, Legislations such as:

- Prohibition of Child Marriage Act 2006,
- Right of Children to Free and Compulsory Education Act 2009,
- Protection of Children from Sexual Offences Act 2012,
- The Child Labor (Prohibition and Regulation) Act 1986,
- The Juvenile Justice (care and Protection of Children) Act 2000, etc., are enacted for the benefit of Children.

The category of Children is the most Susceptible part of a country, even though the rights are granted by the country they are under gross violation, this eventually leads to severe and egregious breaches of the fundamental rights of children. Children are being considered as transient, nonconformists and are being taken for granted by the people. It is not possible to assess the exact magnitude of this problem with the available official statistics as antisocial activities by juveniles are still dealt with

through the prevailing traditional system of social control². One of the main reasons behind this is the dependent nature of children on the society for their basic amenities. An adult is capable in leading an individual life whereas, this is not easily possible in the case of children. Considering the sensitivity of the problem, the countries enacted a set of rules and legislations which grant specific rights for children and safeguard them. The truth rests that even though there are legislations granting rights for children, they are violated on a large scale. In the case of India, despite legislative protections for children's growth and well-being, severe abuses of their rights continue in India. Millions of youngsters around the nation suffer from a variety of problems because of these infractions.

Child trafficking, in which minors are transferred for forced labour, sexual exploitation, or unauthorised adoption, is one of the most concerning infractions. Most of the sexual assaults against small children take place in the home or by people known to the children. Such cases go largely unreported³. When the cases are not reported, even a legislation like POCSO act cannot do justice to the children. Both the Juvenile Justice (Care and Protection of Children) Act and the Immoral Traffic (Prevention) Act, which were designed to safeguard children from such horrible deeds, are violated by this practise. Children still work in dangerous and exploitative jobs in contravention of the Child Labour (Prohibition and Regulation) Act, which is a persistent issue.

These kids often lack access to school, healthcare, and a secure environment, which hinders their entire development. A broad number of

² S. K. Bhattacharyya, "Juvenile Justice System In India", 23 *JLI* 606 (1981)

³ Editorial "Saving Our Children: We Need Better Implementation, Not More Stringent Laws", 51(3) *EPW* 9 (2016)

topics relating to the care, protection, rehabilitation, and adoption of children are covered under the Juvenile Justice (Care and Protection of Children) Act, 2015. The JJ Act and the Adoption Regulations, 2017, both address adoption and give standards for adoption processes in India. Although India has undoubtedly made significant progress in terms of overall social development and has put in place the necessary safeguards for the protection of children, more needs to be done to build the enforcement infrastructure necessary to carry out the nation's various child labour laws⁴.

These changes are intended to strengthen the current system for protecting children and to provide them a caring environment. India aims to establish a strong framework that upholds the rights and safety of its youngest citizens by concentrating on areas like comprehensive child welfare institutions, bolstering the juvenile justice system, encouraging child participation, improving education and skill development, combating child labour and child marriage, and strengthening digital child protection. These changes demonstrate India's dedication to giving its children a better future built on justice, equality, and all-around growth.

CHILDREN INTO TERRORISM

A growing number of children and girls are being used as human shields and explosive detonators, according to the Office of the United Nations High Commissioner for Human Rights. The terrorist groups erroneously mislead young people and persuade them to choose a life of destruction. Children are the victims of violence on many different levels when they are recruited and utilised by terrorist and violent extremist groups. They often endure extreme cruelty while associated with the group, including harsh

⁴ O.P. Maurya, "Child Labour in India", 36(4) IJIR 497 (2001)

recruitment tactics, enslavement, sexual exploitation, pervasive fear, indoctrination, and psychological pressure. They are often wounded or killed in combat. In addition, because of their youth and psychological susceptibility, these kids could develop into particularly dangerous tools for the organisations that recruited them, as they could be used to commit crimes like, in some instances, terrorism, suicide bombings, war crimes, or crimes against humanity.⁵ Children being used in terrorism is not a recent development. The Secretary-expert General's Machel Report on the impact of armed conflict on children, which was released more than 20 years ago, brought to public attention the scope and ramifications of armed forces and armed organisations enlisting and utilising minors.

REASONS FOR RECRUITING CHILDREN

Children are not merely recruited alongside adults, but are specifically targeted, as the use of children is a great advantage to the group. In certain cases, armed organisations, especially terrorist or violent extremist groups, are viewed as a community's defence against the danger of violence from another group or the State. In such cases, families and communities may anticipate and urge youngsters to join the group. It may be difficult to recruit adults to a non-State armed organisation if it is unpopular among the community or does not have widespread geographical support. In such instances, recruiting children is simpler for the organisations and ensures that they can continue to build their power base despite decreasing support. Terrorist and violent extremist groups are prominently exploiting children to boost their visibility for an example the propaganda revealed a total of

⁵ United Nations Office on Drugs and Crime, Vienna "Handbook on Children Recruited and Exploited by Terrorist and Violent Extremist Groups: The Role of the Justice System." (2017)

254 events that included 38 percent of children who were engaged in acts of violence or being exposed and normalized to violence.

Economic Advantage

Children are often paid less and need less food to live, regardless of whether they are utilised as support or combatants. Small arms are simple to use terrorist organisations teach youngsters how to use them and make the weapons readily available. Children are relatively low in price than adult warriors, but they are not necessarily less effective in carrying out violence.

Easier to Control

Children are significantly more readily frightened and lot simpler to manage than adults, both physically and intellectually. Children are more likely to exhibit devotion to authoritative figures and are more prone to adopting the ideas and behaviours of people they love and respect, which is especially important when families are engaged in the recruiting process. Groups seeking to assure their future existence may see the use of children as an investment in the subsequent generation

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The terrorist organisations use increasingly advanced and cutting-edge methods to enlist children as troops. Children are forced to join these organisations due to circumstances including poverty, instability, marginalisation, and prejudice.⁶ Few parents send their kids to work so they may make money.

⁶ Rachel Stohl, “Targeting Children: Small Arms and Children in Conflict”, 9 (1) *BJWA* 287 (2002)

Forcible Recruitment: Kids may be kidnapped, intimidated, or taken in by traffickers. Coercive recruitment schemes target children since they are more likely to be poor, neglected, or living on the streets.⁷

Community Recruitment: Community leaders support terrorist organisations because they believe the organisations will protect the community from dangers posed by other armed organisations. In these situations, the community leaders urge the kids to join such organisations.

Voluntary Recruitment: Some youngsters cross borders with their families voluntarily to join terrorist organisations. The primary cause of this is the instigation of intergroup conflict throughout the children's formative years. Some terrorist groups also use educational institutions to indoctrinate kids with information on the advantages of joining terrorist organisations.

Online recruitment: Online communication is a more recent strategy for spreading violent extremist and terrorist ideologies. It expands the group's message's audience and connects with potential recruits all around the world. Children are particularly at risk since they use the Internet so often. Some websites advertise the existence of the groups, and often, many sites in many languages include unique messages tailored to different audiences.

Tarn Taran bomb blast case: On September 4th, 2019, in the outskirts of Pandori Gola village in Tarn Taran a powerful explosion took place.⁸ Two persons were killed, and another was severely injured. Upon the investigation done by National Investigation Agency, nine 'Pro Khalistan'

⁷ Supra note 5

⁸ Ajay Sura, "Tarn Taran Bomb blast: NIA court can't try juveniles, says HC", *Times of India*, July 28, 2022

youth including a juvenile were booked under various sections of Unlawful Activities Prevention Act, Explosive Act. As per the reports the accused has formed a terrorist gang to carry out secessionist activities on the ground as well as on social media to instigate the members of the Sikh community to agitate for the secession of Punjab from India.

Khalistan Movement is a revolutionary movement which demands the separation of Punjab from India. Some supporters of this movement and their children are being sent as a revolutionist for that Khalistan Organisation.

CHILD LABOUR IN INDIA

Child work is a destructive practice that harms children's physical and mental development and is common in many nations, including India. According to the International Labour Organization (ILO), child labor is any kind of employment that denies children their legal right to childhood, prevents them from attending a normal school, and harms them mentally, physically, socially, or morally.

Child work becomes a huge problem with serious socio-economic repercussions in the Indian setting. An estimated 10.1 million youngsters between the ages of 5 and 14 worked throughout the country in 2017-2018, according to research published by the National Sample Survey Organisation (NSSO).⁹ These young people may be found working in a variety of fields, including household labour, manufacturing, construction, and informal services.

⁹ National Sample Survey Organisation, "NSSO Estimate of Child Labour in Major Indian States, 2004 - 05", available at: <https://labour.gov.in/sites/default/files/NSSOEstimateofChildLabourinMajorIndianState.s.pdf> (last visited on: 23.07.2023)

The root reasons of the widespread usage of child labour in India are complex. Poverty is one of the main causes of this problem since poor families often depend on the meagre wages of their children. Further contributing factors to the perpetuation of this social ill include restricted access to high-quality education and insufficient enforcement of child work rules.

Child work has significant and far-reaching effects. The basic right to education is unfairly denied to children who work, subjecting them to a lifelong cycle of illiteracy and limited prospects. Additionally, these kids often labour in dangerous situations, which poses a serious risk to their bodily and emotional health. As a result, child labour perpetuates the intergenerational cycle of poverty since it traps illiterate and unskilled adults inside of it, where they struggle to escape.

The Indian government and other organizations have made significant efforts to eradicate child labour. A legislative framework forbidding the employment of minors in risky sectors is provided by the Child Labour (Prohibition and Regulation) Act of 1986. No child shall be employed or permitted to work in any of the occupations or in any workshops mentioned in the legislation.¹⁰ Additionally, children ages 6 to 14 are guaranteed free and required education under the Right to Education Act of 2009. To address the underlying causes of child labour, certain measures have been put in place that seek to reduce poverty and build skills.

Despite these admirable efforts, ending child labour in India is still a difficult task. To provide long-lasting solutions, it is necessary to effectively execute and enforce current laws, increase awareness and advocacy, and

¹⁰ The Child Labour (Prohibition and Regulation) Act, 1986 (Act 3 of 1986).

improve socioeconomic circumstances.

HAZARDOUS CHILD LABOUR

Hazardous child labor is defined as labor done by children in risky or unhealthy situations that have the potential to cause a child's death, serious injury, or illness due to lax safety and health regulations and working conditions. It may lead to long-term impairment, health problems, and psychological harm. Often, health issues brought on by child work do not manifest themselves until the child is an adult.

With an estimated 79 million children, aged 5 to 17, working in hazardous conditions in a variety of industries, including agriculture, mining, construction, manufacturing, as well as in hotels, bars, restaurants, markets, and domestic service, hazardous child labour is the largest category of the worst forms of child labour. Both developed and developing nations contain it¹¹. Boys and girls frequently begin performing dangerous tasks at very young ages. Youngsters are more susceptible to job risks than adults are because their bodies and minds are still growing, and the effects of dangerous employment are frequently more severe and long-lasting for youngsters.

When discussing child employment, it's critical to go beyond the definitions of work hazard and risk as they apply to adult employees and to broaden them to consider childhood development. Because they are still developing, children have unique traits and demands, and because of this, workplace hazards and risks must consider how they may affect children's physical,

¹¹ International Labour Organisation, "Hazardous Child Labour", available at: <https://www.ilo.org/ipec/facts/WorstFormsOfChildLabour/Hazardouschildlabour/lang--en/index.html%C2%A0> (last visited on: 23.07.2023)

cognitive (thought/learning), behavioral, and emotional development.

RIGHT TO EDUCATION FOR CHILDREN

Children are the pioneers of education, which is one of the major cornerstones for the growth of a country. Since a child's education serves as the cornerstone for all future growth of a country, providing education from the very earliest stages of life becomes crucial for a nation. A well-educated youngster may bring about a lot of developmental changes in the political system. Nations and several organisations have endorsed educating children due to the value of education. Schools must be constructed in order for students to gain from their education, without using any unethical tactics. Any kind of insubordination in the classroom must respect the child's human dignity. Education is both a fundamental human right in and of itself and a crucial tool for achieving other fundamental rights. The implementation of the Right to Education Act in India has been a significant step towards ensuring that every child has access to quality education. This act, which was enacted in 2009, aims to provide free and compulsory education to all children between the ages of 6 and 14. The Right to Education Act recognizes education as a fundamental right and places a responsibility on the government to ensure its effective implementation. It mandates that all private schools must reserve a certain percentage of seats for children from economically disadvantaged backgrounds.

Furthermore, the act emphasizes the importance of inclusive education by prohibiting discrimination against children based on their gender, caste, religion, or disability. It also sets standards for infrastructure, curriculum, and teacher qualifications to ensure that children receive quality education.

While significant progress has been made in implementing the Right to Education Act, challenges still exist. Issues such as inadequate infrastructure, teacher shortages, and high dropout rates continue to hinder its full realization. Efforts are being made at both the central and state levels to address these challenges and ensure that every child can exercise their right to education.

In this section, we will explore the various aspects of the implementation of the Right to Education Act in India. We will examine its impact on access to education for marginalized communities, evaluate its effectiveness in improving educational outcomes, and discuss ongoing initiatives aimed at strengthening its implementation. By understanding the current status of the right to education in India and analyzing its challenges and achievements, we can work towards creating an inclusive educational system that empowers equal growth and development opportunities for every child.

Since every child would have access to a top-notch education and have their right to dignity and development respected, adopting education using a “Rights Based Approach” would do just that. The Constitution (Eighty-sixth Amendment) Act of 2002 inserted Article 21-A, which declares that all children between the ages of six and fourteen have the basic right to free and compulsory education, to the Indian Constitution the delivery of high-quality education, it requires schools to adhere to certain requirements.

The statute also highlights the significance of qualified educators and their continued professional growth. Children from poor homes can reserve seats in private schools under the RTE Act. Children from socially and economically disadvantaged groups must receive a specified percentage of the seats available in private schools. With this clause, the gap between

public and private schools is meant to be closed and diversity encouraged. The act creates systems for keeping track of and guaranteeing that its rules are followed. To oversee school operations and offer suggestions for improvement, it urges the creation of School Management Committees (SMCs) at the local level, made up of parents and community people. The statute also creates State Commissions to supervise the RTE statute's implementation and handle complaints.

After noting that the “right to education” as such has not been guaranteed as a fundamental right under part-III of the Constitution, the Supreme Court held in *Mohini Jain v. State of Karnataka*¹² that reading articles 21, 38, clauses (a) and (b) of articles 39, 41, and 45 cumulatively makes it clear that the Constitution’s framers intended for the state to provide education for its citizens. relying on the promises made in the preamble. The court stated: “Human dignity cannot be guaranteed to a person without personality development, which can only occur via education.” This is to secure justice that is “social, economic, and political” for the citizens and assures the dignity of the individual. The court continued, saying, the right to education is the main part and parcel of right to life. Without the right to education, the Article 21 right to life and the dignity of the individual cannot be guaranteed. The state government is required to make efforts to offer its inhabitants educational opportunities at all levels. While affirming that article 21 is the source of the right to education, a bigger bench in *J. P. Unnikrishnan v. State of A. P.*¹³ restricted its application to children up until the age of 14. Following that, the right to education is restricted by the

¹² AIR 1992 SC 1858

¹³ AIR 1993 SC 2178

state's economic capacity and level of development. The Indian Law Institute (ILI) published research stating that the right to education has a profound effect on society. By giving people the knowledge, skills, and critical thinking abilities needed for meaningful involvement in the democratic process, it empowers individuals. Education fosters tolerance, empathy, and respect for variety in addition to intellectual development, fostering societal harmony and inclusivity.

CHILD SEXUAL ABUSE

Children in India suffer from the unpleasant and persistent problem of child sexual abuse, which jeopardizes their physical, emotional, and psychological well-being. It includes, but is not limited to, molestation, rape, indecent exposure, pornography, and internet grooming. It also refers to any sexual act or exploitation committed against minors. Child sexual abuse is a serious violation of a child's rights and creates serious obstacles to the child's growth and chances for the future. Child sex abuse in India is a grave issue that affects people from all socioeconomic levels and geographical areas equally. Due to underreporting and social stigma, complete data on child sexual abuse are few, but the figures that are available shed light on how serious the problem is.

According to statistics, child sexual abuse affects youngsters of both sexes, albeit females are typically more vulnerable. Data from the National Crime Records Bureau (NCRB) for the year 2019 show that 84% of the victims of all recorded instances of child sexual abuse were female.¹⁴ Numerous

¹⁴ Esha Roy, "NCRB data- Crime against kids: a third still under POCSO" *The Indian Express* August 30, 2022 available at: <https://indianexpress.com/article/india/crime-against-kids-a-third-still-under-pocso-8119689/> (last visited on: 03.07.2023)

reasons, such as patriarchal norms, unequal power relations, and the sexual objectification of females, are responsible for this gender inequality. The distribution of victims by age shows that minors between the ages of 12 and 16 are most susceptible to sexual abuse. They were followed by kids between the ages of 8 and 12 in terms of reported instances. It is crucial to remember that kids of all ages, including babies and toddlers, can experience sexual abuse, underscoring the essential need for safety precautions for kids of all ages.

POCSO ACT

India passed the comprehensive Protection of Children from Sexual Offences Act, 2012, to address the problem of child sexual abuse and exploitation. It offers a legal framework for children who have been the victims of sexual offences in terms of protection, welfare, and justice. By establishing a child-friendly legal system, the legislation recognizes the vulnerability of children and tries to safeguard their safety and wellbeing. The POCSO Act lists several sexual offences against children, including but not limited to non-penetrative offences, sexual harassment, penetrative assault, and the use of minors in pornography. All children under the age of 18 are covered by it. The act's provision for special courts to hear cases involving child sexual offences is among its noteworthy aspects. These courts are referred to as 'Special Courts' and oversee handling cases brought under the POCSO Act quickly. To ensure that the child feels safe and comfortable while testifying, the statute stipulates that these courts must have a child-friendly setting.

The act acknowledges the significance of protecting the child's privacy and confidentiality throughout the entire legal process. It forbids the publication

of the child victims identify in print, electronic, or digital media of any kind. The child's right to privacy is upheld and their social stigma is lessened thanks to this clause. Additionally, the statute requires that cases of child sexual offences be reported to several agencies, including the police, medical professionals, and child welfare committees. Under the statute, failing to disclose such cases is a crime. This reporting system strives to make sure that instances of child sexual abuse are quickly brought to the authorities' attention so they can look into them and take the appropriate action.

The POCSO Act emphasises the necessity of offering help and rehabilitation to child victims in addition to addressing the legal elements¹⁵. To address cases involving child victims, it requires the creation of Special Juvenile Police Units and Child Welfare Committees at the district level. These committees oversee guaranteeing the wellbeing of the kid, including their access to support, counselling, and medical care. The law acknowledges the rights of victims who are minors to be heard and take part in court procedures. In order to lessen their trauma, it permits video conferencing to record the child's statement. It also allows for the appointment of a legal guardian or support person to assist the youngster during the legal procedure.

CHILD TRAFFICKING

Child trafficking can be defined as the process of immorally transporting, transferring, or harboring a person below the age of 18, for the purpose of

¹⁵ Srity, "Protection Of Children From Sexual Abuses: Decoding The POCSO Act," available at: <https://www.legalserviceindia.com/legal/article-8225-protection-of-children-from-sexual-abuses-decoding-the-pocso-act.html> (last visited on: 03.07.2023)

exploitation.¹⁶ Child trafficking is a serious imminence that's current in utmost corridor of the world. By making false pledges, the merchandisers take advantage of the children. It continues to be a serious issue that affects millions of children's rights and weal around the world.

Child trafficking is a complex issue with multiple beginning issues. The poor and vulnerable families that would vend or transport their children in hunt of better living conditions are the main targets of these merchandisers. Armed conflicts and political insecurity undermine societal institutions, leaving youths vulnerable to exploitation. Also, a lack of education causes to fall for the deceptive pledges made by merchandisers and fall victim to their eventual exploitation. Most child trafficking victims are young girls.

Child labour, sexual exploitation, child marriage, and organ trafficking are each considered to be cases of child trafficking. Children are made to work in dangerous sites like mines, manufactories, granges, or domestic yoke. The minors are utilised for harlotry, pornography, and coitus tourism, and other forms of sexual exploitation as well. A many among these victims of trafficking are also abducted, forced, or signed to fight in wars. constantly, the organs are also removed from the children's bodies to vend the organs immorally, leaving the kiddies permanently impaired.

According to the United Nations Office on Medicines and Crime's 2022 Global Report on Trafficking in Persons, which collected the gests of 51,675 victims of trafficking across 166 countries roughly 18 of those traded were womanish children and 17 were manly children. In terms of total rate, the report estimates that victims were detected at a global average rate of 1

¹⁶ Child Trafficking In India, available at <https://blog.ipleaders.in/child-trafficking-india/> (last visited on: 03.07.2023)

person per 100,000.¹⁷ According to the National Crime Records Bureau (NCRB) Report children were traded in India and roughly eight children are traded daily.¹⁸ Still, activists say that the factual figure could be much advanced as numerous victims don't go to the police because of the fear of the merchandisers.

Composition of the U.N. Convention on the rights of the Children, 1989 prohibits the illegal transfer of children abroad and composition are directly concerned with the child harlotry, child pornography and child trafficking directing the countries to take immediate action to help these conditioning.¹⁹

India inked the Palermo Protocol in 2002, but it was not ratified until 2011. This clarified what constitutes trafficking and backed in the development of laws to help child trafficking. Significant goods were also seen in other nations. The Immoral Trafficking (Prevention) Act, 1956²⁰ is the premiere legislation for the entailment of trafficking for marketable sexual exploitation, but it only deals with the trafficking of minors for harlotry. Section 370 of IPC gives the description of the trafficking and section 370A of IPC defines the discipline for the exploitation of a traded person in which section 370A(i) says that "Whoever, deliberately or having reason to believe that a minor has been traded, engages similar minor for sexual exploitation in any manner, shall be penalized with rigorous imprisonment

¹⁷ "Child Trafficking by Country 2023", 2023 available at <https://worldpopulationreview.com/country-rankings/child-trafficking-by-country> (last visited on: 03.07.2023)

¹⁸ Yuvraj, "A Detailed Description of Child Trafficking In India", available at: <https://www.legalserviceindia.com/legal/article-9984-a-detailed-description-of-child-trafficking-in-india.html> (last visited on: 03.07.2023)

¹⁹ Ibid

²⁰ The Immoral Traffic (Prevention) Act, 1956

for a term which shall not be lower than five times, but which may extend to seven times and shall also be liable to fine.²¹

Child trafficking has numerous causative factors and therefore has no simple result. That said, one of the stylish ways to drop child trafficking is to educate the people to be cautious and educate them on the warning signs and pitfalls associated with child trafficking, including grooming and highway robbery. Strong laws against child trafficking are a helpful interference, as is a high rate of conviction for those caught trafficking. Rehabilitation and reintegration should be handed to the saved children with sanctum, health care, education and vocation-al training to help them rebuild their lives. Cross-border cooperation and information sharing should be enhanced among the nations as it's essential to identify trafficking networks and seize merchandisers. All these practices will insure a safer and brighter future for all children.

CHILD MARRIAGE

Child marriage can be described as "any formal marriage or informal union between children under the age of 18 or between an adult and a child."²² According to UNICEF, even though child marriages have dropped over the once ten times, one in five children worldwide are still being married off at a youthful age.

India has made inconceivable strides in ending child marriages, but the country still has the loftiest proportion of youthful misters in the world. According to UNICEF, one in three of the world's child misters live in

²¹ Supra note 18

²² "Child marriage", available at: <https://www.unicef.org/protection/child-marriage> (last visited on: 03.07.2023)

India. Over half of the girls and women in India who are married in nonage live in the five countries Uttar Pradesh, Bihar, West Bengal, Maharashtra, and Madhya Pradesh. Nearly one in four youthful women in India (roughly 23 of youthful women) are married off before the age of 18.²³

India has legislated numerous laws to help these child marriages. The Child Marriage Restraint Act, 1929²⁴ was legislated by the British government when they were in power. This was the original temporal legislation to address the problem of child marriage. It only outlined the penalties for an adult joker who weds a child as well as the parents who encouraged similar unions. Prohibition of Child Marriage (Correction) Bill 2022²⁵ was approved by the Union Cabinet. The Act raises the age at which women can fairly be married from 18 to 21. The prosecution of the indigenous duty for gender equivalency serves as the foundation for this revision. This measure seeks to increase knowledge rates, drop motherly mortality, and advance equivalency. Despite these developments, the rate of decline in child marriages is inadequate to meet the Sustainable Development Goals by 2023. The forestallment and prohibition of child marriages necessitates a multifaceted approach. Education plays a crucial part, by raising mindfulness of the negative goods of child marriages. A minimal marriage age must be established, and violators must face consequences, according to the strengthened legislation. To combat negative conceptions and offer indispensable options for girls' commission, community engagement

²³ "Ending Child Marriage A Profile of Progress in India", UNICEF data, 2023 *available at:* <https://data.unicef.org/resources/ending-child-marriage-a-profile-of-progress-in-india-2023/> (last visited on: 03.07.2023)

²⁴ The Child Marriage Restraint Act, 1929

²⁵ "The Prohibition of Child Marriage(Correction) Bill, 2021", PRS Legislative Research, 2023 *available at:* <https://prsindia.org/billtrack/the-prohibition-of-child-marriage-amendment-bill-2021> (last visited on: 03.07.2023)

involving parents, religious and traditional leaders, and other influential numbers is needed. To insure the physical and internal well-being of girls, access to quality healthcare and social services pivotal. Girls may have druthers to marriage if they're given profitable commission chances through skill development and employment. To bring about long- lasting change, cooperation between governments, organisations, and people is needed.

JUVENILE JUSTICE ACT

In India someone under the age of 18 who has committed a crime is considered a juvenile. There is a distinction between a minor and juvenile, where the minor is someone who has not reached the age of legal responsibility, while a juvenile is someone who has committed an offence or who requires care and protection.²⁶ Juvenile justice is a component of criminal law that reduces the criminal liability based on the assumption that a juvenile lacks the capacity to act maliciously. The conception of Juvenile justice rose with the idea that the challenges of juvenile delinquency and the kids in the unusual settings could not be resolved through standard criminal justice methods.

Lex Revolution

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In the last few decades, there has been an incredible rise in the number of crimes committed by youngsters under the age of 16. The child's rearing environment, economic situations, lack of education, and parental care are all cited as explanations for the development of such behaviour in children. Even more astounding is the fact that children are being used as the tools in the commission of a crime, and this age range includes mainly youngsters aged 6-12 years, since the minds of innocent children may be controlled more easily at this age. The protection of juveniles and an apt treatment for

²⁶ Supra note 2

betterment was always the main motive behind the drafting of the legislations for the Juveniles in India. In India, Juvenile justice policy is largely guided by the constitutional mandate contained in Article 15²⁷, which guarantees special attention to children through the enactment of required and unique laws and policies to protect their rights.

The Juvenile Justice acts of 2000 and 2015, both have been made as the result of the convention and are a major trial to follow the Convention. On December 30, 2000, the president of India signed the Juvenile Justice Act 2000, The Act mandates the care, protection, treatment, development and restoration of neglected and delinquent children, as well as the necessary machinery and infrastructure. This Act addresses children's basic needs and protects their human rights. Important aspects of the Act includes removing disqualification and publishing the juvenile's name, address etc., in any newspaper or magazine, This Act establishes a Juvenile Justice Board to provide juvenile justice, and a Child Welfare Committee to deal with the child-related issues. Section 23 of this Act punishes a person in actual charge or control of a juvenile for cruelty to a youngster. Section 26 punishes obtaining a juvenile to minor for dangerous job, keeping him in bondage, and withholding or misusing his profits. These are all cognizable offences.²⁸

An advocate Shweta Kapoor filed a PIL in the Delhi High Court, seeking revisions to the Juvenile Justice (Care and Protection of Children) Act, 2000. The case of *Mukesh & Anr v. State of NCT of Delhi & Ors*,²⁹ often known as the Nirbhaya rape case, cleared the path for the amendment. In

²⁷ The Constitution of India, Art. 15

²⁸ The Juvenile Justice (Care And Protection of Children) Act, 2015

²⁹ (2017) 6 SCC 1

this case, it was argued that the accused's age should not obscure the character of his brutality towards the victim. The Juvenile Justice Act of 2015 repealed the Juvenile Justice Act of 2000, recognizing the need for a better comprehensive and efficient juvenile justice system that emphasized both deterrence and reformative techniques.

The Juvenile (Care and Protection) Act 2015 defines a kid as a person under the age of 18. The Act divides "child" into two categories: 'Child in legal trouble' and 'kid in need of care'. Children under the age of 18 who have committed a crime are classified as "children in dispute with the law".³⁰ A Child in need of safety and treatment is specified in Section 14 of the Act. After the amendment, a person aged 16-18 can be tried as adults depending on the characteristics of a crime (if it is a heinous crime) and aged 16-18 is a juvenile, and so can be prosecuted as an adult in court. Section 2(33) of the 2015 Act defines 'heinous crimes' as "crimes for which the minimum sentence under the IPC or any other law in force is seven years or more imprisonment."

The rising rates of youth crime in India are a serious worry that must be addressed.³¹ In India, the need for Juvenile Justice System is felt far more in Delhi as compared to other major cities. In Delhi, there has been a constant increase in this type of crime, with the National Crime Records Bureau recording 1,981 crimes in 2015 and 2,368 cases in 2016. According to the data, juveniles were responsible for 46 killings in 2017, the largest number of homicides across all metropolises, as well as the highest number of robberies and fraud across all metropolises. Although the government has enacted different laws and regulations to reduce juvenile crime, the current

³⁰ C. Roberson, *Juvenile Justice: Theory and Practice* (CRC Press, Boca Raton, 2010)

³¹ B. K. Das, *Research Paper Juvenile Justice System in India*, (2016)

laws on juveniles do not have a practical impact on juveniles, and hence the results are ineffective, and the legislative objective is not being fulfilled.³²

SUGGESTION AND CONCLUSION

There are some suggestable amendments to the existing legislations to make them updated and spatial in the contemporary society. There are several areas where Right to Education act could be improved.

Vocational Education: For children, vocational education has several benefits. It improves their employability and job chances by providing them with real-world information and skills that are directly transferable to a variety of industries. Practical instruction offered by vocational education promotes a greater grasp of crafts and professions. Children who become experts in their chosen profession may also develop a sense of independence and self-confidence. Additionally, by fusing academic learning with real-world experience, vocational education supports a well-rounded education by enabling kids to build a mix of theoretical knowledge and practical skills that are crucial in today's labour market.

Introduction of New Courses in Education for Children: New courses can encompass a variety of areas, such as emerging technologies, environmental studies, entrepreneurship, media literacy, financial literacy, global citizenship, and cultural diversity. These courses aim to foster critical thinking, creativity, problem-solving, collaboration, and adaptability among children. They offer avenues for exploring new interests, discovering talents, and developing a well-rounded educational experience. Introducing new

³² Avnish Kumar Sharma & Prof. (Dr.) Meenu Gupta, "The Path of Juvenile Justice System Development in India: A Hypercritical Study of the Legislations" 10 (6) IJCRT 148 (2022); available at: <https://ijcrt.org/papers/IJCRT22A6628.pdf> (23.07.2023)

courses also allows educational institutions to address pressing societal challenges and promote sustainable development. For instance, courses focusing on environmental studies can raise awareness about conservation, climate change, and sustainable practices. Courses on digital literacy and cybersecurity can equip children with the necessary skills to navigate the digital world safely and responsibly. Such courses empower children to become informed, engaged citizens capable of contributing positively to their communities.

POCSO act can also be improved in many aspects: Punishments: The punishment given to the offender must be graver and grievous so that, the offender and the public get the element of fear towards law and be cautious in the actions they perform.

The Juvenile Justice (Care and Protection of Children) Amendment Act, 2021³³ was passed to amend various provisions of the Juvenile Justice Act, 2015. Adoption as an instrument has always been seen through the rehabilitative and reformative lens by the Indian government. In this view, Smt. Smriti Zubin Irani, Union Minister for Women and Child Development, proposed the Juvenile Justice (Care and Protection of Children) Amendment Act. Her main aim was to underscore the need for handing over the ultimate accountability for the welfare and safeguarding of unsafe and disadvantaged children to the District Magistrates.³⁴

In this act it has stated that an adoption agency is required to file the

³³ “The Juvenile Justice (Care and Protection of Children) Amendment Bill, 2021,” PRS Legislative Research, 2023 available at: <https://prsindia.org/billtrack/the-juvenile-justice-care-and-protection-of-children-amendment-bill-2021> (last visited on: 03.07.2023)

³⁴ “Parliament Passes Juvenile Justice (Care and Protection of Children) Amendment Bill 2021,” available at: <https://pib.gov.in/Pressreleaseshare.aspx?PRID=1740011> (last visited on: 03.07.2023)

paperwork in a civil court of law to secure an adoption order as soon as prospective adoptive parents accept a child. This Act also specifies that the District Magistrate as well as the Additional Magistrate are responsible to carry out these duties regarding the adoption procedure. According to this Act, once a parent registers for adoption, a petition for adoption orders is filed. The prospective parent is then meticulously assessed through a home study report, referred a child, and in due course, allowed to take a child in pre-adoption foster care.³⁵ This Act has provided that within 30 days of the District Magistrate's adoption order, any party that feels aggrieved by it may appeal against it to the Divisional Commissioner. Such appeals have to be adjudicated within four weeks of the appeal's filing date.

According to Juvenile Justice (Care and Protection of Children) Amendment Act, 2015, offences against children that are enumerated in the chapter "Other Offences Against Children" and entail sentences of three years or more, the sentences range from seven years in prison and are cognizable. The abuse and cruelty committed by staff or those in control of childcare institutions was categorised under this new Act as non-cognizable and non-bailable offences. Majority of these crimes are reported to the police by either parents or child rights organisations, as the victims themselves are unable to directly report them owing to the imbalance in power bodies and Child Welfare Committees (CWC). Making these crimes non-cognizable along with several other serious crimes under the special law would make reporting an offence to the police even more difficult.

On the paper, though this Act seems revolutionary but its implementation in the practical world will decide its impact. The recent amendment is one

³⁵ Editorial, "The Tedium process of Adoption", *The Hindu*, September,12, 2022.

of much-needed steps and has been welcomed by most, but it will not yield results without proper training and monitoring of officials especially District Magistrates and implementation of the provisions.



ENFORCEMENT OF MEDIATION SETTLEMENT AGREEMENTS IN FOREIGN JURISDICTIONS

- Bhavya Goswami*

Abstract

Mediation settlement agreements are voluntary, unlike court rulings, hence they are preferred over them. However, an enforceable agreement may be needed to clarify the penalties of breaching the conditions. The agreement can help prevent future disputes by guiding future encounters. Thus, enforceability is crucial, especially in international mediation because parties from different jurisdictions lack a trust connection.

The Singapore Convention is a welcome addition to cross-border dispute settlement enforcement procedures in this uncertain environment. Countries not signing the Singapore Convention or opting out under Article 8 should consider common and civil law options and other international instruments that facilitate enforcement.

This article covers three topics: First, the Convention-its origins, scope, background in private international law, enforcement, and judicial refusal. Second, alternatives to the Convention include local court orders, consent arbitral awards, and notarization. Third, how the Mediation Bill, 2021 enables Singapore Convention and alternate mechanism implementation.

Keywords: Mediation, iMSAs, Singapore Convention, Enforcement of Settlement Agreements, Mediation Bill 2021

* Student- B.B.A.LL.B. (H) @ School of Law, Bennett University, Greater Noida; E-mail: l19blb026@bennett.edu.in

INTRODUCTION

Mediated settlement agreements, which are voluntarily entered into by the parties, have a higher chance of being executed compared to court decisions. However, if the obligations agreed upon are distant in the future, or if the parties require reassurance, they may still wish to create an enforceable agreement. Parties may also hesitate to comply with changes in circumstances or delay performance. The need to enforce agreements is especially important in international mediation, where parties from different cultures may not have a long-standing relationship of trust. The enforcement of international mediated settlement agreements can be complicated, adding to the uncertainty and transaction costs of resolving an international dispute through mediation.

The “Singapore Convention”¹ is a valuable addition to the methods available for enforcing cross-border dispute resolution outcomes. The mediation community is optimistic that the convention will have the same impact on mediation as the “New York Convention”² had on arbitration. The Singapore Convention seeks to establish strong regulations to give cross-border mediation the same importance as other international dispute resolution methods like litigation and arbitration. This is important for improving the standing of mediation as a viable and effective method for resolving disputes.

BACKGROUND: FORMATION OF THE CONVENTION

¹ Convention on International Settlement Agreements Resulting from Mediation GA Res 73/198, adopted at the United Nations General Assembly, 73rd Session (20 December 2018).

² 330 UNTS 3 (10 June 1958; entry into force 7 June, 1959)

In 2014, the United Nations Commission on International Trade Law (UNCITRAL) was submitted a proposal by the United States delegating UNCITRAL Working Group II (Dispute Settlement) (WG II) to find measures and instruments which would help enforce mediation settlement agreements in an expedited manner. Thus, in 2015, the WG II started working on the proposal for making international commercial mediation settlement agreements (iMSAs). In the 68th Session in New York, during 2018, WG II proposed two drafting of the ‘UNCITRAL Model Law on International Commercial Mediation’ and ‘International Settlement Agreements Resulting from Mediation, 2018’. In June 2018, UNCITRAL submitted its final drafts to the UN General Assembly, who adopted the Singapore Convention on 20 December 2018 and opened it for signatures in August 2019.³

Paper Scheme

This paper discusses three aspects: *First*, the Convention, particularly focusing on its genesis, scope, and enforcement. *Second*, the provisions are the Convention are examined through the lens of Private International Law, including understanding the conflict of jurisdiction and choice of law. *Finally*, the paper discusses the alternatives to the Convention, such as an order of a domestic court, considering the domestic laws and international or bilateral treaties; a consent arbitral award and its enforcement; and notarisation.

Requirement of the Convention

³ Timothy Schnabel, The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition & Enforcement of Mediated Settlements, 19 *Pepp. Disp. Resol. L.J.* 1 (2019)

Before the Convention came into the picture, the international community exhibited a cautious approach towards opting for mediation as their dispute resolution method, especially when it came to international commercial agreements.⁴ The general trend was to file a suit in Courts and subsequently apply for out of the Court settlement or court directed mediation proceedings.

The major reason for such hesitancy is the unpredictable challenges to enforceability across different jurisdictions. The iMSAs are treated as any other contractual element with substantive and procedural elements. Thus, their enforceability changes in different jurisdictions- such as in countries following common law against those following civil law.⁵ For instance, the common law country given the discretion to the Courts to remedy any breach or partial breach of contracts by applying doctoring of equitable relief to do complete justice, which consequentially also gives effect to the ‘Rule against Penalty Clauses’ of the Contracts, thus rendering them inapplicable to the breach.⁶ However, countries following civil law follow specific performance of contracts by default. The Penalty clauses are also restricted in civil law, but the restrictions are not identical with restrictions found in common law. The Singapore Convention makes the enforceability of the iMSAs conclusive in nature. Any iMSA made under the Convention can be challenged in the domestic courts only on the grounds provided under Article 5 of the Convention.⁷

⁴ Stacie Strong, “Realizing Rationality: An Empirical Assessment of International Commercial Mediation,” 74 (4) *Wash and Lee L Rev* 1973 (2016)

⁵ James R Coben & Peter N Thompson, “Disputing Irony: A Systematic Look at Litigation about Mediation,” 11 *Harv Negot L Rev* 43 (2006)

⁶ *Lee Chee Wei v. Tan Hor Peow Victor* [2007] 3 SLR(R) 537

⁷ The German Civil Code (Bürgerliches Gesetzbuch), Section 339 ff

Furthermore, mediation proceedings are more suited to commercial agreements. Mediation provides an exit from the contemporary legal methods of resolution and upholds the elements of a business relationship. Since the process is consensual, informal, and flexible, it accommodates culture, respect, and preliminary and tangential interests affecting the parties which cannot be put on the table in arbitration and litigation proceedings.⁸ Thus, the procedure provides a win-win solution at low-costs and preserves the continuity of business relationships.

It is important to finish this section by noting that the Singapore Convention, by providing a strong enforcement mechanism, indirectly supports mediation as a desired and, in many cases, acceptable alternative to international arbitration and litigation. From the standpoint of a consumer in the market for conflict resolution services, parties will gain economically and qualitatively by having access to a larger array of alternatives to pick from.

Scope of the Convention

To scope of the Convention is provided by both inclusive and exclusive provisions on iMSAs governed by the Convention. Article 1(1)⁹ of the

⁸ Carrie Menkel-Meadow, “The Future of Mediation Worldwide: Legal and Cultural Variations in the Uptake of or Resistance to Mediation” in Essays on Mediation Dealing with Disputes in the 21st Century (Ian Macduff ed) (Wolters Kluwer, 2016) at p 31.

⁹ *Article 1. Scope of application*

This Convention applies to an agreement resulting from mediation and concluded in writing by parties to resolve a commercial dispute (“settlement agreement”) which, at the time of its conclusion, is international in that: (a) At least two parties to the settlement agreement have their places of business in different States; or (b) The State in which the parties to the settlement agreement have their places of business is different from either: (i) The State in which a substantial part of the obligations under the settlement agreement is performed; or (ii) The State with which the subject matter of the settlement agreement is most closely connected.

Convention lays down three essential elements of any iMSAs to which the Convention is applicable:

- i. To agreement resulting from mediation,
- ii. Resolving commercial dispute,
- iii. The dispute has to be international.

Article 1(1) itself defines the international nature as –

“At least two of the parties to the settlement agreement have their places of business in different states; or the state in which the parties to the settlement agreement have their places of business is different from either the state in which a substantial part of the obligations under the settlement agreement are performed or the state with which the subject matter of the settlement agreement is most closely connected.”¹⁰

According to Art. 2(1)(a)¹¹, if a party has more than one place of business, the relevant place is the one that is most closely related to the dispute that the “settlement agreement, having regard to the circumstances known to, or contemplated by, the parties at the time of the settlement agreement’s conclusion.” If a party lacks a place of business, Art. 2(1)(b)¹² requires that the party’s habitual residence be used as a point of reference.

The definition of international has been essentially included by the drafters of the Convention, since unlike arbitration, there is no concept of a seat of mediation.

¹⁰ Ibid

¹¹ For the purposes of article 1, paragraph 1: (a) If a party has more than one place of business, the relevant place of business is that which has the closest relationship to the dispute resolved by the settlement agreement, having regard to the circumstances known to, or contemplated by, the parties at the time of the conclusion of the settlement agreement; (b) If a party does not have a place of business, reference is to be made to the party’s habitual residence.

¹² Ibid

Commercial dispute is outlined with the use of illustration from footnote 1 of the UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation.¹³ The Convention only applies to “commercial” disputes. The drafters are aware that any incompatibility with domestic public policy, which may occur if the Convention were made to cover non-commercial issues, should be avoided.

If the Convention were designed to regulate just business-related transactions, such a conflict would be less likely to arise. Thus, according to Article 1(2) of the Convention, conflicts between consumers “for personal, family, or domestic purposes” and those concerning “family, inheritance, or employment law” are not covered.¹⁴

The Convention’s implementation will establish whether the concept of mediation in Article 2(3)¹⁵ is overly wide. This definition includes aspects such as a peaceful resolution, the involvement of third parties, and no power to enforce a solution, and it may also apply to methods other than mediation, such as conciliation and ombudsman proceedings. These

¹³ GA Res 73/199, adopted at the United Nations General Assembly, 73rd Session (20 December 2018).

The term ‘commercial’ should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; and carriage of goods or passengers by air, sea, rail or road.

¹⁴ Shouyu Chong & Felix Steffek, Enforcement of International Settlement Agreements Resulting from Mediation under the Singapore Convention: Private International Law Issues in Perspective, 31 *SACLJ* 448 (2019).

¹⁵ “Mediation” means a process, irrespective of the expression used or the basis upon which the process is carried out, whereby parties attempt to reach an amicable settlement of their dispute with the assistance of a third person or persons (“the mediator”) lacking the authority to impose a solution upon the parties to the dispute

processes include parties seeking to negotiate an acceptable settlement with the assistance of a third party who lacks decision-making authority. Such techniques include neutral review, mini-trials, and expert opinion. If courts want to limit the scope of applicability, they may demand a more qualified third-party engagement, which would preclude methods such as expert opinion that just give parties with information without engaging in an amicable resolution approach. Furthermore, it is unclear if the Convention's functional definitions of "mediation" and "mediator" would include technical advances in conflict resolution, such as the employment of artificial intelligence algorithms to aid in dispute resolution services.¹⁶

With respect to the exclusions, if the mediation's subject matter is international and commercial and isn't precluded by Art. 1(2) or 1(3), the Singapore Convention is applicable to both institutional and ad hoc mediation. Under Art. 1(2), disputes involving consumers are excluded, as are those involving family, inheritance, or employment law. Under Art. 1(3), iMSAs that have been approved by a court or resolved during court proceedings, recorded, and enforceable as judgements in the state of that court, or recorded and enforceable as arbitral awards, are excluded. For the Convention to fill up any gaps in the cross-border enforcement of iMSAs, these exclusions are deemed essential.¹⁷ As long as the mediation's subject matter is international and commercial and isn't precluded by Art. 1(2) or 1(3), the Singapore Convention is applicable to both institutional and ad hoc mediation. Under Art. 1(2), disputes involving consumers are excluded, as

¹⁶ Nadja Alexander & Shouyu Chong, "An Introduction to the Singapore Convention on Mediation Perspectives from Singapore" *Nederlands-Vlaams tijdschrift voor Mediation en conflictmanagement* 2018 (22) 4, available at SSRN: <https://ssrn.com/abstract=3756911> (last visited on: 02.06.2023)

¹⁷ Nadja Alexander & Shouyu Chong, "The New UN Convention on Mediation (aka the 'Singapore Convention') Why It's Important for Hong Kong" *Hong Kong Lawyer* 26 (2019)

are those involving family, inheritance, or employment law. Under Art. 1(3), iMSAs that have been approved by a court or resolved during court proceedings, recorded, and enforceable as judgements in the state of that court, or recorded and enforceable as arbitral awards, are excluded. For the Convention to fill up any gaps in the cross-border enforcement of iMSAs, these exclusions are deemed essential. In accordance with the Hague Convention of June 30, 2005 on Choice of Court Agreements (HCCA)¹⁸, iMSAs may result from judicial or arbitral procedures and may be documented as a judicial settlement or as an arbitral consent award that is enforceable under the New York Convention.¹⁹ The exclusions in Art. 1(3) exclude any overlap between the Convention's administration and those of these international agreements, and the Convention will enforce IMSAs that fall beyond the purview of the HCCA or the New York Convention. The Convention's Article 7²⁰ retains the duties that member governments currently have under existing treaties regarding the pertinent rights of settlement agreements.²¹

If the applicable laws permit, the Singapore Convention shall manage settlement agreements emerging from investor-State disputes without conflicting with any existing bilateral or multilateral agreements that limit how they can be implemented.

¹⁸ Hague Convention of 30 June 2005 on Choice of Court Agreements (30 June 2005; entry into force 1 October 2015) Art 12.

¹⁹ Gary Born, *International Commercial Arbitration* 3021-3027 (Wolters Kluwer, 2nd Ed, 2014)

²⁰ *This Convention shall not deprive any interested party of any right it may have to avail itself of a settlement agreement in the manner and to the extent allowed by the law or the treaties of the Party to the Convention where such settlement agreement is sought to be relied upon.*

²¹ Hague Conference on Private International Law, Convention of 30 June 2005 on Choice of Court Agreements: Explanatory Report (by Trevor Hartley & Masato Dogauchi) at paras 206-209.

THE CONVENTION WITH RESPECT TO PRIVATE INTERNATIONAL LAW

In cross-border disputes, private international law primarily addresses three concerns. First, it offers conflict rules so that parties, judges, and attorneys can decide which venue has jurisdiction over issues. It also offers conflict rules to help choose the law to use in conflicts. Lastly, it offers conflict rules for parties wishing to have dispute resolution decisions made by foreign courts, arbitral tribunals, and iMSAs recognised and enforced internationally.²²

The Singapore Convention doesn't specify the appropriate forum for enforcing mediation agreements, hence it has very minor jurisdictional consequences. Moreover, it has no impact on how courts and arbitral tribunals exercise their jurisdiction over international issues. Yet the Convention will alter how iMSAs are acknowledged and applied. Each signatory state shall carry out a settlement agreement in accordance with its own procedural procedures and the guidelines outlined in the Convention, as per Article 3(1). This indicates that the Singapore Convention will have an equivalent impact on iMSAs to the New York Convention's elimination of the necessity for "double exequatur" for arbitral judgements in international enforcement procedures. The quantity and variety of legal instruments that can be recognised and upheld in accordance with principles of private international law are increased by these instruments.²³

When requesting the recognition and enforcement of IMSAs under the

²² Paul Torremans, Uglješa Grušić, et al (ed.) *Private International Law* 3 (Oxford University Press, 15th Ed, 2017)

²³ See Lucy Reed, "Ultima Thule: Prospects for International Commercial Mediation" NUS Centre for International Law Working Paper 19/03 (unpublished) 12-13 (2019)

Convention, particularly when Art 5 defences are asserted, the issue of choice of law may be pertinent. The Convention is further examined in light of these problems with private international law.

JURISDICTION ON MATTERS OF THE AGREEMENT – OR BEYOND

Working Group II omitted measures for enforcing mediation agreements when crafting the Singapore Convention.²⁴ This was due to the fact that mediation is a flexible alternative dispute resolution method and parties may discuss issues that are neither expressly covered by the mediation agreement nor impliedly covered by it. The introduction of convention rules for upholding mediation agreements would cause disarray since it would be difficult to define the boundaries of the disputes addressed by the agreement, which would be against the mediation process. At the moment, jurisdictional questions for mediation forums are governed by the regulations or legislation each state has enacted to regulate mediation procedures. Sometimes mediation is required before moving on with a legal or arbitral process for adjudicating a dispute. For instance, mediation agreements are seen as binding in France, where parties are required to try mediation before using alternative dispute resolution techniques like litigation. A properly formulated mediation agreement is usually binding on the parties in Germany and claims in court may not be brought until after a mediation session has been agreed upon.²⁵ Common law examples from the

²⁴ Stacie Strong, “Use and Perception of International Commercial Mediation and Conciliation: A Preliminary Report on Issues Relating to the Proposed UNCITRAL Convention on International Commercial Mediation and Conciliation” 46 (University of Missouri School of Law Legal Studies Research Paper No 2014-28)

²⁵ Klaus J. Hopt & Felix Steffek (eds.), *Mediation: Principles and Regulation in Comparative Perspective* 549 (Oxford, 2012; Online Ed., Oxford Academic, 2013), available

UK²⁶, Hong Kong²⁷, and Singapore demonstrate the need of carefully drafting mediation agreements. If not, there will probably be too much ambiguity for them to be enforced.²⁸

CONFLICTS IN CHOICE OF LAW

It is crucial to emphasise some of the new choice of law conflicts that result from the Convention's implementation to give a thorough assessment on the position of the Singapore Convention in private international law. These problems only come up during the iMSA enforcement stage, notably when the signatory nations' competent authorities or courts are asked to take the Art 5 reasons for refusal into consideration. The four basic grounds for refusal listed in Art. 5 are (a) the law of obligations, (b) the misconduct of the mediator, (c) public policy, and (d) the subject matter that are unsuitable for mediation.

Law of Obligations

Owing to constraints, only the choice of law conflicts resulting from the reasons for rejection listed in Art. 5(1) will be addressed in the paper. These circumstances include those in which (a) a party was under incapacity at the time the agreement was reached and (b) the agreement is void, ineffective, or unable to be carried out under the relevant legislation.

A. Incapacity

at: <https://doi.org/10.1093/acprof:oso/9780199653485.003.0008> (last visited on: 02.06.2023)

²⁶ Ibid

²⁷ Hyundai Engineering and Construction Co Ltd v Vigour Ltd [2005] HKEC 258 at [29].

²⁸ Cf Scandinavian Trading Tank v Flota Petrolera Ecuatoriana (*The Scaptrade*) [1983] QB 529 at 540.

The Singapore Convention's definition of incapacity in Art. 5(1)(a) has the same language as Art. V(1)(a) of the New York Convention, but it does not include the clause on choice of law, which states that incapacity is determined "under the law applicable to them." Nonetheless, given how differently civil and common law courts perceive disability, it appears improbable that the choice to remove this word represents an independent opinion on incapacity. The drafters' aim must thus be understood in more detail. Applying Gary Born's "validation principle,"²⁹ according to which parties who voluntarily engage in international commerce are assumed to want their dispute resolution agreements to be performed effectively, even if that necessitates a broader choice of law principle, is one strategy that might be used. As a result, a court may have a pro-enforcement bias.³⁰

As an alternative, a court may use *renvoi* to ascertain a party's eligibility to sign an iMSA. *Renvoi*³¹ might be used to determine whether a party has the legal competence to complete the agreement, for instance, if a party enters into an agreement in State A in accordance with that state's laws but seeks enforcement in State B, where the legislation is different. Yet, courts have not overwhelmingly backed the *renvoi* doctrine or the validation principle. The pro-enforcement bias has not found much support in practise, and the application of *renvoi* is difficult due to its complexity. It is uncertain if the courts will eventually employ these choice-of-law strategies to decide whether an iMSA can be denied enforcement under the Convention because one or more parties are unable.

²⁹ Gary Born, *International Commercial Arbitration* 3489-3490 (Wolters Kluwer, 2nd Ed, 2014)

³⁰ *Ibid*

³¹ David Alexander Hughes, "The Insolubility of 'Renvoi' and Its Consequences" (2010) 6 *JPL* 195

B. Void, ineffective, or unable to be carried out

The language of Art. 5(1)(b)(i) of the Singapore Convention is similar to that of Art. 11(3) of the New York Convention, with the addition of a choice-of-law clause that requires the court to choose the appropriate law before determining whether the agreement is void, ineffective, or incapable of performance. In order to determine whether the iMSA is subject to any of these situations, the court of the signatory state must first determine the applicable legislation to the agreement.

If the court rules that the iMSA is null and invalid, it signifies that the contract was founded on a flawed document, which may have been created under pressure, fraud, coercion, unconscionability, or other circumstances. In defending against such problems, the law of obligations is definitely a useful tool.³²

The court also considers whether the applicable legislation prevents performance of the iMSA. The clauses involving contractual impossibility, frustration, or other unforeseen events that arise after contract formation would need to be examined by the court.³³

Nevertheless, as “inoperative” is a legal word of art that is not specifically defined in the contract laws of many legal systems, it can be difficult for the court to decide if an iMSA is inoperative. The courts may take an independent stance while considering this defence. If an iMSA contains

³² George A Bermann (ed.), *Recognition and Enforcement of Foreign Arbitral Awards The Interpretation and Application of the New York Convention by National Courts* 23 (Springer, 2017)

³³ Ibid

inherent inconsistencies or self-defeating clauses, it may be deemed “inoperative” at the time of its completion or after. Alternately, a future agreement to surrender all rights to pursue remedies under an iMSA might render it ineffective.³⁴

Misconduct by the Misconduct

In the Singapore Convention, the two categories of behaviour that constitute grounds for refusal based on mediator misconduct are failing to declare conflicts of interest under Article 5(1)(e) and the occurrence of undue influence before or during the mediation process under Article 5(1)(f). In deciding whether a party entered into the agreement under undue influence, the court of the signatory state may need to consider the governing law of the agreement where a party seeks to refuse execution of an iMSA under Article 5(1)(f). In addition, the party seeking to refuse enforcement may show that the mediator’s wrongdoing significantly affected them and prevented them from entering the agreement if adequate disclosure had been provided. In certain situations, the court might need to take the iMSA’s governing law into account while deciding whether there was a meaningful impact.³⁵

Hence, while assessing the grounds for rejection based on mediator misconduct in the Singapore Convention, selecting the appropriate controlling legislation of the iMSA is crucial. The court will depend on the applicable legislation to assess whether the party seeking to refuse the enforcement of the iMSA was the victim of undue influence and if the mediator’s misconduct had a material effect on the party that would have

³⁴ Ibid

³⁵ Supra note 14

impacted their choice to enter into the iMSA.³⁶

Public Policy

Using the public policy defence under Art. 5(2)(a), during the enforcement stage of a cross-border dispute resolution agreement, requires close examination of both domestic and foreign elements.³⁷ Unless extraordinary circumstances require differently, the courts of the signatory state shall use reasonable discretion in applying this ground for refusal and granting enforcement of iMSAs under the Singapore Convention, even if they conflict with some domestic public interests. As a result, the public policy argument should only be used in situations when it violates fundamental international public policy, including when there is corruption or a violation of human rights.

Subject Matters not Amenable to Mediation

Parties seeking to plead with the court of a signatory state to refuse enforcement of an IMSA under Art 5(2)(b) of the Singapore Convention must refer first to the law of the enforcing state for guidance. However, since this ground for refusal is another exceptional “escape mechanism” similar to the public policy defense, the courts should use a restrictive approach when applying it.³⁸

Therefore, when the enforcing court refers to its law to establish if the IMSA relates to subject matters amenable to mediation, it should also evaluate the degree of nexus linking the subject matter resolved at mediation

³⁶ Supra note 20, p. 3652

³⁷ Supra note 17

³⁸ Supra note 14

to its forum. The court should not automatically apply its domestic rules concerning the IMSA. Instead, it should assess and evaluate the availability of the defense based on the law of the state with the closest connection to the dispute resolved at mediation.³⁹

This means that the courts should avoid being parochial when administering the “subject matter” defense in the context of international commercial arbitration. In conclusion, when deciding whether to refuse enforcement of an IMSA.

ALTERNATIVES OF ENFORCEMENT OF INTERNATIONAL MEDIATED SETTLEMENTS

Without the Singapore Convention on Mediation, it may be difficult to enforce international agreements reached through mediation. The Convention offers a framework for the acceptance and enforcement of agreements for international mediated settlement, which can aid in the mediated settlement of cross-border conflicts.

The acceptance and execution of international mediated settlement agreements will be governed by the domestic laws of each party to the dispute in the absence of the Singapore Convention. In order to enforce the settlement agreement, the parties may need to negotiate many legal frameworks and processes, which may be a difficult and time-consuming process.

The acceptance and enforcement of international mediated settlement agreements may be covered by national laws or treaties in some nations. For

³⁹ Supra note 20, p. 3702

instance, the Uniform Mediation Act in the United States offers a framework for the acceptance and enforcement of mediated settlement agreements throughout various jurisdictions.

Other international treaties or conventions that support the execution and acceptance of international mediated settlement agreements may also be parties to which some nations are a signatory. For instance, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards establishes a framework for international arbitral awards to be recognised and enforced in more than 160 nations.

The enforcement procedure, however, may become more challenging and ambiguous due to the lack of a standardised international framework for the recognition and execution of international mediated settlement agreements. By establishing a consistent framework for the acceptance and enforcement of international mediated settlement agreements, the Singapore Convention on Mediation tries to overcome this problem and may encourage the use of mediation as a successful method of settling international conflicts.

It is crucial to be informed of the choices when nations decide whether or not to sign the Singapore Convention on Mediation or when potential users choose to opt out of it if given the chance, which is a choice made possible by Art. 8 of the Singapore Convention on Mediation. Considering common law, civil law, and other international instrument enforcement strategies following are the options available for enforcement of mediated settlements without the enforcement of Singapore convention.

Court orders

Without the Singapore Convention on Mediation, it may be difficult and

complicated to enforce mediated agreements through a court order under international law.

The domestic laws and processes of the nation where enforcement is sought will frequently determine whether a mediated settlement agreement may be carried out. For instance, in the United States, parties may file a petition to enter judgement based on a mediated settlement agreement in order to attempt to have the agreement enforced in court.

But, in addition to the legislation of the country where the mediation took place, any applicable international treaties or conventions may also have an impact on whether a mediated settlement agreement may be enforced. In rare circumstances, the parties to a mediated settlement agreement may need to file a lawsuit in the court where the agreement was made or in the court where enforcement is sought in order to have it enforced.

Additionally, parties may decide to include clauses in their mediated settlement agreement that specify how the agreement will be enforced across different jurisdictions or that demand that, in the event of a dispute regarding the enforcement of the agreement, the parties submit to binding arbitration.

Without the Singapore Convention on Mediation, enforcing a mediated settlement agreement under international law can be a complicated and difficult process that requires parties to negotiate several legal systems and processes. Nonetheless, parties can raise the chance of effectively enforcing their agreement in several countries by taking rigorous planning precautions and include enforceability measures in the settlement agreement.

For instance, in the United States, parties may file a motion to enter

judgement based on a mediated settlement agreement in order to attempt to have the agreement enforced in court. A mediated settlement agreement is regarded as a contract under US law, and parties may enforce the agreement by asking a court to issue an order that has the same legal weight as a court decision. Other cases have employed this strategy, notably in *re Gulf Oil Spill*, when the US District Court for the Eastern District of Louisiana upheld a mediated settlement deal relating to the Deepwater Horizon oil leak.⁴⁰

Similar to other countries, Australia allows parties to request that a mediation settlement agreement become a court order by submitting an application. According to the Australian method, a mediated settlement agreement is recognised as a legally enforceable contract, and the parties can ask the court to make the agreement's contents binding just like any other court order. Many instances have employed this strategy, notably *Pennisi v. Maritsas*, in which the Supreme Court of Victoria upheld a mediated settlement agreement relating to a business dispute.⁴¹

A court in another country is typically not required to recognise a foreign court's judgement unless there are pre-negotiated obligations to enforce in place, whether in the form of a multilateral or bilateral agreement, so even if some expedited procedure is available for a mediated settlement agreement to take the form of a court order, there remains the challenge of international enforcement. The discussion in this section looks at domestic legal concepts, international treaties, and regional or bilateral agreements to see how they affect the execution of mediated settlement agreements that

⁴⁰ *In re Gulf Oil Spill*, 2012 U.S. Dist. LEXIS 129082 (E.D. La. Sept. 12, 2012).

⁴¹ *Pennisi v. Maritsas* [2017] VSC 502.

take the form of a foreign court judgement or order. It comes to the conclusion that, notwithstanding the promise of multilateral treaties for the implementation of foreign court judgements, parties will need to rely on regional or bilateral treaties in addition to domestic law.

However, since these treaties are subject to various restrictions, it is challenging to provide precise general guidelines that might help parties understand when one jurisdiction will recognise court orders issued in another. The application of a domestic law concept to enforcement practise varies much more. International enterprises who conduct business globally and have counterparts with global assets face uncertainty as a result of this.⁴²

International Treaties

In the absence of the Singapore Convention on Mediation, additional pertinent international treaties or conventions must exist in order to enforce international mediated settlements through international treaties.

The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards is an example of international convention that offers a framework for the execution of international mediated settlements. Notwithstanding the fact that the New York Convention⁴³ focuses on the enforcement of arbitral judgements, some courts have construed its provisions to also apply to the execution of mediated settlement agreements.

Another example would be the Singapore Convention on Mediation, which

⁴² Bobette Wolski, “Enforcing Mediated Settlement Agreements (MSAs): Critical Questions and Directions for Future Research” 7(1) *Contemp Asia Arb J* 87 at 95 (2014)

⁴³ Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)

provides a framework for the recognition and enforcement of international mediated settlement agreements, which was adopted in 2018 and is also known as the United Nations Convention on International Settlement Agreements Resulting from Mediation.⁴⁴ A framework for the execution of international mediated settlement agreements is also provided by a few bilateral investment treaties (BITs), apart from these treaties.

An international instrument that aimed to provide harmony and certainty to the execution of foreign judgements is the Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters. However, this instrument has not acquired much support. A more effective multilateral treaty that allows for the mutual recognition and execution of foreign judgements from courts that the parties have mutually agreed upon is their choice of court is the Choice of Court convention. The Choice of Court Convention has been ratified by 31 nations as of December 31, 2018. China, Ukraine, and the US are signatories to the Choice of Court Convention. Even with the signatories listed, it is obvious that these nations have a small geographic dispersion. Namely, there are just two Asian nations, one Latin American nation, and no Middle Eastern or African nations. It is also uncertain whether the US, a signatory since 2009, would implement the Choice of Court Agreement. So, unless additional nations ratify and implement the Choice of Court Agreement, its ability to enforce international judgements may be limited.

International parties to a mediated settlement must make sure that their agreement to mediate contains a clause establishing an exclusive choice of court before having that court record the settlement agreement as a court

⁴⁴ United Nations Convention on International Settlement Agreements Resulting from Mediation (New York, 2018) (Singapore Convention on Mediation)

order to take advantage of the Choice of Court Convention.⁴⁵ So, if the parties did not initially consider enforcement in another jurisdiction, this method of enforcement might not be helpful.

However, in some instances, such as where a dispute between foreign parties is of a civil rather than a commercial nature, resort to the Choice of Court Convention may be preferable over the Singapore Convention on Mediation. This is since, Singapore Convention on Mediation, only applies to commercial disputes, the Choice of Court Convention covers both civil and commercial disputes, and, to gain from the finality that very few justifications exist for not enforcing the agreement.⁴⁶

The only other ground for refusing recognition or enforcement under the Choice of Court Convention, aside from the agreement being void and unenforceable, a party lacking capacity, failure to provide notice for the institution of proceedings, recognition or enforcement being manifestly incompatible with public policy, and inconsistency with existing judgements, is if the judgement was obtained through fraud.⁴⁷

These reasons for rejecting a mediation are more stringent than those provided by the Singapore Convention on Mediation, which may have more subjective elements.

These include the mediator's "serious breach" of the standards that apply to the mediator or mediation and the mediator's failure to disclose to the party's information that "raises justifiable doubts as to the mediator's

⁴⁵ Convention of 30 June 2005 on Choice of Court Agreements

⁴⁶ Supra note 1, Art 1.

⁴⁷ Convention of 30 June 2005 on Choice of Court Agreements (30 June 2005; entry into force 1 October 2015) Art 9.

impartiality or independence.”⁴⁸

The Singapore Convention on Mediation also permits non-enforcement when doing so would be “contrary to the public policy” of the nation from which relief is sought, which seems to be a less stringent standard to meet than the “manifestly incompatible with public policy” requirement of the Choice of Court Convention.⁴⁹

Separately, the Hague Conference on Private International Law has resurrected its Judgments Project, which broadens the scope of international cases involving choice of court agreements beyond the scope of the Choice of Court Convention and incorporates all judgements in civil and commercial cases where recognition and enforcement are sought abroad. From 2016 through 2018, the Special Commission on the Judgments Project met often to debate a draught treaty text. This could improve the international framework for the enforcement of foreign judgements in the future and support the search for convergence in this area, particularly when combined with other regional initiatives like the Asian Principles of Private International Law⁵⁰ and the Commonwealth Model Recognition and Enforcement of Foreign Judgments Bill.⁵¹

Regional and Bilateral treaties

⁴⁸ Supra note 1, Art. 5(1)

⁴⁹ Supra note 1, Art 5(2); cf Convention of 30 June 2005 on Choice of Court Agreements (30 June 2005; entry into force 1 October 2015) Art 9(e).

⁵⁰ Weizuo Chen & Gerald Goldstein, “The Asian Principles of Private International Law: Objectives, Contents, Structure and Selected Topics on Choice of Law” 13 *J Priv Int'l Law* 411 (2017)

⁵¹ Commonwealth Secretariat, “Improving the Recognition of Foreign Judgments: Model Law on the Recognition and Enforcement of Foreign Judgments” 43 (3/4) *Commonwealth Law Bulletin* 545 at 547 (2017)

Regional and bilateral accords may also make it easier for mediated agreements to be enforced by judicial orders under international law.

For instance, the Mediation Directive (2008/52/EC) adopted by the European Union ensures that mediation agreements are upheld by all EU Member States. According to the Mediation Directive, parties can ask that a mediated settlement agreement be rendered enforceable in a Member State's court, and the court may do so in line with its own domestic legal framework. This strategy has been applied in a number of instances, including the one in which the English High Court upheld a mediated settlement agreement in compliance with the Mediation Directive in *Energy Finance Team AG v. LDK Solar HI-Tech Co Ltd*.⁵²

Similar provisions for the execution of mediated settlement agreements may be found in various bilateral investment treaties (BITs). For instance, the Singapore-India BIT has provisions for the enforcement of mediated settlement agreements connected to commercial disputes. The Canada-China BIT⁵³ also contains measures for the recognition and enforcement of mediated settlement agreements linked to investment disputes. These BITs give parties a way to request that a mediated settlement agreement be recognised and upheld in line with the rules of the treaty.⁵⁴.

A number of regional and bilateral treaties that India has signed have clauses allowing for the implementation of mediated settlement agreements.

⁵² [2014] EWHC 3116 (Comm).

⁵³ Canada-China Foreign Investment Promotion and Protection Agreement (FIPA), Article 16.3(3)

⁵⁴ Agreement between the Government of the Republic of Singapore and the Government of the Republic of India for the Promotion and Protection of Investments (Singapore-India BIT), Article 15.8

A clause enabling the acceptance and enforcement of mediated settlement agreements pertaining to business disputes, for instance, is included in the Comprehensive Economic Cooperation Agreement (CECA) between India and Singapore. A mediated settlement agreement may be rendered enforceable in either country's courts under the terms of the CECA, and those courts may do so in line with their respective domestic legal frameworks.⁵⁵

Moreover, India has ratified the SAARC Agreement on Arbitration, which permits the enforcement of arbitral rulings as well as “any other legal document” that the parties may agree upon, such as mediated settlement agreements. A mediated settlement agreement may be enforced in any SAARC member state’s court at a party’s request, and the court may do so in line with its own domestic laws and processes.⁵⁶

The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which establishes a procedure for the recognition and enforcement of arbitral decisions, including those resulting from mediated settlement agreements, has also been approved by India. Although though the New York Convention does not directly address mediated settlement agreements, certain courts have acknowledged that, for the purposes of enforcement under the Convention, mediated settlement agreements can be interpreted as arbitral decisions.⁵⁷

Domestic Laws

⁵⁵ India-Singapore Comprehensive Economic Cooperation Agreement (CECA), Chapter 8, Article 13.

⁵⁶ SAARC Agreement on Arbitration, Article 8 (1).

⁵⁷ New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Article 1(1), Article II, Article V

when it comes to enforceability of settlements through mediation, in International law domestic legislations can also be used to facilitate court orders.

The Mediation Bill, 2021, which provides a legal framework for the mediation procedure and the enforcement of mediated settlement agreements, was recently enacted by the Indian government. A mediated settlement agreement can be enforced under the Mediation Bill as if it were a court order, and parties can ask for a consent decree to be issued by the court based on the conditions of the mediated settlement agreement. In order to make it easier for people to recognise and enforce mediated settlement agreements, the Mediation Law also calls for the establishment of a central register of such agreements.

The Indian Arbitration and Conciliation Act, 1996 also offers a framework for the enforcement of mediated settlement agreements, in addition to the Mediation Bill. According to Section 74 of the Act, a court may issue an order requiring the execution of a settlement agreement that resulted through conciliation, and such an order will be enforceable as if it were a court judgement.

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Additionally, a method for enforcing agreements between parties is provided under the Code of Civil Procedure, 1908. Parties may petition to the court for the execution of an agreement or compromise under Section 47 of the Code, and the court will then issue an order that will be enforceable much like a judgement.

CONCLUSION

In essence, the Singapore Convention represents a significant advancement

in the field of international dispute resolution and gives parties another out-of-court conflict resolution alternative. It has brought up a number of concerns, including the choice of law and private international law considerations, regarding the acceptance and enforcement of IMSAs as a novel type of legal instrument.

The Singapore Convention seeks to gain from tried-and-true methods and maintain uniformity across conflict resolution systems by making comparisons to the New York Convention. Authorities, scholars, and practitioners are anticipated to create a body of guidelines and standards for the implementation of iMSAs in order to increase clarity and predictability as the Singapore Convention gains greater traction. The Singapore Convention offers a consistent and effective framework for implementing iMSAs among signatory states, which has the potential to boost global trade and commerce. Achieving this goal will depend on the Convention being implemented effectively, with adequate attention paid to conflicts between choice of law and private international law.

It is crucial for prospective signatory states to consider the new laws and guidelines that could be necessarily present in order to enforce IMSAs under the Convention. Despite the basic guidelines provided by the Convention, signatory states are required to enforce a settlement agreement in accordance with their respective procedural laws and under the restrictions outlined in the Convention. Hence, prospective signatories must first determine whether their present procedures for enforcing international settlement agreements need to be updated to bring them into compliance with the Convention's requirements. A study of local laws, rules, and judicial procedures may be necessary to make sure they comply with the Convention's obligations. Local particularities, such as the legal system and

cultural norms of the signatory state, should be considered during this reform process.

Overall, the Singapore Convention is a welcome addition to the landscape of international dispute resolution, and its application may help to increase predictability and clarity in the mediation of cross-border conflicts.





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ANAGH is a non-profit organization constituted under section 8 of the Company Act, 2013 to promote social efforts which empower the society to outreach the sustainable goals.

Why & How?

We envisioned a world where every human being has access to sustainable resources and opportunities for growth and human development. We believe that through strategic partnerships and the utilization of technological advancements, we can create a community of individuals with shared values to effect positive change on a broad scale. To achieve this, we will enable both individuals and communities through sustainable outreach initiatives and facilitate the networking of individuals, communities, and organizations with a shared interest in sustainable development and social justice.

What?



Support us :

ANAGH-Forum For Sustainable Outreach
A/C : 120003062694
IFSC Code : CNRB0004193
Bank : CANARA BANK, DUMRAON

GET IN TOUCH  info.anagh@gmail.com