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"It is imperative that the discourse on persons with mental health disorders is not limited to biomedical and health issues. The discourse needs to expand to fundamental issues of housing, education, support, and employment. The present case presents one such opportunity."

- **Dr. D.Y. Chandrachud, J.** in
Ravinder Kumar Dhariwal v. *Union of India*,
(2023) 2 SCC 209, para 91

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JUDICIAL REFORM: TOWARDS THE RULE OF LAW

Dr. Akhilesh Yadav*

Abstract

There are some institutional changes that have become necessary, seven decades after 26th January 1950. The foremost is the process of appointment of judges. The Supreme Court of India, and the High Courts, have come to occupy a space of constitutional governance unlike their counterparts elsewhere, and have played a vital part in the survival of democracy. They have ensured the sensitization of the system to the need for transparency. The entry of private electronic media has revolutionized governance. If corruption and inept government have today upstaged caste and religion as primary electoral agendas, credit must rightly be given to the media for this evolution. Every powerful institution must have checks and balances. The media cannot be governed by the government - it can justly assert the right to be governed by a jury of its peers. However, this must be done in a statutory framework with a content regulator who can effectively deal with the black sheep. Labour reform is vital, as is the reform of environmental laws, including the set of Forest Acts. These must be adapted to enable India to break the cycle of poverty, reminding us that in the ultimate analysis, abysmal poverty is the primary cause of environmental degradation. Commercial litigation and dispute resolution must be on commercial timelines - the slow dance from now to infinity is a luxury that business disputes cannot afford. The laws must be changed - and more than that, the mindsets must change. The appointment of regulators with domain knowledge to provide effective, yet transparent and fair regulation should be the object of regulatory reform – not to create a second tier of jobs for the retired.

Keywords: *Judicial Reform, Curruption, Labour Reform, Dispute Resolution, Law.*

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INTRODUCTION

The sole sentiment of this Article is inspired by the fundamental vision of creating an effective legal framework for an equitably growing and humane India. A democratic State needs the better governance through better laws. Better laws must be high-impact and capable of positively affecting the lives of the people they intend to serve. Here, I would like to suggest some of the most important reforms which are necessary to strengthen the constitutional influence in our judicial system and society. The suggestions are discussed below.

STREAMLINE JUDICIAL APPOINTMENTS

Making the process of appointments to the Supreme Court and High Courts participatory and transparent. The Supreme Court of India and the High Courts are the guardians of the Constitution of India. Given their exalted constitutional status, it is imperative that the method of appointing judges to these courts is such that only persons of the highest integrity and aptitude are chosen. Unfortunately, the current system of appointments, led by a collegium of senior Justices of the Supreme Court, pursuant to a decision of the Court itself, has proven unequal to this task. The corridors of the judiciary are rife with widespread charges of nepotism and factors other than merit guiding appointment decisions. The process is completely opaque without any possibility of holding decision-makers accountable. It is inconsonant with best practices worldwide which have shown a discernible pattern of moving towards optimally transparent and accountable processes of appointment. Finally, it proceeds on an indefensible interpretation of Article 124(2) and Article 217(1) of the Constitution which prescribes the method of judicial appointments.

There should be a participatory and transparent process of appointment to the Supreme Court and High Courts as well. Such reform will ensure that the best Candidates for judicial office are selected in an optimally transparent Manner. This will reaffirm respect for the institution of the judiciary currently Sullied by wanton speculation and rumour surrounding the appointments Process. Further, it will do so in a Manner that is perfectly consonant with the independence of the judiciary.

MAKE TRIBUNALS EFFECTIVE

Streamlining the nation's tribunals to improve efficiency and allow functional autonomy. The idea behind tribunals is to provide a more efficient and specialized means of dispute resolution between citizens, and between citizens and the State. At present 29 tribunals of various sizes and jurisdictions function under the aegis of different ministries. They operate outside the regular court structure, replacing the existing judicial structure in some cases, and providing for a specialized forum for dispute settlement in others.

However, three problem areas have called into question the very system of tribunals: first, there is a lack of functional autonomy as compared to courts- functionally, tribunals are dependent on allocation of funds by the appropriate ministry and do not always have the power to hire their own staff. Second, with respect to independence of appointees, tribunal members, unlike judges at all levels, have short tenures, subject to renewal by the Government at its pleasure. Further, in several tribunals the pool of possible appointees to the tribunal inevitably includes retired government officials whose administrative decisions are in fact being challenged before the tribunal. Finally, there is the problem of inefficiency – far from

improving the disposal rate of cases and providing quick and ready justice delivery, tribunals seem to have become bogged down with cases in the same manner as the regular judicial system, attributable to the lack of appointments and adequate infrastructure. Unsatisfactory dispute resolution in tribunals has resulted in increase in litigation at the High Court and Supreme Court levels, nullifying to some extent the benefits of having the tribunal supplement the Court. In addition, where tribunals were supposed to divert the flow of cases from overburdened courts, they are becoming overburdened themselves, due to inefficient functioning.

The reforms necessary to revamp the tribunal system in India will require legislative, procedural, and systemic changes to their function. The legislation should look to bring about uniformity in the administration of the tribunal, and in appointment, removal, and terms and conditions of service of the tribunal Members. The mechanism to fund tribunals must be changed to allow tribunals to raise funds directly where possible. Their functioning must also be closely monitored through proper collection and collation of data related to the functioning of tribunals.

ADVANCE POLICE REFORMS

Law enforcement in India is a legacy of the British Raj – a system put in place with the intention of controlling the public and stifling civil liberties. Since independence, efforts have been made to change the police into a force that is more integrated with the society it serves. But police reform remains one of those issues that is caught in an endless loop of commissions, committees, and Public Interest Litigation ('PIL'). In recent years, under pressure from the judiciary and the public, some states have acknowledged the importance of an effective and independent police force

and taken some positive steps in this area. The Delhi Police Act of 1978, however, has remained largely untouched**.**

SUGGESTIONS

***Modernisation of Police Forces*:** The Modernisation of Police Forces (MPF) scheme was initiated in 1969-70 and has undergone several revisions over the years. However, there is a need to fully utilize the finances sanctioned by the government.

MPF scheme envisages –

- Procurement of modern weapons,
- Mobility of police forces,
- A National Satellite Network,
- Logistics support, upgradation of police wireless, etc.

***Need For Political Will*:** The Supreme Court in the landmark **Prakash Singh case (2006)** gave seven directives where considerable work in police reforms is still needed. However, due to the lack of political will these directives were not implemented in letter and spirit in many states.

***Revamping Criminal Justice System*:** Along with Police reforms, there is a need to reform the criminal justice system too. In this context, the recommendations of the *Menon and Malimath Committees* can be implemented. Some of the key recommendations are as follows:

- Creation of a fund to compensate victims who turn hostile from the pressure of culprits.
- Setting up separate authority at the national level to deal with crimes threatening the country's security.

- A complete revamp of the entire criminal procedure system.

REGULATE THE MEDIA

A mandatory system of self-regulation for the news media that balances media freedom and public interest. Calls for better governance of the news media have been heard in recent times around the world, not least in India. The debate on this issue, however, seems stuck in the binary of self-regulation versus institution of a statutory regulator. The existing regulatory framework demonstrates the shortcomings of both these approaches. News media regulation in India is fragmented, with multiple regulatory bodies. In most cases, decisions made by these bodies are not enforceable. The Press Council of India, a statutory body governing the print media may entertain complaints and issue admonishments for violation of its guidelines but does not have the power to enforce compliance. The self-organised News Broadcasting Standards Authority governing news broadcast media has the power to fine, but its jurisdiction extends to only those organizations that choose to be members of the News Broadcasters Association. Therefore, its efficacy depends on voluntary compliance with its orders. Calls for more vigorous statutory regulation, such as setting up a media regulatory authority to offset these drawbacks, lead to widely expressed fears of censorship and state suppression of free media. It is therefore necessary to move beyond a simplistic binary of self-regulation and statutory regulation, and to explore models that incorporate the best elements of each.

One such mechanism that incorporates elements of self-regulation and statutory regulation is the system of Bar Councils, established under the Advocates Act, 1961. Under the statute, the State Bar Council consists of members elected through the system of proportional representation by

means of a single transferable vote from amongst advocates on the electoral roll. The Bar Council of India comprises certain ex-officio members such as the Attorney General of India, and one member elected from each State Bar Council. The Bar Councils are responsible for admitting advocates on their rolls, setting standards of conduct, and enforcing compliance through suspensions or disbarment. The Advocates Act therefore does not leave it to the discretion of either the government or the industry to appoint a governing body, but instead sets up a framework according to which such a body shall be constituted.

The following principles must therefore be incorporated in a new comprehensive law that sets up a news media self-regulatory authority for print and broadcast media. While regulation of internet news media is also an important issue, it is best dealt with separately in a manner that considers the unique characteristics of the open internet.

- With the convergence of media platforms, it is necessary that such a self-regulatory authority's jurisdiction encompasses both print and broadcast media,
- Enrolment according to the procedures laid down by the authority must be made mandatory for all news media entities, so that it is not possible to opt out. The authority must lay down procedures for licensing and delicensing,
- The members of the authority must be media professionals selected by the industry in a transparent manner, along with some ex-officio members,
- The authority must be statutorily granted the power to lay down rules of conduct backed by punitive measures, including fines and directions to government for delicensing.

Here, after this, it is necessary to draw attention to some more legal reforms

which are important to ensure the rule of law. In short, they are as follows:

- ***Reduce Government Litigation*:** By Revising the National Litigation Policy to unlock the judicial gridlock.
- ***Expedite Arbitrations*:** By Amending the Arbitration and Conciliation Act to speed up arbitration in India.
- ***Clarify Forest Laws*:** By Reconciling statutory regimes for a better balance between conservation and the rights of indigenous forest-dwelling tribes.
- ***Prevent Water Wars*:** Providing more effective inter-state river water disputes tribunals.
- ***Harmonise Labour Laws*:** Standardizing definitions in labour law for more effective targeting in labour welfare.
- ***Reform The Corporate Insolvency System*:** Introducing institutional and substantive changes to the corporate insolvency regime in India to promote economic growth and entrepreneurship.
- ***Ensure The Safer Clinical Trials*:** Regulating clinical trials to promote safety and efficacy.
- ***Protect Net Neutrality*:** Introducing net neutrality regulation to protect a free and open internet.
- ***Expand RTE Coverage*:** Amending the Constitution to ensure quality primary education for all.
- ***Bolster Free Speech*:** Circumscribing criminal prosecution for literary works to bolster free speech in India.
- ***Draft A New Anti-Trafficking Law*:** Proposing a new comprehensive anti-trafficking law to better combat human trafficking.
- ***Consolidate Anti - Corruption Laws*:** Tackling graft through a consolidated and updated corruption legislation.
- ***Repeal Obstructionist Laws*:** Tackling archaic and obstructionist laws to

remove impediments to development.

CONCLUSION

Implementation of suggested legal reforms made in this Article must be implemented through careful drafting of new laws or amendments or repeal of existing provisions. There are some important steps which must accompany legal drafting, irrespective of the area being legislated upon, to confront the challenges facing law-making today:

***Ensuring Constitutionality*:** Provisions and laws are often drafted such that they conflict with the Constitution of India, or with relevant Supreme Court precedent. This makes litigation inevitable, where provisions are struck down after protracted judicial proceedings. This difficulty can be easily remedied by ensuring constitutionality at the time of drafting, not at the time of implementation, as is the case today.

***Ensuring Coherence*:** Many laws are drafted without reference to or knowledge of other existing statutory enactments that cover a similar field. This leads to complications ranging from confusion and contradiction to the dilution of standards in specific instances. Cognizance of other relevant legislations at the time of drafting is essential for legislative coherence.

***Ensuring Compliance*:** Another challenge facing law-making and reform in India is lack of compliance with international law. India is a party to several international instruments and is under an obligation to incorporate them into domestic law. However, Indian laws are often drafted in complete disregard of international law. It is thus necessary to ensure that the body of international law which India is obliged to comply with is understood while framing domestic legislation.

***Ensuring Clarity*:** The endemic problem afflicting law-making in India is that of badly drafted legislation – provisions that are circular, contradictory, vague and unclear. This leads to deficient implementation and adverse judicial interpretations. There is a need to ensure that Indian laws are clear and specific in both form and substance.

***Ensuring Contemporaneity*:** An increasingly globalized world gives us the opportunity to learn from the experiences of other similarly positioned countries. Foreign law and comparative domain expertise is being increasingly recognized as an important source of information. Indian law-making often does not benefit from progressive developments in other jurisdictions, and it is desirable that contemporary comparative developments are systematically factored into this process.

Thus, based on the above description, it can be clearly said that in order to ensure the rule of law in this changing human society, we must emphasize on important legal reforms so that we can develop a well-being, developed and law-abiding society. By doing so, we will be able to perpetuate our constitutional values.

IDDAT: IS IT BOON OR BANE FOR A MUSLIM WOMAN?

Adrija Ghose*

Abstract

A general rule for a woman belonging to the Muslim community is that she must undergo a period of Iddat upon dissolution of her marriage due to either death of her husband or divorce. During this period the Muslim woman is not allowed to re-marry. It is often commonly known as a period of seclusion which must be undertaken by a woman while not by a man if his wife dies or he is divorced. This period protects her from being criticised in society for re-marrying someone or consummating with another man. Even though there are boons of practicing Iddat there are banes overshadowing it when it comes to equality amongst the genders. The woman should be allowed to lead her own life. To be able to move onto the next phase of her life without being limited in any way from living her life according to her liberty. The fact that the Muslim husband after divorce is allowed to consummate with his other wives while the wife, he has divorced is not allowed to show that Muslim law favours men over women. Further while being in an existing marriage a muslim man is allowed to have up to three wives and even after the death muslim men are allowed to re-marry while for a woman she is constrained and treated unequally. Women belonging to other religious communities do not have similar practices. This paper seeks into the legal, socio-religious aspects/implications of the practice of "Iddat" with a bring introduction into what Iddat is and when it is to be followed delving into the boons and banes of Iddat, concluding with an objective perspective regarding the subject.

Keywords: *Iddat, Women, Inequality, Seclusion, Muslim.*

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INTRODUCTION

Iddat or Iddah is a period of seclusion observed by a Muslim woman for a specific period after her marriage has dissolved due to death of her husband or divorce from her husband. During this period the Muslim woman is not allowed to re-marry.

In the words of Justice Mahmood, Iddat is a period observed by a Muslim woman on the completion of which her new marriage will be seen as lawful.

The duration of Iddat depends on the way the marriage had been dissolved by them. Under s. 2(b) of the Muslim Women Act 1986 the statute defines as well as differentiates the different types of observing Iddat. The period of Iddat varies depending on the circumstances of the case:

In case of divorce from her husband, as per s. 2(b) of the Muslim Women Act 1986[1]

- If a woman has been divorced, she has to observe Iddat for a period of three menstrual cycles if she still goes through menstruation, if she no longer goes through menstruation then she will have to observe Iddat for a period of three lunar months.
- For a woman who has been divorced but was pregnant at the time of divorce she is to observe Iddat till the date she gives birth to her child or if she has an unfortunate miscarriage before four months and 10 days, she no longer must observe Iddat then
- If she has not consummated with her husband during the marriage and if her husband is divorcing her, she will not have to observe

[1] The Muslim Women (Protection of Rights on Divorce) Act, 1986.

Iddat

- In case of death of her husband:
- While if her husband has dies, she must observe Iddat for a period of four lunar months and ten days after he dies, immaterial if she had consummated or not
- If the woman is pregnant at the time when her husband dies, she must observe Iddat for a full year which includes nine months of her pregnancy and the mandatory three months of Iddat.
- The wife will start observing Iddat on the date on which her husband divorces her, but during that period if her husband unfortunately dies, she again must observe Iddat.

Iddat is observed as a way of respecting the death of the husband and the wife does not move on too quickly. This period protects her from being criticised in society for re-marrying someone or consummating with another man. She is strictly not allowed to have a sexual-physical relation with any man. The normal duration is of Iddat for a widow is four months which gives her enough time to grieve the loss of her husband without being criticised by society or looked at poorly. It also helps the woman to establish who the real father of her child is. So that there is no scope of confusion. If her husband dies or he divorces her observing three months of Iddat would give her clarity as to who the father of her child is.

This period is observed due to the following reasons by the wife: To make sure that the pregnancy of the widow or the divorcee is by the deceased husband or the divorced husband. It is a means to determine the paternity of the child. if there is no Iddat period observed by the Muslim woman she may marry another man or consummate hence being pregnant. Due to the

fact it would be hard for the child to determine who his/her father is, observing this period would help the child in knowing who his/her father is.

In case of a divorce, it would give a chance to either revoke or dissolve the talaq, Divorce is to be avoided at all costs, the institution of a family is of great value. This break would give a chance to the husband to think over his decision to divorce his wife and rekindle their marriage. Preventing a family from breaking up if the husband and wife try to get back together.

In case of the death of the husband, it gives a chance to the wife to mourn for her deceased husband. She is not allowed to marry another man during this period to show respect to her husband and not mock the institution of the society.

Iddat starts on the day right after the husband dies or the day she has been divorced by her husband and it does not start on the day she gets to know about the death of her husband or that her husband has divorced her.

If she does not receive the information about the death of her husband till the expiration of the period of Iddat that she is to observe, she is not bound to observe it then.

BOONS

The paternity of a child is of extreme importance. The child has the right to know who his/her father is, so that he/she does not fallback not knowing who his/her father is. To avoid unnecessary confusion about paternity, when the wife gets pregnant just before she gets divorced, or her husband dies. This period bars her from consummating or remarrying another man. So as for her child to be acknowledged as legitimate and not illegitimate out

of the "zina". In Muslim law acknowledgement of the paternity of the child is "iqrar" which is of extreme importance when it comes to determining the legitimacy of the child. it was held in *Muhammad Allahabad* v. *Mohammad Ismail*[2] that paternity cannot be proved by just saying that the child was born out of the valid marriage of the parents. The Muhammadan law recognises "acknowledgement" as a method of proving legitimacy of the child as established by substantive law for the purpose of inheritance.[3] From the view of parentage, Iddat must be observed. As held in the case *of Khurshid Khan* v. *Husnabanu Mahimood*[4] the court ruled that Iddat had a peculiar feature since it was observed by to avoid any confusion of parentage of the child and to establish that a certain man was his father.

This period of Iddat gives a chance to husband to reconsider his decision of taking a divorce from his wife. The society is always in the hope to preserve marriage and is not of the opinion to take divorce unless it is extremely necessary. It was held in the case of *Ahamadalli Mahamad Hanafi Makndar* v. *Rabiya alias Babijan Hasan Shaikh*[5]that depending on the form of divorce the husband has the chance to rethink his option as to get divorced. If the divorce is done by the husband by Talaq Ahsan, the parties can revoke it, it does not become irrevocable till the expiration of the period of Iddat. Therefore, the parties can go over the period and this go over their decision.

- The Muslim wives have the right to receive deferred dower as well as they are entitled to ask for prompt dower to be paid immediately to them.

[2] 1888 ILR 10 All 289.
[3] Ibid.
[4] (1976) 78 BOMLR 240.
[5] (1978) 80 BOMLR 238.

- It gives a chance for the wife to mourn the death of the husband and to grieve him which is an important part of healing. It prevents from making any mistake by consummating with another man or marrying someone else which would lower her prestige in society.
- *"The Muslim personal law, it is the husband's liability to provide for the maintenance of his divorced wife till this expiration of this period."* As held in *Mohd. Ahmed Khan* v. *Shah Bano Begum and Ors*[6]. The boon in this is that it is mandatory for the husband to provide for maintenance for his wife during this period without any form of controversy involved.

BANES

Iddat is to be observed only by woman. The Muslim Law is silent about the fact whether men to have to observe Iddat. The only thing that the law says that the Muslim man must not marry during this period. Which shows gender inequality. Why should women compulsorily observe a period of three months on getting divorced. No other religion prescribes a period like this when they cannot re-marry or have a physical-sexual relation with another man.

The rule which says that if the husband has divorced the wife, she will have to observe Iddat but if the husband dies during the period of Iddat she will have to again observe Iddat. Which is kind of a curse for the woman to again stay in seclusion.

The time ranging from three months to four months depending on the manner of the dissolution of marriage. I feel it is a curse because it should

[6] AIR 1985 SC 945

be up to the Muslim wife as to how long she requires to mourn over the death of her husband or adjust with her surroundings after a divorce. No law should be prescribed as to how long she must wait before she can remarry or consummate with another man. The time should not be fixed different women grieve their loss differently. The wife should be given the time to fix the time herself.

One of reasons to observe Iddat by a woman is to not disrespect or ridicule society. How is leading one's life according to their own wishes ridiculing society. Article 21 gives the freedom to every person to lead their life according to their wishes. In *Kharak Singh* v. *State of Uttar Pradesh*[7] it was held by the court that the term life which was used in Article 21 meant that the individual should be allowed to live a life and "*not just mere animal existence*"[8]. Hence it gives the right to every individual to be with whoever she likes and lead her life. She should be allowed to have sexual or a physical relationship with a man. If she feels she can move on from grieving her husband, it should be her choice. She should not be restrained.

Muslim law recognises polygamy; hence a Muslim man is allowed to have four wives at a time, but a Muslim woman is not allowed to have more than one husband. It was held in *Itwari Plff* v. *Smt. Asghari and ors*[9] that Muslim law permits polygamy by a Muslim law but does not encourage it. If she does, she will be liable for bigamy. This means if he is divorcing one wife, he can go live another wife and consummate with her. Though the law bars the woman from having more than one husband therefore if her husband dies or divorces her, she cannot consummate which again shows that men

[7] AIR 1963 SC 1295.
[8] Ibid.
[9] AIR 1960 All 684.

are favoured and they have far less regulations. Men are not seen poorly in the eyes of society since they are having relations with their other wives. While if a woman is seen having relations with men other than her husband during the Iddat period it is wrong.

Earlier if she married another man during this period her marriage would have been seen as a void form of marriage. It was in the case of *Lila Gupta* v. *Laxmi Narain*[10] the position was clarified by the court by saying it would not be a void marriage but an irregular form of marriage.

While what if a Muslim woman is not pregnant at the time of divorce but she has consummated the marriage before, she still has to observe three months which is completely unfair.

The other curse would be that Muslim woman could only receive maintenance during the Iddat period and not afterward. Nor could they ask for maintenance to look after themselves. It is a curse as to why should the Iddat period be the benchmark till when she can be maintained by her husband. The same is not prevalent in other religions. But several developments have been made regarding this. The Shariat Law said that Muslim Women only have the right to receive maintenance from their husband after divorce during the Iddat period and not beyond that. It was only in 1985 The Supreme Court ruled in the *Shah Bano*[11] judgement that Muslim Women have the right to receive maintenance after the Iddat period by availing the secular provision of section 125 of the CrPC. It further held that section 125 of the CrPC imposes an obligation upon "individuals to maintain close relatives who are indigent as their obligation towards society

[10] AIR 1978 SC 1351
[11] AIR 1985 SC 945

in order to prevent destitution and vagrancy This is the moral edict of the law and morality cannot be clubbed with religion." [12] This judgement led to a nationwide controversy and agitation within the Muslim community leading the government in power, Rajiv Gandhi to enact and enforce the Muslim Women (Right to Protection on Divorce) Act 1986. Which nullified the Supreme Courts Shah Bano judgement by curtailing the rights of Muslim Women to avail maintenance on the grounds of section 125 CrPC. This vaguely act said that the Muslim Man was only to provide maintenance to his divorced wife during the Iddat period. After the Iddat period is over if the wife is unable to maintain herself, she can seek maintenance from the Wakft Board or her relatives or her divorced husband. in 2001 Daniel Latifi challenged the validity of the Muslim Women (Right to Protection on Divorce) Act 1986 as it violated the right to equality of a Muslim woman as compared to a woman belonging to another religion. The Supreme Court used its "*exemplary exercise of judicial creativity in conferring equal maintenance rights to Indian Muslim women, at par with Indian women following other religions.*"[13] It did not hold the act to be unconstitutional but entitled a Muslim woman to maintenance. She is to receive maintenance after the Iddat period but such an amount which would allow her to maintain the same standard of living during the marriage. The amount she was to get during the Iddat period she will be able to maintain herself for her entire life or until she gets remarried. The law of the land now says, a divorced Muslim woman is entitled to provision for maintenance for a lifetime or until she is remarried, which

[12] Dr. G.S. Rajpurohit & Dr. Nitesh Saraswat*, Need and Challenges to Uniform Civil Code in India: A Special Reference to Muslim Ethos,* Vol-IV, 20-44, Journal of Law and Public Policy, Uniform Civil Code (2017).

[13] Pranusha Kulkarni, *Multi culturalism or malestreamism: A feminist Jurisprudential Critique*, Vol-IV, 66-88, Journal of Law and Public Policy, Uniform Civil Code, (2017).

shall be made within the period of Iddat.[14] Again in *Shamim Ara's*[15] the Supreme Court held its position on Daneil Latifi's judgement by strictly barring the injustice meted out by the whimsical acts of the husband by holding that Talaq shall not be valid unless preceded by an effort at rapprochement and strict rules of evidence about the pronouncement itself.[16]

CONCLUSION

Hence, the author would see the Iddat period as more of a curse than a boon. The only reason the author feels the Iddat period is a boon is that it helps the child know who his or her father is and makes sure that he or she is legitimate or not; otherwise, she will not receive her due inheritance from her father. Illegitimate children are not accepted in Muslim law.

While the author feels the Iddat period is a curse because it should be the right of a woman to decide when she should grieve her husband and when she is ready to move on from him, she has been unequally treated as compared to women in similar circumstances in other religions. Hindu or Christian women do not compulsorily have to observe Iddat, a period of seclusion, after the death of their husband or after the divorce. The woman should be allowed to lead her own life and be able to move on to the next stage of her life without being restricted in any way from living her life according to her liberty. The fact that a Muslim husband is permitted to have other wives after divorce while his wife is divorced does not demonstrate that Muslim law favours men over women. As a result, the

[14] Danial Latifi v. Union of India, (2001) 7 SCC 740.
[15] (2002) 7 SCC 518
[16] Ibid.

author believes that Iddat is a curse and that women in Muslim Law, as well as women in other religious communities, do not have equal standing as men.

HUMAN RIGHTS OF REFUGEES IN SOUTH ASIA: A STUDY

Richa Kaur*

"We can't deter people fleeing for their lives. They will come. The choice we have is how well we manage their arrival, and how humanely."

-UN Secretary-General António Guterres

Abstract

South Asia is home to one of the world's highest concentrations of refugees, but none of the South Asian countries other than Afghanistan have ratified the 1951 Convention or its 1967 Protocol. India, Pakistan, and Bangladesh are members of the Executive Committee of the United Nations High Commissioner for Refugees. This paper discusses the lack of a regional framework among South Asian countries in dealing with the refugee problem and the reasons for their apathy in not acceding to the Refugee Convention. Additionally, it studies the refugee movements and their influx since 1947 in this region and the steps taken by UNHCR in providing durable solutions to the problems of refugees.

Keywords: *UDHR, Refugees, UNHCR, Refugees Conventions, South Asia*

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INTRODUCTION

Every State is under an obligation to protect its citizens against violation of their human rights. However, when a State fails to protect these basic rights, individuals may be compelled to leave their home and their families to seek refuge in some other country. In such circumstances, it is incumbent upon the international community to step in and provide help to these vulnerable groups, whereas nations that are parties to the Refugee Convention ought to protect refugees on their territory in consonance with international norms. Even though the rules of the 1951 Refugee Convention are not applicable to non-signatories[1], the principle of non-refoulement[2] (which forms part of jus cogens prinicple[3] prohibits the states from forcing refugees to return to their home country where their life or liberty is in jeopardy.

When we trace the development of law on refugees, Universal Declaration on Human Rights (UDHR), 1948 can be given credit for being the first law to declare and protect rights of refugees in an explicit manner. Thereafter, various other international and regional instruments protecting the rights of refugees were signed. Article 14(1) of the Universal Declaration of Human Rights, 1948 states that everyone has the right to seek and enjoy in other countries asylum from persecution, Article 6 of International Covenant on Civil and Political Rights, 1966 (ICCPR) declares that everyone has an inherent right to life, Article 22 (7) of the American Convention on Human Rights, 1969 grants right to asylum in foreign territory, and Article 12(3) of

[1] States that are not parties to the 1951 Refugee Convention in South and Southeast Asia include India, Bangladesh, Pakistan, Sri Lanka, Malaysia, and Indonesia.

[2] The principle of non-refoulement is enshrined in Article 33 of the refugee convention. Because of its widespread practice, it is now considered as a customary principle of international Law.

[3] Principle*s* which are norms of international law due to widespread practice.

African Charter on Human Rights, 1981 declares that everyone shall have the right when persecuted to seek and obtain asylum in another country in accordance with the law of that country and International conventions. However, the most significant and fundamental law on refugees is the 1951 Refugee Convention[4] adopted by General Assembly resolution 429 (V) of 14 December 1950 and its 1967 Protocol. According to Article 1 of the Convention, Refugee is defined as a person who, "owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality or habitual residence." The Convention enunciates the rights and obligations of States that have ratified it. The UNHCR serves as the guardian and complements the work of States in protecting rights of refugees. The 1951 Refugee Convention was a precursor to the signing of various other regional instruments, including the 1969 Organization of African Unity (OAU) Refugee Convention in Africa, the 1984 Cartagena Declaration in Latin America.[5]

South Asia consists of eight countries as per the South Asian Association for Regional Cooperation (SAARC). These include India, Pakistan, Nepal, Bhutan, Afghanistan, Sri Lanka, Bangladesh, and Maldives. South Asia has hosted one of the maximum numbers of refugee population throughout the

[4] Convention relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (1951 Convention); Protocol relating to the Status of Refugees (adopted 31 January 1967, entered into force 4 October 1967) 606 UNTS 267 (1967 Protocol).

[5] The Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa is a treaty governing refugee protection in the continent of Africa and ratified by 46 of 55 member states of African Union. The Cartagena Declaration on Refugees was adopted by the Colloquium on the International Protection of Refugees in Central America, Mexico, and Panama on November 22, 1984. The declaration is a non-binding agreement but has been incorporated in refugee law in various countries.

world. Six different factors have been stated as "being the root causes of refugee generation, ranging from the fight for political independence, human rights violation including social discrimination and de-citizening, economic alienation including poverty, forced colonization and landlessness, religious persecution, cultural discrimination and population transfer, Environmental dislocation by high dam projects, deforestation, desertification and natural disasters, to armed conflicts and violence."[6] In all these factors, one cannot overlook the role of the State in generating refugees in South Asia. "A refugee observer in South Asia supports this idea that the state system is at the root of refugee generation and notes that the upsurge in refugee flow in the post-cold war era…was primarily caused by nation states induced factors, such as the state repression for political or ethnic reasons or failure of the state to provide economic, social and environmental sense of security to the people."[7]

None of the South Asian countries, other than Afghanistan are parties to the 1951 Convention or its 1967 Protocol which is a clear indication of reluctance on the part of South Asian nations to be bound by international standards laid down for refugees. Even SAARC, which is a regional organization of South Asian countries, failed to discuss the concerns of refugees in any of its meetings. These nations wrongly perceive the Refugee Convention as inappropriate and not applicable within the South Asian context because their refugee scenario has distinct characteristics in comparison to other nations.

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[6] Mahendra P Lama, "Managing Refugees in South Asia," RMMRU Occasional Paper Series (4), Dhaka, 7 (2000)

[7] Bhumitra Chakma, "Refugees: The Experience in Bangladesh," in Joshva Raja (Ed.), Refugees and their Right to Communicate: South Asian Perspectives, Bangalore: United Theological College 64 (2003)

RIGHTS OF REFUGEES

Every State ought to protect the human rights of its citizens. Those persons or groups who flee their own countries seeking refuge or shelter in other countries do so precisely because their human rights are susceptible to abuse in the country they are residing. When a State fails to protect the human rights of its own citizens due to discrimination or political reasons, the international community has to step in to take charge and grant protection to the refugees who have been forced to leave their countries. Even though, it is the discretion of the State to decide whether to permit an alien to stay on its land, this prerogative must be in consonance with the international obligations binding upon the State. Rather than making the problem of refugees a political issue, the government should consider it on humanitarian grounds to avert the possibility of refugees being subjected to religion-induced hatred and violence.

Many South Asian countries have concluded bilateral agreements, which include the Repatriation agreement on Rohingyas between Myanmar and Bangladesh[8], an agreement on Chakma refugees between India and Bangladesh[9], and an agreement for protecting Afghan refugees signed in 1993 between Pakistan and Afghanistan.[10] These countries have dealt with

[8] On November 23, 2017, Bangladesh and Myanmar signed a repatriation agreement. However, the two sides had not agreed on a concrete process of repatriation or on a deadline for completion of the repatriation. The contents of the agreement were not disclosed. Two subsequent repatriation attempts in November, 2018 and August, 2019 failed.

[9] In 1997, the Chittagong Hill Tracts peace accord was signed. The Bangladeshi government agreed to take back the Chakma refugees in Tripura and rehabilitate them.

[10] Afghan Peace Accord signed on 7th March 1993 between State of Afghanistan, Pakistan and United Nations High Commissioner For Refugees for facilitating voluntary repatriation and reintegration of Afghan refugees in the country of origin.

refugee problems under bilateral and ad hoc arrangements which most of the time hinders the compliance of human rights standards applicable to all nations. This manner of ad hoc treatment of refugees leads to discrimination based on religious and ethnic grounds. While some may be bestowed with favorable treatment, others may be neglected and left to fend for themselves. One such illustration is the manner in which Tamil Refugees from Sri Lanka have been accorded adverse treatment on the grounds of religion.[11] In the Citizenship Amendment Act, 2019 (CAA) drafted by the Indian government, the Tamilian refugees who are predominantly Muslims have been excluded from the ambit of the Act, and this provision has been challenged before the Supreme Court as being manifestly arbitrary and discriminatory.[12] On the other hand, Tibetan refugees in India have enjoyed favorable treatment by the government. This explains the lacunae of the ad hoc system for handling the refugee crisis and the clear need for a regional framework for the same. Such discrimination by these countries on religious grounds has provided an impetus to the violation of human rights. These refugees from religious minorities are considered a threat to the internal security and stability of nations where they are seeking refuge from persecution persisting in their own country.

It is imperative that South Asian nations develop a regional framework by involving non-governmental organizations (NGOs), civil society organizations (CSOs), academia, governments, and other stakeholders in the process of researching and formulating policies to protect all classes of refugees keeping in mind the regional peculiarities. A regional regime has

[11] Citizenship Amendment Act 2019 has excluded Tamil refugees from Sri Lanka who are Muslims from the ambit of the Act.

[12] DMK filed affidavit in November 2022 in Supreme Court challenging CAA, 2019 as arbitrary (Deccan Chronicle, 30th November 2022).

advantages vis-a-vis a national legislation in terms of depoliticizing the gesture of granting asylum as it increases burden sharing among states within the region and provides accountability with respect to the acts of the administration. Once the refugee situation is depoliticized, there is a lesser chance of any conflict between the country of origin and the refugee hosting country as both sides can reach an amicable solution to their problem.

Some of the regional initiatives undertaken by the South Asian States include their participation in Asian African Legal Consultative Organization (AALCO), which meets every year to discuss issues affecting their region and more over refugee problem has been on its agenda since its inception. Other initiatives include membership of India, Bangladesh and Pakistan in the Ex. Com of the UNHCR, Informal Consultations on Refugee and Migratory Movements held in 1994 in Geneva by South Asian countries, rights granted to aliens by most of these countries in their Constitution, recognition of such rights in favor of refugees by the judiciary in these countries, and the role of media in disseminating awareness on refugee rights are illustrative of a consensus being built in favor of a specific regime on refugees.

REFUGEE MOVEMENT IN SOUTH ASIA POST 1947

Refugees constitute the most vulnerable section in the world. Both the World Wars resulted in massive displacement of population from their nation State with people seeking refuge in other countries. This resulted in international community drafting agreements and laws for providing adequate treatment and protecting the basic human rights of refugees. "South Asia is home to over 2.5 million refugees (75,927 in Afghanistan,

932,209 in Bangladesh, 197,122 in India, 21,467 in Nepal, 1,393,132 in Pakistan, and 820 in Sri Lanka).[13] This poses unprecedented challenges to a region ill-equipped to deal with the contemporary refugee crisis."[14] Pakistan has hosted a large number of Afghan refugees since the Russian invasion of Afghanistan in 1979, whereas Nepal, being such a small country, has hosted refugees from Bhutan and Tibet.[15] From the time Bangladesh was established as a nation in 1971, 'Urdu Speaking Biharis' have taken refuge there.[16] Besides a little over 671,000 Rohingya refugees have arrived in Bangladesh since August 2017 and continue to arrive, although the government has refused to recognize them.[17] India has been a host to many refugee communities, however, it does not produce refugees. The reason for the same could be because India has a federal set up where States have been given a lot of independence and each State has a pluralistic culture thereby accommodating other ethnic groups.

A cursory observation on refugee movements in the South Asian region reveals that they were a result of State persecution, state repression, or failure of the State to protect the rights of its citizens. The most prominent amongst these was the 1947 Partition by the British, which established India and Pakistan as two independent nations and led to large-scale displacement of population from both countries. The population comprising Hindus were inclined to move to India, and the Muslims gravitated towards East and

[13] Nafees Ahmad, "*Options for Protecting Refugees in South Asia*" Available at: https://harvardilj.org/2019/09/options-for-protecting-refugees-in-south-asia/ (last visited on: 15.11.2022)

[14] Ibid.

[15] Louie Albert, S. J., Stan Fernandes, S. J., & D'Sami, B. "Asia Refugees: in South Asia: Issues and Concerns" *Migratory Flows at the Borders of Our World, 276*.

[16] Ibid at 278

[17] Ibid

West Pakistan. However, those people who were called refugees, migrants, and displaced persons were given permanent status in their respective territories by their governments. "The Chakma refugees, the tribal groups of Chittagong Hill Tracts (CHT) consisting of Chakmas, Murangs, and Tripuras migrated to the territories of Assam, Tripura, Arunachal Pradesh, Mizoram, and Meghalaya after the partition in 1947.[18] During 1963, about 45,000 Chakmas fled to India from East Pakistan as victims of the Kaptai Hydro-electric project that inundated their homelands."[19] Another refugee influx took place in the year 1959 after Dalai Lama, along with his multitude of followers, fled Tibet and sought political asylum in India.[20] The government of India granted asylum to the Tibetans on humanitarian grounds providing them with basic living conditions and assistance, which resulted in animosity from the Chinese government. It is significant to mention here the UNHCR, with the aid of the Indian government, gave recognition to the Tibetans in exile as refugees and expedited their resettlement by involving them in traditional handicraft skilled work.

Another major refugee influx took place from the nation of Sri Lanka. "Due to the civil war in Sri Lanka in 1983 between the Sinhalese majority community and the Tamil minority, the Tamils fled to India in tiny boats from the northern tip of Sri Lanka. During the first wave, from 1983 to 1987, 134,053 Tamil refugees were reported to have come to India."[21] "Following Sri Lanka and India's 1987 Accord, which sought to create an agreement between the two warring communities, the Indian government

[18] V. Vijayakumar, "A Critical Analysis of Refugee Protection in South Asia" Vol. 19, *Canada's Journal on Refugees* 9 (2001)
[19] Ibid at 9
[20] Ibid
[21] South Asia Human Rights Documentation Centre, Sri Lankan Tamil Refugees in Tamil Nadu Camps-Valuntary Repatriation or Subtle Refoulement (New Delhi: SAHRDC, 1996).

repatriated 25,885 Tamil refugees from 1987 to 1989."[22] "India had to stop the repatriation program in 1989 when its shores were flooded once again with a refugee wave fleeing Sri Lankan violence. During this second phase of Tamil flight in search of a haven, from 1989 to 1991, 122,037 Tamil refugees reportedly reached India but 113,298 of them are still currently held in 298 camps along the coastal Indian states of Tamil Nadu and Orissa."[23] The refugee movement from Sri Lanka persists unabated even today. The condition of Sri Lankan Tamil refugees has remained precarious, which has been a source of conflict between government of India and Sri Lanka. The majority population of Sri Lankan refugees prefers resettlement in a third country rather than repatriation to their home country. Another refugee constituting group in South Asia is the Bhutanese who fled to Nepal. Worried that the growing ethnic Nepali minority threatened the culture and political dominance of the majority Drukpa people, the government adopted a "One Nation, One People" policy in the 1980s.[24] In the early 1900's, "about 125,000 Bhutanese of Nepali origin were forced to leave Bhutan by the actions taken by the Government of Bhutan including the passing of the Citizenship Act. These people are now settled in about 7 camps in Southern Nepal. India also hosts some of them."[25]

Post-independence of Myanmar (earlier Burma) in 1948 by the British, many Indian origin residents were forced to return to India as refugees.[26]

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[22] Ibid

[23] Ibid

[24] Erika Schultz, "Bhutanese refugee crisis: a brief history" The Seattle Times, October 14, 2016

[25] The World Refugee Survey, 2000, U.S Committee for Refugees at 3 indicates that 110,000 Bhutanese are in Nepal while India hosts 15,000.

[26] V. Vijayakumar, "A Critical Analysis of Refugee Protection in South Asia" Vol. 19, *Canada's Journal on Refugees* 9 (2001)

Similar situation occurred in 1962 when the army staged a coup and put an end to democracy resulting in migration by many groups.

When the nation of Pakistan was created in 1947, it comprised of Muslim population in Western Pakistan, and Bengali population in Eastern Pakistan, and these two parts were physically separated by India. In addition, the country was governed by the rulers in West Pakistan, thereby causing resentment among the Bengali community in East Pakistan. Soon thereafter, this resentment led to the division of the two nations in 1971, resulting in a mass refugee exodus to India. Within a span of one month, nearly one million refugees fled the military repression in East Pakistan and made their way into India, and by the end of May, 1971 the average daily influx into India was over 100,000 and had reached a total of almost four million [27] By the end of 1971, as per the data given by the Indian government to the United Nation, the total refugee influx into India had reached about 10 million.[28] The government of India was not in a position to accommodate such large numbers of refugees but due to pressure from international community, they were left with no other alternative and had housed most of these refugees into camps at the borders.

Recently, the Mizoram government in India is preparing for the influx of more refugees from Bangladesh after the State Cabinet agreed to provide food and shelter to Kuki-Chin-Mizo refugees who have crossed the international borders of India, Bangladesh, and Myanmar.[29] The refugee influx began after clashes broke out between the Kuki-Chin National Army,

[27] Rupture in South Asia, Available at: https://www.unhcr.org/3ebf9bab0.pdf (last visited on 02.02.2023)

[28] Ibid

[29] Esha Roy, "Mizoram expecting more Kuki tribal 'asylum seekers' from Bangladesh" The Indian Express, November 28, 2022

the armed wing of the Kuki-Chin National Front, and Bangladesh's Rapid Action Battalion, in the Bandarban region of Chittagong Hill Tracts, an area populated by Bawn tribe.[30] The refugees had fled to escape being caught in the crossfire. This is the second influx of refugees from a neighboring country, after an earlier exodus of refugees, also of Kuki-Chin ethnicity from Myanmar last year in the wake of a coup by the military junta in Myanmar and the resulting conflict between the junta and various resistance groups.[31]

REASONS FOR NON-RATIFICATION OF REFUGEE CONVENTION

It is believed that a regulatory framework on refugees cognizant of human rights objectives would not only acknowledge a nation's security issue but would also respect the concerns of refugees and migrant populations. Despite these advantages, none of the South Asian countries other than Afghanistan have ratified the Refugee Convention or its 1967 Protocol. This apathy can be attributed to their belief that the refugee convention does not reflect the realities of developing countries with respect to mass exodus of refugees. They believe that the definition given to the term refugee is very restricted (for instance, the term does not include climate refugees) and reflective of the European context and is inapplicable to the South Asian milieu. Also, according to them, most of these contentious issues can be best resolved bilaterally rather than by resorting to a legal framework. None of these countries want to be subjected to the interventionist approach that may be adopted by the United Nations in handling the refugee concern. The South Asian nations also apprehend that they would be under intense

[30] Ibid
[31] Ibid

scrutiny from the international community and would be subjected to additional burdens and obligations that the Refugee Convention and its Protocol entail. The ratification would have financial implications on them as well.

The primary reasons that India cited for not acceding to the 1951 Refugee Convention were that the Convention was only meant to help the cold-war refugees from communist countries who were seeking refuge in western democratic countries and that the Convention has lost its importance in the current scenario and failed to address the current refugee situation and problems. India cited that the Convention couldn't be applied to circumstances of developing countries that are experiencing mass and mixed flow of refugees. Also, the signing of the Convention will not put India in a better position than it already was with respect to protecting and securing the rights of refugees.[32] Pakistan cited that being a developing country, it has very limited resources, and the signing of the Refugee Convention would entail additional obligations, which it cannot fulfill, keeping in mind its economic condition.[33]

Additionally, the 1951 Convention dealt with civil and political rights of refugees and overlooked the significance of their economic, social, and cultural rights. These countries allege that even those countries that have ratified the Convention have not implemented the provisions effectively, and therefore, no benefit accrues from adopting the same. The current scenario is that the countries that signed the 1951 Convention have endorsed strict immigration policies. Therefore, those who seek asylum are

[32] Narayan Sharma, "Refugee Situation in South Asia: Need of A Regional Mechanism" Kathmandu Law Review Vol. 1 No.1 2000, p.87
[33] Ibid

consequently being sent to detention centers. However, it is not out of context to state that some nations that have acceded to the Refugee Convention have adopted better policies and norms for protecting the rights of refugees.

ROLE OF UNHCR

United Nations High Commissioner for Refugees (UNHCR) was initially constituted for a period of three years with the objective of providing help to millions of Europeans who were forced to flee their country after the Second World War. However, the organization continues to exist till today, rendering help to millions of refugees across the world. The UNHCR has established its offices in the South Asian nations even though none of these countries have ratified the 1951 Convention or its protocol. It has been instrumental in providing lasting solutions to the problem of refugees. In cases where solutions have not been provided, UNHCR has made efforts to protect the rights of refugees and especially the weaker sections. One such illustration is in respect of the Bhutan refugees taking shelter in Nepal. The UN High Commissioner for Refugees in the year 2000 visited both the countries of Bhutan and Nepal, which culminated into the signing of agreements on various issues though there was some disagreement regarding the definition of 'family unit, serving as the yardstick for verification of refugees before repatriation. Pending a solution on this subject, UNHCR has continued to aid the Bhutanese refugees in their camps. In the year 2010, the government of Nepal, supporting UNHCR's proposals, carried into effect a strategy named, the Community Based Development Programme to provide rehabilitation and consolidation of its

refugees.[34] In the case of Tibetan Refugees sheltered in India, UNHCR has provided them with vocational training through its office established in India in the year 1969.

In another major refugee influx, which took place in 1979 after the Soviet invasion of Afghanistan, UNHCR assisted in the repatriation of many Afghans who had taken shelter in Pakistan.[35] "In fact, the repatriation process of Afghans returning to their country from Pakistan has been one of the largest in the world."[36] The office of UNHCR deserves credit for working with the government of Pakistan to provide relief and rehabilitation to one of the largest refugee populations. It prepared the census in 2005 of Afghans who were taking shelter in Pakistan along with undertaking a nationwide registration between 2006 and 2007, which provided the much-needed data to cope with the refugee problem.[37] UNHCR has, with the assistance of Myanmar government played a significant role in implementing quick impact projects for ameliorating the conditions of all sections of persons inhabiting the Rakhine State and advancing social solidarity between them in order to facilitate the voluntary return of refugees.[38] UNHCR has facilitated reintegration efforts and engaged in a dialogue with the authorities in Myanmar with respect to issues affecting the

[34] Louie Albert, S. J., Stan Fernandes, S. J., & D'Sami, B. "Asia Refugees: in South Asia: Issues and Concerns" Migratory Flows at the Borders of Our World, 278

[35] Ibid at 277

[36] Ibid at 275

[37] Nasreen Ghufran, "The Role of UNHCR and Afghan Refugees in Pakistan" Strategic Analysis, Vol.35, No.6 (2011), p.945

[38] "UNHCR Statement on Voluntary Repatriation to Myanmar" available on https://www.unhcr.org/news/press/2019/8/5d5e720a4/unhcr-statement-voluntary-repatriation-myanmar (last visited on 31.12.2022)

Muslim population in Northern Rakhine State.[39] Most of the discussions laid emphasis on the issue of compulsory labour as well as contributions, which adversely impact the stability of returnee populations.

Despite the security problems which persisted in parts of Afghanistan, "almost half a million refugees and over 80,000 internally displaced persons returned to their homes with the help of UNHCR and its partners. By year's end, over three million persons had received assistance to return home since December 2001.[40]

The office of UNHCR has contributed to fast-tracking the process of vulnerable cases, including those of children, rape victims, determination of gender-sensitive refugees and providing impetus in securing enrolment of children in schools.

CONCLUSION

South Asian countries have come under severe criticism for not formulating a law on refugees, which is a grave challenge facing all nations. Though there has been some development toward establishing a refugee protection framework at the regional level in South Asia, but it has not paved the way for devising concrete legislation. UNHCR has been tasked to pursue its efforts until the refugee problem is solved. The regional initiatives undertaken include the Colombo Consultation of 1995, which outlined the need for a South Asian regional framework for refugees, the New Delhi Consultation of 1996, and the Dhaka Declaration of 1997. Though none of

[39] "Myanmar/Bangladesh Repatriation and Reintegration Operation", UNHCR Global Report 1999 available on https://www.unhcr.org/3e2d4d617.pdf (last visited on 01.01.2023)

[40] "UNHCR Global Report" (2003) p.16

these yielded any fruitful results. It is the need of the hour for countries to frame a national legislation that incorporates their distinctive requirements, and additionally, the national law should be following the regional convention/treaty. Also, it is imperative that the refugees and people seeking asylum are granted legal status. In absence of which they apprehend the threat of arrest if they go out to work and the distress of seeing their children grow up without access to education.

Some refugees have lived for decades in host countries, such as Tibetans (in India and Nepal), Sri Lankan Tamils (in India), Afghans (in India, Iran and Pakistan), Biharis (in Bangladesh), Rohingyas (Bangladesh and India), and Chin (India and Malaysia).[41] Since the refugee crisis is a result of persecution by the State and failure on the part of the State to grant national protection to its citizens, the government should adopt a non-political approach while dealing with their issues and play a constructive role in rehabilitating them. There should be a political consensus amongst the government of South Asian nations with respect to the management of refugees, and adoption of appropriate measures for handling different groups of refugees according to their needs. To find a long-term solution to the refugee problem, the international community must become more actively involved in supporting, building, and keeping the peace and framing laws that incorporate the distinctive requirements of each region affected by refugee crisis.

[41] Louie Albert, S. J., Stan Fernandes, S. J., & D'Sami, B. "Asia Refugees: in South Asia: Issues and Concerns" Migratory Flows at the Borders of Our World, 275.

SOCIAL MEDIA AND RIGHT TO PRIVACY

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Abstract

If we look back in time, we would have a million reasons to point out the fact that India, being the largest democratic country, was empowered with many fundamental rights for each individual after Independence, including the right to privacy, equality, etc. Having said that, it exists in every Indian individual because without rights, there won't be any duties to perform. The common question that is raised by every layman is, "When rights are violated in a broader sense, then what can be done to prevent that from happening?" This paper deals with the question of whether the right to privacy act can coincide with the ongoing capacities of knowledge organisations to get to and break down essentially everything about a person's life. A significant question is whether the right to protection as a common agreement specialty should be abandoned to strengthen safeguards against assumed psychological oppressor dangers. Furthermore, psychological oppression can be blamed for keeping tabs on the public.

Keywords: *Data Protection, Privacy, Freedom of Speech, IT Act, social media*

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INTRODUCTION

Communication and information technology have reached another level in the past two decades. The world is transforming consistently due to technological advancements. This advancement in technology brings with it the development of social media and social networking sites. Social media has drastically changed the mindset of the people in such a manner that individuals, especially women and children, fall prey to unknown people through these social networking sites. Social networking sites offer privacy policies for every social media application; however, it is important to understand the privacy risks involved while using these applications. The InfoTech Revolution of the 20th Century has put the entire country on fast forward by introducing social media platforms where one can share information in fractions of seconds.[1] Social media platforms such as YouTube, Twitter, and Instagram have greatly impacted the political playing field and often play the role of a deciding factor in elections. The spread of information on social media has impacted political dynamics globally by enabling users to express themselves publicly through social media platforms.[2] The impact of social media is not only limited to politics but has become a part and parcel of people's professional and personal lives. For example, every small or big office in India now has a *WhatsApp* group, which is now mandatory and gives access to people's contact details to a few other people who they don't even know. There are violations of regulations and various laws due to these social media websites, commonly known as "cybercrimes." Regulation of such cybercrimes has not caught up to the speed with which technology has grown and become an inherent part

[1] Ajay Yadav, 'The Legal Complexities of The Digital World' (2012) 18 Lex Witness 1

[2] Wolfgang Danspeckgruber 'Introduction' in Princeton University' (eds.), 'Social Media Revolutions: All Hype or New Reality?' (Spring, 2011)

of the system. It is necessary for the country to legislate new and strict laws to deal with developing technology. The question of paramount importance arises here: Can one maintain his right to privacy while using social media?

RIGHT TO PRIVACY AND SOCIAL MEDIA

Privacy is a fundamental right recognised under Article 21 of the Indian Constitution and is also enshrined in various international instruments. The jurisprudence of privacy laws in India is still developing, but they have taken a sophisticated turn in countries like the UK and the USA. Human dignity was recognised very early on in India through various landmark cases, but it has only been very recently that the right to human dignity has been viewed as intertwined with the right to privacy. The protection of human dignity is critical for any society to function democratically. Jude Cooley explains the right to privacy as synonymous with "the right to be left alone."[3] The right to privacy has been recognised in the eyes of the law and in modern society due to advancements in technology in the global sphere. The collection, storage, and sharing of personal data have changed in unimagined ways with the innovation of technology, which results in breaches of privacy in many spheres of life. This puts an obligation on the state to enact laws for the protection of personal data.[4] Therefore, it can be seen that the right to privacy has always been a fundamental issue and has always been in controversy. In today's world, a person requires a safe private sphere, free from any intervention, be it state or private, to express his or her thoughts

[3] Cooley, Thomas M. "A Treatise on the Law of Torts", 1888, p.29 (2nd ed.)

[4] Human Rights Committee general comment No. 16 (1988) on the right to respect of privacy, family, home and correspondence, and protection of honour and reputation (Art. 17) para. 37

and ideas. Then only individual protection could be granted. It needs to go hand in hand with the right to freedom of information and transparency.[5]

REASONABLE RESTRICTION UNDER FREEDOM OF SPEECH

With the enormous workload of the judicial system, the judiciary also has enormous power to deal with it. It is safe to say that every individual's right to speak is protected under Article 19 of the Indian Constitution, but with that protection comes certain reasonable limitations, such as those against India's sovereignty and integrity, the security of the state, friendly relations with foreign states, public order, decency, or morality, or in relation to contempt of court, against defamation or incitement to an offense, which means that any individual is free to speak. The backbone of this article could be based on the landmark case of *Romesh Thappar* v. *State of Madras,*[6] which gives a definitive meaning to the interpretation of Article 19.

CONSTITUTION IN RESCUE OF FUNDAMENTAL RIGHT TO PRIVACY

In the case of *Kharak Singh* v. *State of Uttar Pradesh*[7] Supreme Court recognized for the first time that the citizens of India have the fundamental right to privacy which is a part of the right to liberty in Article 21 as well as right to freedom of speech and expression under Article 19 (1) (a), and of the right to movement under Article 19 (1) (d). However, in the Meneka

[5] *Poorvisha Jindal*, "Right to privacy in India: Its sanctity in India", Available at: Know the Right to privacy in India: Its sanctity in India (ipleaders.in)

[6] AIR 1950 SC 124

[7] (1964) 1 SCR 332

Gandhi[8] and RC Cooper case[9], the Supreme Court modified its approach and held that freedom and liberty is void without Right to Privacy. In today's world, a person requires a safe private sphere free from any intervention be it State or private, to express his/her thoughts and ideas. Then the protection of privacy would be given to one's right only. It needs to go hand in hand with the right to freedom of information and transparency.[10]

After the Judgement of *Justice K.S. Puttaswamy (Retd.) & Anr.* v. *Union of India & Ors.*[11], The right to privacy was given the status of a fundamental right; therefore, every citizen is provided with a right to be left alone and to safeguard its privacy in terms of marriage, education, childbearing, identity, family, motherhood, etc. On the other hand, we have Article 14, which provides freedom of speech and expression. In today's world of globalisation, advanced media, and cutthroat competition, it is becoming next to impossible to balance these two rights provided to citizens. Theoretically speaking, the freedom of the media cannot breach an individual's privacy, but practically there have been many instances where the media has not only breached the individual's privacy but has also acted like an image-building portal. The power that today's media contains and the role it plays are reflected in elections, court decisions, business forums, ad markets, and even the choices made by an individual. Social media in today's world is influential and resourceful; therefore, there is a need to channel the power. Today's problems must be adjudged by a vibrant application of constitutional doctrine and cannot be frozen by a vision

[8] Maneka Gandhi v. Union of India 1978 AIR 597

[9] (1970) 1 SCC 248

[10] Supra note 5

[11] (2017) 10 SCC 1

suited to a radically different society because the television media, newspapers, and technology, along with social media, have completely altered the lives of individuals, and it's no longer as it used to be in the generation when the constitution was drafted. It can be seen from the above paragraphs that the role of the media regarding public figures and matters that are already in the public domain is treated as an exception when it comes to the fundamental right to privacy. Though the media provides an excellent platform for discussing certain issues, there is a need to bridge a gap when privacy and public matters are intertwined. It cannot be overlooked that public figures, like all citizens, have the "right to be left alone," which is a fundamental right included under privacy. If a public figure is accused, the debates and acquisitions on social media draw conclusions before the decision of the court. The unbridled power of the media can become dangerous if check and balance are not inherent in it. The role of the media is to provide the readers and the public in general with information and views that are tested and found to be true and correct. This power should be painstakingly controlled and should accommodate an individual's major right to security.[12]

PRIVACY VIOLATION BY SOCIAL MEDIA

Have you at any point saw that anything you looked for and wished to purchase not many hours prior, their promotions begin jumping out on the web-based entertainment applications or while riding the net amazingly? What is your take, is that a fortuitous event each time? The solution to this question is not a solitary time, it is an occurrence. That is called Online Entertainment Promoting and Systems administration done by different

[12] *PJS* v. *News Group Newspapers Ltd*, (2016) U.K.S.C. 26

organizations to arrive at new clients by in a roundabout way attacking our protection.

To understand how right to privacy is violated while using social media, one must understand what social media is. Social media is nothing, but a form of communication based on the internet. Blogs, Social Media Applications, social Networking Sites, Widgets, YouTube, are some examples of Social Media Platforms. But in the past few years Facebook, Whatsapp, Instagram, Twitter have become voguish. Modern obsessions with privacy are rooted in the past century.[13] Dissemination of information on social media websites impacts user's personal privacy. Social networking sites like Facebook, Twitter, Whatsapp, Instagram have default privacy settings which enables other users to see a person's private information until the settings are actively changed. Merely failing to change their privacy settings, can make personal information of the user accessible to the public.[14] Technology aware users who change their default privacy settings also fall prey to this kind of violation as most of their personal information is available to their friends on social media.

The main purpose of social media platforms is to establish a relationship between the real and virtual world. The fault is ours to allow the entry of the virtual world in our real life because of which our privacy has been compromised. From IP address to online transactions, to mobile registration personal details, we make ourselves prone to the dangerous risk of cybercrime using the internet. All these sites instantly record personal

[13] Andrew T. Kenyon & Megan Richardson (eds.), 'New Dimensions in Privacy Law' (Reprint, Cambridge University Press 2007) 1

[14] Helen Anderson, 'A Privacy Wake-Up Call for Social Networking Sites?' (2009) 20 Entertainment Law Review 7, 245

details like in the case of Amazon.[15] This happens because more personal information leads to more potential advertisers. The giant advertising companies and websites with this personal information can track every step of the user on the internet when he is unaware and is choosing his preferential habits and lifestyles. One example could be how Facebook shows adds to a user's based on his internet surfing history. Have we given too much importance to this question as to how Facebook exactly knows what we were shopping from other websites? Probably this question would become problematic after many years in India when people will realize the importance of their privacy rights, but the UK Government recently imposed heavy penalty on Facebook for invasion of privacy of its citizens. A user's data is collected by these companies using an electronic trail which the user leaves behind every time a user logs into the internet. The information so collected is then used for marketing purposes targeting a particular individual. These pop-up messages will then appear in social media pages of the user. From this, it can be concluded that somewhere or the other, personal information of the user is being shared by these social networking sites just for the purpose of earning revenues.

Another problematic means adopted by social media applications and websites is permanent availability of user's information to others. For example, even if a person permanently deletes his Facebook account, the application does not delete complete information of the user. This is because of its data-use policy which clearly states that it typically takes about one month to delete an account. Thus, some information may remain for up to 90 days in logs or backup. Your friend may still have a message you

[15] Karnika Seth, "Computers, internet and new technology laws" 276 (1st Ed. 2012)

sent, even after you delete your account.[16] Moreover, pictures captured during video calls are automatically saved in Google's social media platform and the user remains unaware about it. The automatic saving and its permanent availability without the consent of the user is a gross violation of right to know and right to privacy. Even if you delete the Google account, the pictures will not be deleted as per the Google privacy policy. As a result, cases of identity thefts, sexual predators, unintentional fame, cyber stalking, Phishing, and defamation have started to increase.

Scams like KOOBFACE stealing personal information of FACEBOOK users, Version 5 HTML code providing personal details of the users to advertising companies, Twitter scanning phone contacts of their users and importing this information to their website database, are increasing daily and ironically, there is no remedy to all these scams as there is no law to curb the same.

INDIAN LEGISLATION ON SOCIAL MEDIA AND DATA PROTECTION

Keeping up with satisfactory network safety estimates in the present super advanced computerized climate is vital and the most ideal way to shield the IT foundation of the associations. Besides the fact that these dangers hurting are the organizations, yet in addition government specialists. Starting digital protection estimates by the public authority of India will help keep a digital secure climate and moderate the dangers related with the danger. The quantity of digital protection occurrences has expanded throughout the long term. Mr. P. P. Choudhary, clergyman of state for hardware and IT

[16] Facebook, 'Data Policy' (Facebook, 30 January 2015) <https://www.facebook.com/about/privacy/yourinfo>

expressed that 44679, 49455, 50362 network safety occurrences occurred in India during the years 2014, 2015 and 2016, as expressed by the data gathered by India's PC crisis reaction group (CERT-in). Albeit the public authority has taken certain network protection drives as talked about underneath, more forceful measures are expected to address the difficulty.

The current legal regime that regulates and protects privacy of citizens in India is under-developed and highly lacking to combat such sophisticated problems. Till now, we do not have any legislation dedicated to crimes on social media and data protection. In fact, cyber-bullying has also taken a concrete form, but the legislature is yet to mull on such issues. However, there are different laws which will be applicable in different situations broadly. The one and only statute which accounts for the media privacy issues to an extent is the Information Technology Act, 2000 (herein referred to as the IT Act, 2000) which is used in the present time to counter the challenges posed by information technology. The IT Act, 2000 does not capture the essence of privacy as a concept but only as a literal interpretation. It is self-explanatory as to how much this legislation can regulate given the fact that it was enacted nearly two decades ago, a point from which technology has exponentially grown multiple folds.

THE INFORMATION TECHNOLOGY ACT, 2000

- **Section 66 A of the IT Act, 2000** - Widely used for Offences in social media- Held unconstitutional by the Hon'ble Supreme Court in the case of *Shreya Singhal* v. *Union of India*.[17]

- **Section 66 C of the IT Act, 2000 -** Punishment for Identity Theft[18]

[17] (2015) 5 SCC 1

- **Section 66 E of the IT Act, 2000 -** One of the most important provisions - Punishment for violation of privacy without the consent of the user.[19]

- **Section 66 F of the IT Act, 2000 -** Punishment for cyber-Terrorism

- **Section 67 of the IT Act, 2000 -** Punishment for transmitting and publishing any obscene material.

- **Section 67 A of the IT Act, 2000 -** Punishment for transmitting material containing sexually explicit acts.

- **Section 69 of the IT Act, 2000 -** Power of Central or State Government to issue directions for interpretation of information in the interest of sovereignty or integrity of India.

- **Section 79 of the IT Act, 2000 -** Liability for intermediary. This section gives closest reference to social media. It states that the intermediary on which any data or information is hosted, like Facebook, Twitter, etc is not liable for any content given by the third party.

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[18] "Whoever, fraudulently or dishonestly make use of the electronic signature, password or any other unique identification feature of any other person, shall be punished with imprisonment of either description for a term which may extend to three years and shall also be liable to fine which may extend to rupees one lakh."

[19] "Whoever, intentionally or knowingly captures, publishes, or transmits the image of a private area of any person without his or her consent, under circumstances violating the privacy of that person, shall be punished with imprisonment which may extend to three years or with fine not exceeding two lakh rupees, or with both.

"The intermediaries like Facebook, Twitter, Instagram, Google, etc have to remove any objectionable content hosted on their page when complaints to remove them have been received." - Shreya Singhal Case. These guidelines if implemented can protect privacy of individuals but in the practical world it is not possible. The issue which should be addressed is the usage of data and how these intermediaries get access to it.

THE IT (PROCEDURE AND SAFEGUARDS OF INTERCEPTION, MONITORING AND DECRYPTION OF INFORMATION) RULES, 2009

The Central Government in exercise of its power under section 87 (2) (y) of the IT Act, 2000 framed these rules to lay down procedure and to safeguard, monitor and collect data or information. Relevant rules in this regard are as follows:

- **Rule 4 -** An agency of the Government will carry out the functions of monitoring, safeguarding, and collecting data.
- **Rule 13 -** Intermediary will provide facilities and will cooperate for monitoring or decryption of information.

THE IT (PROCEDURE AND SAFEGUARDS FOR BLOCKING FOR ACCESS OF INFORMATION BY PUBLIC) RULES, 2009

The Central Government in exercise of its power under section 87 (2) (z) of the IT Act, 2000 framed these rules to lay down procedure and to safeguard for blocking of access by the public. Relevant rules are as follows:

- **Rules 3 to 8 -** Method for requesting the Nodal Officer to block the concerned organization. Approval necessary from the IT

Department of the central government after which the blocking will be done by the Nodal Officer.

- **Rule 9 -** Power to the Nodal Officer to decide regarding blocking
- **Rule 10 -** The Court can direct the Nodal Officer regarding blocking of any information and the information be given to the IT Department.
- **Rule 13 -** Every intermediary shall appoint a person to handle directions for blocking of information.

THE INFORMATION TECHNOLOGY (INTERMEDIARIES GUIDELINES) RULES, 2011

Enacted under section 79 of the IT Act, 2000. The intermediaries to claim exemption from liability must follow some rules regarding blocking of certain content.

- **Rule 3 -** Intermediaries should inform the users not to display, upload any information which is objectionable.
- **Rule 3 (4) -** Intermediary shall remove the objectionable content within 36 hours.

THE INDIAN PENAL CODE, 1860

- **Section 153 A -** Punishment for class hatred
- **Section 292 -** Offence of Obscenity

- **Section 295 A -** Punishment for insult to religion and to religious beliefs.

- **Section 499 -** Offence of Defamation

- **Section 505 -** Offence to incite any community against another.

THE CRIMINAL PROCEDURE CODE, 1973

- **Section 166 A -** Letter of request for investigation at any place in or outside India

- **Section 4 -** Trial of offences under any law

- **Section 188 -** Regarding offences committed outside India

THE PERSONAL DATA PROTECTION BILL

Following the debates in the year 2019, the personal data protection bill was tabled in the Lok Sabha in December 2019. Relevant provisions are as follows:

- **Section 26 -** It defines "Social Media intermediary" - Service that facilitates transaction between two users to convey information.

- **Section 28 (3) -** Users to get account verification mechanisms by the intermediaries.

- Data Protection Authority (DPA) to be set up to resolve issues relating to intermediaries.

- **Section 35 -** Central Government has powers to exempt any agency from its obligations relating to processing of personal data of users.

RECENT CASES AND EXAMPLES

Hacking in today's world has become common. A user knows that his account is being hacked, but he cannot do anything about it because he has shared relevant information. Nowadays, hackers look for people who visit harmful sites. Hackers use short URLs, and they inject viruses into the computers of those who open these URLs. They also tend to use apps, with the help of which they can see the screen of the user's phone on their phone. These kinds of spyware give the hacker information about the user's passwords and credentials for the accounts from which you do online transactions.

Shreya Singhal Case [20]

In the case of Shreya Singhal v. Union of India, the Supreme Court of India established important guidelines for intermediaries to follow. According to these guidelines, Facebook, Twitter, Google, Instagram, and YouTube have an obligation to remove any objectionable content displayed on their respective platforms after they receive complaints to do so. These guidelines were set to protect the privacy of individuals, but there is no proper implementation of them. In this regard, the real issue must be addressed, i.e., the usage of data by these intermediaries and how they gain access to it.

Brief Facts- Two young ladies, Shaheen Dhada and Rinu Srinivasan, were captured by the Mumbai police in 2012 for communicating their dismay at a bandh following Shiv Sena boss Bal Thackery's passing. The ladies posted their remarks on Facebook. The captured ladies were later delivered, and it was decided to strip the crook bodies of evidence against them, but the

[20] Supra note 17

captures sparked widespread public outrage. It was felt that the police have abused their power by summoning Segment 66A, inter alia, and that this disregards the right to speak freely and articulate.

Whatsapp - Facebook Privacy Case[21]

The actions of one private party to enter a contract with another private party was constitutionally challenged before the court. According to the latest privacy update, WhatsApp's analytics and data will be sent to Facebook. The data includes important credentials and details of the WhatsApp account holder. The catch here is that the user is unaware that his data will be sent to some other social media platform as the users are not informed about EULA.[22] This is a gross violation of the user's right to privacy because the WhatsApp update is deceptive.

As this case needed serious constitutional interpretation, it was referred to a constitutional bench. The bench observed: "There are 3 zones of privacy". They are:

- Intimate Zone - Sexuality, Physical privacy, etc.
- Private Zone - PAN Card Number, ATM Number, etc.
- Public Zone - Big Data Analytics, etc.

The Hon'ble Supreme Court ruled that the first two zones are out of the bounds of Facebook and Whatsapp, while the public zone requires deliberations on a case-to-case basis.

[21] *Karmanya Singh Sareen* v. *Union of India*, (2017) 10 SCC 638
[22] WhatsApp's End User License Agreement

Bois Locker Room Case

Few guys of XI-XII standard in Delhi allegedly made certain remarks in a group named 'Bois Locker Room'.[23] These sexually colored remarks were made on underaged girls and objectified them too. Some even went to an extent of discussion of raping them. The offences relevant to this scenario are:

- Section 292 of IPC, 1860 - Offence of Obscenity
- Section 66 of IT Act, 2000 - transmitting gross offensive information
- Section 503 of IPC, 1860 - Criminal Intimidation
- Section 509 of IPC, 1860 - Raging Modesty of a woman
- Section 499 of IPC, 1860 - Defamation
- Section 354 D of IPC, 1860 - Stalking
- Provisions of POCSO Act
- Section 79 of IT Act, 2000 - Liability of Intermediary

Eventually the Cyber Cell Delhi arrested those juveniles, and it turned out that one of the juveniles was the fake ID made by a girl who started the conversation by sending a picture of hers.

[23] Sparsh Sharma, "Bois Locker Room Controversy And The Law Related To The Liability For Sharing Obscene Material In A Group Chat" http://www.legalserviceindia.com/legal/article-2286-bois-locker-room-controversy-and-the-law-related-to-the-liability-for-sharing-obscene-material-in-a-group-chat.html

Twitter case

Twitter itself has admitted that they have scanned contacts of its users and have imported them to their database to know more about their users.

CONCLUSION

It's high time we make ourselves prepared for the tech boom which will hit us in the coming years. Stringent Laws shall be made in the wake of increasing technology and invasion of privacy at the same time. Theory of Protection of Privacy shall be applied in the real world and shall be given practical use. The developers of the application should change their approach from data centric to consumer trust centric. The users should be given an option whether to share their information or not. The principle of data minimization should be adopted. Information Technology Act, 2000 should be redrafted along with its rules and regulations so that it can be applied in today's world in the 21st century.

CHILD MARRIAGE: A SILENT HEALTH AND HUMAN RIGHT ISSUE

Shikha Saharawat*

Abstract

Child marriage is a human rights crisis in South Asia, caused by poverty, economic pressure, customary laws, and deeply rooted patriarchal customs. South Asian governments are under an absolute legal obligation to end child marriage, as it violates states' international and constitutional obligations to protect children's rights and discriminatorily with women's and girls' ability to enjoy a wide range of human rights. This paper provides insight into the impact on girls due to the significantly higher incidence of child marriage among girls and the unique risks of reproductive rights violations and sexual violence faced by girls who were married as children. It also provides recommendations and a conclusion to strengthen the legal framework and law enforcement.

Keywords: *Data Protection, Privacy, Freedom of Speech, IT Act, Social Media.*

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INTRODUCTION

Child marriage is defined as a girl or a boy marrying before the age of 18, and it includes both informal and formal unions between children. Most of the time, these marriages are also forced marriages, where consent from either party is not stated but the marriage still occurs under parental coercion. The "United Nations Sustainable Development Goals" mention that global-level action is needed to end this human rights violation by 2030.[1] Child marriage affects both girls and boys, but it affects girls more than boys. Child marriage not only violates children's rights but also exposes them to exploitation and abuse, particularly among girls in South Asia.[2] Child marriage is a human rights violation. Despite laws against it, the harmful practise continues.[3] Child marriage can convey dependable wretchedness or mental injury to those young women who marry before the age of 18, and they are less disposed to continue with their education and are more likely to be victims of domestic violence.[4] South Asian governments have an absolute legal obligation to end child marriage. Child marriage has far-reaching consequences that disregard states' global and constitutional commitments to safeguard children's freedoms and interfere discriminatorily with girls' ability to exercise a wide range of human rights. The persistence of child marriage in South Asia reflects the failure of

[1] Child marriage available at https://www.unicef.org/protection/child-marriage (Last visited on December 12, 2022)

[2] UNFA, Marrying Too Young: End Child Marriage 30 (2012), available at:https://www.unfpa.org/sites/default/files/pub-pdf/MarryingTooYoung.pdf (Last visited on December 10,2022)

[3] Child marriage is a violation of human rights, but is all too common, UNICEF data, available at: https://data.unicef.org/topic/child-protection/child-marriage/ (Last visited on December 05, 2022)

[4] Bhanji SM, Punjani NS, "Determinants of Child (Early) Marriages among Young Girls- a Public Health Issue" 3 Women's Health Care (2014)

legislatures to address one of the most pressing and common human rights issues, and it also violates human constitutional rights. Child marriage is certainly not a solitary infringement of a girl's privileges; rather, each example of child marriage starts a chain of violations that she will remember her entire life. Child marriage threatens the survival and well-being of girls by subjecting them to forced initiation into sex as well as early, unplanned, and frequent pregnancies. Furthermore, girls and women who marry as children are frequently denied educational opportunities, socially isolated, and economically dependent on others for the rest of their lives.[5] All these factors result in serious violations of girls' rights, such as their reproductive rights or their right to be free of gender-based violence. It is the responsibility of the government as well as society to implement strict laws and policies prohibiting the practice, and society needs to follow those laws and policies to end child marriage. Those who violate the laws should face harsh punishment from the government.[6]

Child marriage is rooted in South Asian cultural practises such as religion, social norms, and patriarchy. Regional inequalities resulting from a caste system and religious traditions have resulted in modern gender inequalities that frequently lag behind male economic and social progress. Similarly, patriarchal values and social norms, such as male household heads and female nurturers, have become entrenched in South Asian countries, limiting females' access to opportunities and influence outside of the home. The region's alarmingly high rates of child marriage have been influenced by

[5] Mathur, S., M. Greene, and A. Malhotra., "Too Young to Wed: The Lives, Rights and Health of Young Married Girls." International Centre for Research on Women (ICRW): Washington, D.C (2003)

[6] Subramanee SD, Agho K, Lakshmi J, Huda MN, Joshi R, Akombi-Inyang B. Child Marriage in South Asia: A Systematic Review. *International Journal of Environmental Research and Public Health*. 2022; 19(22):15138. https://doi.org/10.3390/ijerph192215138.

the hardening of stereotypes about girls in South Asia. The historical convergence of societal factors and regional economic pressures has set the stage for higher regional child marriage rates. Children have faced new challenges because of COVID-19, as they have moved away from historical attitudes towards girls. Children have stayed at home for more than a year due to a combination of school closures, economic shock, disruptions in health care, and familial deaths, which has only exacerbated the issue of child marriage. UNICEF estimates that the pandemic will result in more than 10 million additional child marriages by 2030. In other words, now is the time to take serious action against child marriage for the benefit of children worldwide.[7]

REASON CHILD MARRIAGE PERSISTS IN SOUTH ASIA

Gender Discrimination

Due to prevalence of Gender inequality in south Asia it can also be the one of reason of major cause of child marriage in South Asia. Families and communities view girls as secondary source and see them as they only have roles which is to be fulfil as mothers or wives in family and nothing more than that. They paid little attention to the girl and consider girls marriage as a financial burden in family that did not increase the family's income. In fact, delaying marriage means more family expenses and dowry. As a result, many parents, especially the poor, see little benefit in investing in their daughters' education and delay getting married until they reach puberty.[8]

Poverty

[7] Kyle felter, "Child marriage in South Asia" Harvard model congress 2 (2022)

[8] Bhanji, S. M., & Punjani, N. S., "Determinants of child (early) marriages among young girls: A public health issue 3 women's health care, 1-3 (2014)

Poverty is an important predictor of early marriage. Underage girl marriages are more common in rural and impoverished areas, according to numerous studies. Girls from low-income families are more expose to child marriage because the parents did not afford the cost of education for them. Also, girls who belong to poor families are more likely to be sexually abused by men and boys from wealthy families, so parents see marriage as a way to protect their daughter's chasteness. Many parents in rural Bangladesh and India see girls as a financial burden and marry them as soon as they reach puberty[9].

Weak Enforcement of Child Marriage Laws

The practice flourishes in South Asia, despite widespread laws against child marriage. One of the main reasons for the prevalence of child marriage in South Asia is the poor enforcement of child marriage laws. This, combined with married children (under the age of 18) being legal adults and deprived of child protection rights, opens the door to abuse and exploitation. Most governments have authorized their law in accordance with international instruments and drafted clear laws to prevent child marriage. However, its enforcement remains one of the most difficult challenges. Reasons for weak law enforcement include lack of enforcement mechanisms, lack of coordination and convergence among various stakeholders, and lack of awareness of the law**.**

Beliefs that it offers Protection

The primary reason for child marriage is economic necessity. People think that girls are expensive to feed, educate, and eventually abandon by their

[9] Supra note 6

families. As a result of her marriage, the bride's family receives a dowry. The younger the girl, the larger the dowry, and the sooner the financial burden of raising the girl is lifted. Parents increase their social status and strengthen social ties between tribes and clans by marrying off their daughters into "good" families. Parents also believe that marrying their daughters at an early age protects them from rape, premarital sex, unwanted pregnancies, and sexually transmitted diseases, particularly HIV and AIDS[10].

Educational Opportunities

Another factor to consider when discussing past views about the financial burden a daughter owes to her family is her education costs. Girls are forced into dependent and often risky marriages at an early age, without the opportunity to grow independently in an academic environment or the possibility of earning income through professional development. The impact on the child's academic future is immeasurable.

HEALTH CONSEQUENCES OF CHILD MARRIAGE.

Child Brides are Vulnerable to Abuse and Poor Mental Health

Due to demand of dowry girls have to face violence against them, including psychological abuse or physical abuse. After marriage girls moves to their husband house which is totally new to them. They have to perform household duties and fulfil the role of wife. Due to high demand of dowry parents force their daughter to marry older men and after marriage they were forced to be in marital relation with older men. Polygamy may also be acceptable in some of these areas. Due to early marriage of girls, they miss

[10] Nadia Agha, Terrible tradition: she is too young for it available at: https://www.dawn.com/news/1050480 (Last visited on: December 12, 2022)

out all those childhood activities, to play around with friends, education etc. Due to all these issue girls feel isolated as there is no one to talk to them or to understand them which results them into depression and causes severe mental health problem.[11]

Risk of Sexually Transmitted infection and Cervical Cancer

Child brides are frequently married to much older men in South Asia, who are more likely to be HIV positive than younger men because they have had unprotected sex with multiple or high-risk partners. Furthermore, when it comes to negotiating condom use or refusing sex with their partners, girls have less control than adult female counterparts, and they have limited access to health information, protection, and services. All these factors raise their chances of getting HIV or other sexually transmitted infections.[12]

Early Pregnancy Can Bring Out Poor Maternal and Infant Health Outcomes

"Girls are under excessive pressure to prove their fertility soon after marriage, and they have limited access to reproductive health information and influence decisions of family planning. When adolescent girls become pregnant, they are not physically, mentally, and emotionally prepared to give birth. Girls under the age of 15 are five times more likely to die from their mothers. In addition, young pregnant women are more likely to have low birth weight babies and premature births, two factors that increase the risk of death. If these children survive, they will face a higher risk of

[11] Nour NM, "Health Consequences of Child Marriage in Africa" 12 *Emerging Infectious Diseases*, 1644-1649 (2006)

[12] Santosh K. Mahato, "Causes and Consequences of Child Marriage: A Perspective" 7 International Journal of Scientific & Engineering Research 698-702 (2016)

malnutrition."[13]

LEGISLATIVE RESPONSE TO CHILD MARRIAGE IN SOUTH ASIA

Pakistan

Child marriage is legally prohibited in Pakistan under the Child Marriage Restraint Act 1929. The minimum age for marriage under their act was 16 for females and 18 for male. It is given under section 2 of Child Marriage Restraint Act 1929. Nonetheless, under another new bill passed by the Pakistani Senate, the minimum age for female marriage has been raised to 18.

- An adult male (over the age of 18) who contracts marriage with a child is subject to a Rs.1000 fine and a month's imprisonment, or both (section 4),
- A person who performs a child marriage ceremony (section 5), and
- A parent or guardian who fails to intervene to prevent a child marriage (section 6).

However, unlike in India, the current law does not require the annulment of illegal child marriages. "Tribal customary law, specifically Vani and Swara, which require the forced marriage of girls as compensation or currency to settle a dispute or debt, persists, despite a recently proposed amendment that would authorise harsh punishment for Vani and Swara perpetrators."[14]

[13] Supra note 9

[14] Razi et, al., "Child Marriage in Pakistan: A Critical Analysis in the Light of Socio-Legal and Religious Context"18 Palarch's Journal of Archaeology of Egypt/Egyptology 283-302 (2021)

Bangladesh

The Child Marriage Regulation Act 2017 (CMRA) superseded the previous British law enacted in 1929 and CMRA 2017 is Bangladesh's current law dealing with child marriage. The law sets the minimum age for marriage at 21 for men and 18 for women. CMRA makes it illegal to initiate, permit, or celebrate child marriage. Regulations to Limit Child Marriage (Regulations) were also developed in 2018, outlining details of the composition and responsibilities of the Child Marriage Prevention Commission and other functions.

Nepal

"According to Nepalese child marriage law, both girls and boys can marry at the age of 18 with parental consent and at the age of 20 without consent. Furthermore, it recognises daughters as rightful heirs and increases the punishment for child marriage to imprisonment for up to three years and a fine of up to ten thousand rupees, with the punishment decreasing as the girl's age increases. The Marriage Registration Act of 1971 and the Birth (Registration) Act of 1977 are two other pieces of legislation. Despite these positive steps against child marriage, a large number of girls are still married before the age of 18."[15]

India

To prevent child marriage, India has taken active and progressive legal measures. The Child Marriage Restriction Act of 1929 was the first Indian

[15] Ending Impunity for Child Marriage in Nepal, available at: https://nepal.unfpa.org/sites/default/files/pub-pdf/Ending%20Impunity%20for%20Child%20marriage%28final%29_25Nov16.pdf (Last visited on: November 20, 2022).

law to set a minimum age limit for marriage. In December 2006, new laws banning child marriage were passed, in which one of the parties is a minor and setting the legal age of marriage at "18 for female and 21 for male". The new law imposes severe penalties on anyone who commits, permits or encourages child marriage. These penalties include up to" two years in prison or a fine of up to one lakh rupee." The law allows courts to intervene to prevent child marriage through suspension orders. Another positive aspect of the law is the provision of alimony and residency for the separated wife until she remarries. In addition, a 2006 Supreme Court decision made the registration of all marriages mandatory, creating a more favourable environment for law enforcement and enforcement. Despite these commendable changes, the biggest challenge in India is enforcement and oversight. Moreover, many people follow the coexistence of identity laws and customs that allow child marriage, which is a major obstacle to the abolition of child marriage in India. In 2021, the Indian government proposes a bill to amend the Child Marriage Act.

- The bill amends the Child Marriage Prohibition Act of 2006 to raise the minimum age of marriage for women to 21. In addition, it supersedes any other law, custom or practice.
- A person married before attaining majority may seek annulment within two years of attaining majority (i.e., before 20 years of age) as given in Child marriage prohibition act 2006. ("The Prohibition of Child Marriage (Amendment) Bill, 2021") The Bill raises this to five years (I.e., at the age of 23).

Sri Lanka

For most of the non-Muslim population, the minimum age of marriage for

men and women was set at 18 in 1995. Progressive court rulings and legal reform in Sri Lanka played a major significant role in reducing the rate of child marriage. For example, all marriages must be registered, as well as the mutual consent of both parties to the marriage, effectively nullifying any non-consensual marriage forced upon a girl by her parents. This has contributed to raising public awareness of the injustice and illegality of child marriage. "However, the country has a mixed legal system for Sri Lanka's minority Muslim community. The Muslim Marriage and Divorce Act of 1951 continues to govern matrimonial law in the community, allowing girls as young as 12 years old to marry with the permission of a "Quazi," or Muslim court. Child marriage in Sri Lanka is lower than in other South Asian countries"[16].

Afghanistan

Afghan civil law sets the legal age of marriage at 16 for girls and 18 for boys. In Afghanistan, a girl cannot legally marry until she attains the age of 16. However, according to Sharia Law, if her father allows her, she can marry at the age of 15. The government of Afghanistan has issued orders to take to control forced and early marriage in the country. In response to this, the Ministry of Labour and Social affairs and Disabled has developed a national strategy for children at risk in order to raise awareness on rights violation and negative health consequences for young girls due to forced and early marriage[17].

[16] Reforms regarding child marriage in Sri Lanka available at: https://borgenproject.org/child-marriage-in-sri-lanka/ (Last visited on: November 25, 2022)

[17] Early marriage in Afghanistan available at: http://www.iccwtnispcanarc.org/upload/pdf/5449204478Early%20Marriage%20in%20Af

UNICEF Action

UNICEF has stood firmly against child marriage since its establishment in 1946. As the central organization tasked with ensuring an equitable future for all children, the rights of children to live healthy lives free of violence and full of choice forms the backbone of UNICEF's actions to halt child marriage rates worldwide. In addition to advocacy at various international summits, the most pertinent, on-the-ground action taken by UNICEF to tackle child marriage in South Asia is UNICEF's partnership with the United Nations Population Fund. In 2016, UNICEF and the UNFPA launched the "Global Programme to End Child Marriage" in 12 countries that face the highest rates of child marriages globally including South Asian countries like India, Nepal, and Bangladesh. At its core, the Programme coordinates actions with governmental bodies, non-government organizations (NGOs), and citizens to propel education, protect children, and achieve gender equality goals for girls living in these countries. The initiative also works with teachers, families, health providers, and other community officials to devise strategic goals and interventions for the betterment of girls' futures. The Programme plans to connect with over 14 million adolescent girls across the 12 countries by 2023. When analysing the results of the UNFPA-UNICEF partnership since 2016, the productivity of the program collectively and on a country-by-country basis is unmatched. Across all 12 countries, the Programme has saved millions of girls from entering harmful child marriages and saw governments make stronger commitments to ending child marriage in the form of advocacy and data support across political levels. In the South Asian region, numerous results were similarly worthy of praise. In Bangladesh, the Programme established

ghanistan.pdf (Last visited on: November 26, 2022)

over 3,000 adolescent clubs where children could learn and play together outside of the home and supported over 37,000 girls in their secondary education endeavours. Additionally, in India, the Programme connected over 200,000 adolescents with life-saving reproductive health information and helped nearly 3,50,000 girls continue their education. Finally, the Programme empowered over 29,000 girls and taught them valuable life skills on how to live a life of independence and assisted nearly 28,000 girls in continuing their educational journeys. As the Programme continues to roll out Phase II, the eyes of the world are on its future, diverse impacts of its programmatic interventions, and the girls that will be saved from early marriages.[18]

RECOMMENDATIONS

In South Asia, the protection of children's rights due to child marriage is at risk now and in the future. Child marriage has declined globally over the past two decades and progressively perceived as a human rights violation. However, it is still widespread in most of South Asia. Child marriage is closely related to issues affecting children and young people and should be ended. Addressing this threat will require partnerships and cooperation between sectors such as "education, health and justice, and between girls and boys, their families, communities, religious and traditional leaders, governments and other stakeholders" is required. Early marriage for girls is socially acceptable and widespread in South Asia. Regardless domestic and international treaties and laws, child marriage remains prevalent in the region, especially in the four hotspot countries of Bangladesh, Afghanistan, India, and Nepal. The following are the main concerns suggested for public

[18] Kyle felter, "Child marriage in South Asia" Harvard Model Congress", 2 (2022)

and state legislatures.[19]

Strengthening the Legal Framework and Law Enforcement

All countries in South Asia have laws to prevent child marriage, but there is a lack of uniform legislation setting a minimum age for marriage for girls over the age of 18, and a lack of awareness and enforcement remains a major challenge to child marriage. Governments should educate the public and law enforcement officials about girls' legal rights not to marry children and to be protected from reproductive rights violations and sexual violence that this practise causes. Educate girls about legal options to avoid or abort child marriage. The government should impose severe penalties on violators. In countries where the current penalty is low, it should be increased. The government should conduct comprehensive training programmes. Inform law enforcement officials, civil status registrars, judicial authorities, and religious leaders about the negative impact of child marriage, especially in poor and high-risk areas where it is common, and their role in preventing child marriage.[20]

Expand Girls' Educational Opportunities

Providing girls with an education, especially at the secondary level, is an important strategy to prevent child marriage. Young married girls often drop out of school. Parents and girls need more assurance about the quality, safety, and value of continuing education to keep girls in school. Families

[19] Tina Khanna, International Center for Research on Women for the UNFPA Asia Pacific Regional Office, "Child marriage in south Asia: Reality, Responses, and The Way Forward", Available at: https://resourcecentre.savethechildren.net/pdf/child_marriage_paper_in_south_asia.2013.pdf/ (Last visited on: December 01, 2022)

[20] Ibid.

also need financial incentives to make education more affordable. While much progress has been made in primary education, girls' secondary and university enrolment rates are lagging in many South Asian countries. Provide adequate resources from the national and state budgets to ensure quality education for girls at all levels. The government should provide financial incentives to girls from low-income families and facilitate education for married adolescent girls. Efforts should be made to encourage girls who have dropped out of school to apply for readmission so that they can continue and complete their secondary education. Provide sufficient resources from national and state budgets to ensure quality education for girls at all levels. By providing a safer and more accessible environment in school, clean toilets, recruiting more female teachers, and improving the quality of the school, the school will become a better place for girls, and their parents will find it more attractive.[21]

Provide Life Skills Education, Reproductive Health Education & Services

Early marriage and having a child in her teenage years have serious implications for a girl's health and development. Life skills education for a girl, her family and community can help delay marriage. Reproductive health information and services are also important for adolescent girls, especially to support married couples. Governments should focus school curricula on life skills, reproductive health, and rights. Train teachers and professionals to have conversations with students about relationships, sexism, contraception, and maternal and new-born health. Improve health systems and train health care providers to provide adolescent girls with information on sexual and

[21] Malhotra, Anju, Ann Warner, Allison McGonagle, and Susan Lee-Rife., "Solutions to end child marriage." *Washington, DC: International Center for Research on Women* (2011).

reproductive health issues.[22]

Invest in Programs that Empower Young Women and Girls Economically

Projects to work on young ladies' monetary proficiency and wage-producing abilities can emphatically affect the prevention of child marriage in South Asia. In Nepal, projects to outfit young ladies with occupations and pay-age abilities have demonstrated success in preventing child marriage. at the point when you support market-based interventions for the monetary strengthening of young ladies. Such interventions ought to be executed at both national and local levels and should give priority to girls and women in marginalised communities where child marriage is common.[23]

Improve Safety and Provide Security in Public Areas

Women and girls live at risk of sexual harassment and violence in numerous public places. The risk of sexual harassment and rape forces parents to marry their daughters early before they lose their chastity. Governments need to ensure that girls have safe means of transport to get to school safely and create safe areas for women and girls, especially during humanitarian emergencies. By setting up friendly helplines for girls and women to report and seek help in cases of abuse and violence, this will likewise assist with ending child marriage.

Working with Men and Boys to Prevent Child Marriage

One of the most effective ways to prevent child marriage is to work with both men and boys. A study conducted in India revealed that boys can

[22] Ibid

[23] Supra note 17

become effective advocates for girls by training them as educators. In addition, a young girl or boy who articulates her views in a mature manner can convince her parents to stop child marriage. It is especially important that children and young people are equipped with the necessary skills and knowledge to become advocates for their rights. This can be done through the work of World Vision, which works with boys and men in India.

Address the Needs of Married Girls

There are limited public and civil society programmes to meet the needs of married youth. Protecting married adolescent girls from health and social hazards requires tailored and targeted interventions. Governments should amend laws that prohibit married and/or pregnant girls from attending school and do more to help girls return to school after marriage or childbirth. Conduct community awareness and education campaigns to highlight the value of married girls completing secondary school.

CONCLUSION

The actions portrayed above show that no single measure is adequate to diminish the pace of child marriage altogether. The answer lies in a holistic approach with a clear focus on adding value to girls. Ongoing programmes need to find ways to connect with each other and improve their strategies. For example, by expanding existing programmes to promote girls' education, it may be helpful to prevent child marriage, including through community campaigns and key stakeholder engagement, including parents and families; we need to find a way to monitor or watch the marriage process in culturally sensitive areas. At the same time, the programme should pay particular or special attention to improving the safety of girls on

their way to school, to ensure they are protected from any kind of violence. Efforts should be made to reach out to countries with legal systems to prevent child marriage that do not comply with international standards. Child-centered programmes should emphasis the role children play in delaying the age of marriage and develop effective negotiation skills with parents. Programs should work with children's groups to increase participation and enhance girls' self-esteem and aspirations to improve expectations and provide alternatives to early marriage. A support system that focuses on child-centered programmed will go a long way towards sustaining these changing aspirations. Finally, the operational links between education, livelihoods, and sexual and reproductive health and rights interventions need to be identified and implemented. To really address child marriage, these linkages should work within a strong legal system and with the active participation of the community and family members. Likewise, efforts should be made to lay out orientation fair standards and practices that priorities young ladies' education, employability, procuring potential, and regenerative health outcomes.

COLLECTIVE INVESTMENT SCHEME: AN ANALYSIS

Aryan Sinha*

Abstract

A collective Investment Scheme (CIS) is a popular investment scheme in the securities market. In this, several people come together and invest their finances collectively in a specific or many asset(s) and share the profits according to their share of investment. Each investor has a specific stake in the Collective Investment Scheme which depends on how much investment they have made. Large-scale misutilization of pool of money, dishonesty and mischievous activities lead to the establishment of a regulatory system for the operating the Collective Investment Scheme. Under the Chairmanship of Dr. S. A. Dave, a committee was constituted to examine the shortcomings of such scheme and prepare a draft for the regulations of Collective investment scheme. Along with this SEBI issued the regulations for Collective Investment Scheme; SEBI (collective investment schemes) Regulations, 1996. In this research paper, we will be discussing the concept of CIS, its applicability under SEBI, History, Characteristics/Features of CIS, Exceptions, Registration, and conditions of Collective Investment Management Company (CIMC), Certificate of CIS, Trustee for CIS, Procedure for launching CIS, Action, and Penalties in case of default CIS.

Keywords: *Collective Investment Schemes, SEBI, Collective Investment Management Company, Securities Law*

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INTRODUCTION

We have heard about the collective efforts of an individual in a group for the betterment of the entire group. Similarly, the concept of CIS is based on this ideology. "Collective Investment Scheme (CIS) is a mechanism where several individuals mutually pool their money to invest it in a particular asset. Further, when profits are arising out of that particular investment, it gets shared between the investors as per the finalized agreement, before the act."[1] This form of scheme is somehow similar to a mutual fund. However, it is not a mutual fund.

In more depth, "the collective investment scheme is a plan of action that comprises a pool of assets that are managed & handled by the collective scheme manager and is governed by the Collective Investment Schemes Regulations issued by the Securities & Exchange Board of India. Thus, this regulation provided by the SEBI acts as a provision for the Investor's Protection"[2]. The main objective of having this sort of collective investment scheme is to get some form of income or profit as a result of this investment.

COLLECTIVE INVESTMENT SCHEME: UNDER THE PURVIEW OF SEBI

1. ***Securities Exchange Board of India (Collective Investment Schemes) Regulation, 1999:*** SEBI regulations on the CIS specifically

[1] Rajdeep Saini, "Collective Investment Scheme: An Overview", *Enterslice* (Dec 03, 2020). https://enterslice.com/learning/collective-investment-schemes-an-overview/ (Last visited on: November 25, 2022)

[2] Deyasini Chakrabarti, "All About Collective Investment Scheme", *iPleaders* (Mar 31, 2020). https://blog.ipleaders.in/collective-investment-scheme-2/#Introduction (Last visited on: November 25, 2022)

talk about the establishment of Collective Investment Management Company (CIMC) which means a corporation incorporated under the "Companies Act 2013"[3] and also enrolled with the SEBI, whose purpose is to manage, deal, work, and arrange CIS. Only the Collective Investment Management Company which has obtained all the necessary certifications under the guidelines should only be allowed to support and continue the collective investment scheme.[4]

2. ***Securities Exchange Board of India Act, 1992:*** "After the Securities Laws (Amendment) Act 31 of 1999, Section 11AA was inserted under the Securities Exchange Board of India Act 1992, which was effective from 22.02.2000. Section 11AA defines the Collective Investment Scheme. A CIS scheme or arrangement made or offered by any company under which the contributions, or payments made by the investors, by whatever name called, are pooled and utilized solely for the scheme or arrangement. The contributions or payments are made to such scheme or arrangement by the investors to receive profits, income, produce, or property, whether movable or immovable from such scheme or arrangement. The property, contribution, or investment forming part of the scheme or arrangement, whether identifiable or not, is managed on behalf of the investors. The investors do not have day-to-day control over the management and operation of the scheme or arrangement."[5]

COLLECTIVE INVESTMENT SCHEME: HISTORY

In the earlier 1990s, some businessmen took plantation activities to a commercial level to support the Government's efforts to prevent the destruction of forests in the country and also to channel private investments

[3] The Companies Act, 2013, (Act 18 of 2013).
[4] Securities Exchange Board of India (Collective Investment Scheme) Regulations. 1999.
[5] The Securities Exchange Board of India Act, 1992, (Act 15 of 1992), Collective Investment Scheme.

towards Agro plantation activities. The Government of India observed these private investments and decided to regulate of such instruments (Agro Bonds & Plantation Bonds) and should be treated as a "Collective Investment Scheme" under the SEBI Act, 1992. On November 18, 1997, a press release was declared for the same. For the implementation of such a scheme, SEBI was asked to draft a regulation for investor protection and promotion of legitimate investment activity. "SEBI formulated a committee under the chairmanship of Dr. S.A. Dave along with the representatives from Regulatory Bodies, Plantation Industries & Consumer Forums."[6] Accordingly, Section 11AA was inserted under the SEBI Act 1992 for the concept of a Collective Investment Scheme. Such a Scheme was brought within the purview of securities to give statutory protection to the investors. "The phrase 'units or any other instrument issued by any collective investment scheme to the investors in such schemes' was inserted by the Securities Laws (Amendment) Act, 1999 within the definition of 'securities' in Section **2**(*h*) of the Securities Contract (Regulation) Act, 1956."[7]

COLLECTIVE INVESTMENT SCHEME: OBJECTIVES

The main objectives of this schemes are:

1. Protection of the investors belonging to the class of average income group of people, retired group of people, illiterate group of people, lower category group of people.
2. People who seek to invest their savings in order to gain benefits from such scheme.

[6] Dave Committee, "Report of the Committee on Collective Investment Schemes", *Securities Exchange Board of India* (Apr 05, 1999).
[7] The Securities Contract (Regulation) Act, 1956, (Act 42 of 1956), s. 2(h)(ib).

3. Sharing of profits through several activities.

COLLECTIVE INVESTMENT SCHEMES: CHARACTERISTICS

In India, Collective Investment Scheme is an arrangement offered by any "person"[8]. It includes:

1. The financial investment of people is pooled together and is utilized for the realisation of Collective Investment Scheme.
2. To gain income or other benefits from the financial investment made in the Collective Investment Scheme.
3. To manage such scheme on behalf of investors.
4. The investors have partial control on the management and operation of such scheme.

COLLECTIVE INVESTMENT SCHEME: EXCEPTIONS

Following scheme or arrangement shall not be considered a Collective Investment Scheme:

1. **Co-operative Societies:** If any arrangement made or scheme offered by a co-operative society registered under the "Co-operative Societies Act, 1912"[9]
2. **Non-Banking Financial Companies (NBFC):** If any arrangement made or scheme offered under which deposits are accepted by non-banking financial companies is defined under "Section 45-I(f) of Reserve Bank of India Act, 1934"[10].
3. **Insurance:** If any scheme or arrangement was made or offered to be a

[8] The Income Tax Act, 1961, (Act 43 of 1961), s. 2(31).
[9] The Co-operatives Societies Act, 1912, (Act 2 of 1912).
[10] The Reserve Bank of India Act, 1934, (Act 2 of 1934), NBFC.

contract of insurance under the "Insurance Act, 1938"[11].

4. **Provident Fund/Pension Fund:** If collection is made for any Scheme, Pension Scheme or Insurance Scheme framed under the "Employees Provident Fund and Miscellaneous Provisions Act, 1952"[12].
5. **Public Deposit:** If any collection is made under which deposits were accepted under "Section 73 of the Companies Act, 2013"[13].
6. **Nidhi Company:** If any collection has been made under the purview of "Section 405 of the Companies Act, 2013"[14].
7. **Chit Fund:** If any collection is falling within the meaning of Chit business under the provision of "2(d) of Chit Fund Act, 1982"[15].
8. **Mutual Fund:** If any collection is made under which contributions made are like a subscription to a mutual fund.
9. **Residuary Provision:** Any collection made in consultation with the Securities Exchange Board of India.

COLLECTIVE INVESTMENT SCHEME: REGISTRATION OF COLLECTIVE INVESTMENT MANAGEMENT COMPANY

CIMC is a company registered under SEBI and incorporated under the Companies Act 2013 to organize, operate & manage a CIS.[16] Any person who proposes to sponsor, launch or carry on any scheme or arrangement shall be deemed to be a collective investment scheme under the CIMC on

[11] The Insurance Act, 1938, (Act 4 of 1938).
[12] The Employees Provident Funds and Miscellaneous Provisions Act, 1952, (Act 19 of 1952).
[13] The Companies Act, 2013, (Act 18 of 2013), Prohibition on acceptance of deposits from public.
[14] The Companies Act, 2013, (Act 18 of 2013), Power of Central Government to direct companies to furnish information or statistics.
[15] The Chit Funds Act, 1982, (Act 40 of 1982), Chit Amount.
[16] Regulation 2 (1) (h) of the Securities and Exchange Board of India (Collective Investment Schemes) Regulations, 1999.

or after the commencement of SEBI (Collective Investment Schemes) Regulations, 1999 shall make an application for the grant of registration to SEBI.[17] CIMC shall not indulge in any other activities, except managing such scheme, acting as a trustee of any scheme, launching any scheme to invest in securities. A CIMC may invest in the scheme if it gives a declaration of purpose of investment in the scheme and shall not charge any fees for that investment.[18] Only a certified CIMC shall carry on or sponsor or launch a collective investment scheme.[19]

COLLECTIVE INVESTMENT SCHEME: CONDITIONS FOR CIMC

"When the SEBI is satisfied with the application, SEBI calls upon the applicant to pay registration fees. On receipt of registration fees, SEBI shall grant the certificate only when certain terms and conditions are satisfied by the SEBI and must be in the interest of investors."[20]

Certain Conditions for registration of CIMC are:

1. The applicant must be registered as a company under the Companies Act, 2013.
2. The applicant must specify the managing of CIS as one of the main objectives under its Memorandum of Association (MoA).
3. The applicant must have a minimum net worth of rupees five crores. The exception to this is if the applicant does not have the minimum net worth, then at the time of making the application, the

[17] Ibid, Regulation 4 & 4A
[18] Ibid, Regulation 13
[19] Ibid, Regulation 3
[20] Ibid, Regulation 9 & 10

applicant must have a minimum of rupees three crores which shall be increased to rupees five crores within three years from the date of registration.

4. The applicant must follow the criteria specified in Schedule II of the "Securities and Exchange Board of India (Intermediaries) Regulations, 2008"[21]
5. The applicant must follow the criteria specified in the Securities Exchange Board of India (Collective Investment Schemes) Regulations, 1999.
6. The directors and key personnel of the applicant have not been convicted for an offense involving moral turpitude or for any economic offense or the violation of any securities laws.
7. At least 50% of the directors of CIMC must be independent. They shall not be directly or indirectly associated with the persons who have control over the Collective Investment Management Company.
8. No person, directly or indirectly connected with the applicant has in the past been refused registration by the SEBI. That person connected with the applicant has been rejected by the Board or any disciplinary action has been taken against such person under the rules and regulations made under the act.
9. At least one of the directors, on the Board of the CIMC who is not subject to retirement must be a representative of the trustee.
10. The CIMC must not be a trustee of any CIS.
11. The applicant must follow the criteria specified in the provisions of Chapter IX of the SEBI (Collective Investment Schemes)

[21] Securities Exchange Board of India (Intermediaries) Regulations 2008.

Regulations, 1999."[22]

COLLECTIVE INVESTMENT SCHEME: TERMS & CONDITIONS FOR CERTIFICATE

The certificate shall be granted after fulfilling the certain "terms & conditions"[23]:

1. Any director of the Collective Investment Management Company must not be a director of another CIMC unless he's an independent director and that person must be approved by the board of directors of other CIMC.
2. The CIMC must inform the board of directors about the change of information in the previously published information.
3. The trustee shall give approval for appointment of director of CIMC.
4. CIMC shall adhere the regulations of SEBI (Collective Investment Schemes) Regulations, 1999.
5. SEBI, Trustee & Unit Holders must approve the changes made for the controlling & management interest of CIMC.
6. CIMC must address the grievances & complaints of investors within the prescribed time limit.
7. CIMC shall agree with a depository for the dematerialization of the units of CIS proposed to be issued.
8. Subscription of units of CIS shall be paid back through payment channels of cheque, demand draft, or other but not through cash.
9. The CIMC must comply with the KYC (Know your client) Norms

[22] Supra note 16, Regulations 68 - 74
[23] Ibid, Regulation 11

specified by the SEBI.

*Terms & Conditions 7-9 were inserted after the 2014 Securities Law Amendment.[24]

COLLECTIVE INVESTMENT SCHEME: THE TRUSTEE

1. For the purpose of holding the assets of CIS, the CIMC must appoint a trustee.[25]
2. Persons registered as a Debenture Trustee under the "SEBI (Debenture Trustee) Regulations, 1993"[26] are eligible for the position of trustee of such CIS but if that person directly or indirectly indulged with the control of CIMC is not eligible to be appointed as trustee.[27]
3. As per the recommendations of the Dave Committee, it was stated that CIS shall be constituted in the form of a deed registered under the "Indian Registration Act, 1908"[28] And shall be executed by CIMC in the favor of the trustee.[29]
4. The Trustee and the CIMC shall agree on managing the scheme according to the SEBI Regulations to fulfill the scheme's objectives.[30]
5. No scheme shall be launched by CIMC unless approved by the

[24] Securities and Exchange Board of India (Collective Investment Schemes) (Amendment) Regulations (Jan 09, 2014).
[25] Supra note 16, Regulation 16(2)
[26] Securities Exchange Board of India (Debenture Trustees) Regulations, 1993.
[27] Supra note 16, Regulation 18(1)
[28] The Registrations Act, 1908, No. 16, Acts of Parliament, 1908 (India).
[29] Dave Committee, "Report of the Committee on Collective Investment Schemes", *Securities Exchange Board of India*, p. 14 (Apr 05, 1999).
[30] Supra note 16, Regulation 20

Trustee.[31]

COLLECTIVE INVESTMENT SCHEME: PROCEDURE FOR LAUNCHING CIS

Every scheme shall be launched after following the due compliances:

1. CIMC must take the approval of the Trustee for launching the scheme.
2. CIMC must take ratings from a Rating Agency.
3. CIMC must take appraisals for such scheme by an appraising agency.
4. CIMC must take an insurance policy for the protection of such schemes.
5. CIMC shall launch close-ended schemes (CES) whose duration shall not be less than of three calendar years.
6. CIMC must publish disclosure information stating that such schemes do not provide guaranteed returns.[32]
7. The CIMC must issue Unit Certificate to its applicants within six weeks from the subscription list's closure date.
8. If the units are issued through depositories, then the "Securities Exchange Board of India (Depositories and Participants)"[33] Regulations must be followed.[34]
9. The scheme units shall be listed with each stock exchange within six

[31] Supra note 16, Regulation 24
[32] Supra note 16, Regulation 24-25
[33] Securities Exchange Board of India (Depositories and Participants) Regulations, 1996.
[34] Supra note 16, Regulation 32

weeks from the scheme's closure.[35]

COLLECTIVE INVESTMENT SCHEME: ACTION IN CASE OF DEFAULT BY CIS

1. Violation of SEBI Provisions and CIS Regulations.
2. Publishing of false or misleading information related to such regulations.
3. Does not cooperate with any inquiry, investigation or inspection conducted by the SEBI under such provisions or regulations.
4. Fails to adhere the directions issued by the SEBI.
5. Fails to resolve the complaints of investors by the SEBI.
6. Breach of the Third Schedule provided under the Act.
7. Fails to pay the appropriate fees provided under the Second Schedule of the Act.
8. Fails to make an application for listing of units with the Stock Exchange.

Then the CIMC will be dealt with under the Chapter-V of the "Securities and Exchange Board of India (Intermediaries) Regulations, 2008"[36]

COLLECTIVE INVESTMENT SCHEME: APPEAL

Any person who has been aggrieved by any order of the SEBI may appeal to the Securities Appellate Tribunal having jurisdiction in the matter.[37]

[35] Supra note 16, Regulation 36
[36] Securities Exchange Board of India (Intermediaries) Regulations, 2008.
[37] Ibid.

DOCTRINE OF PITH AND SUBSTANCE: CONSTITUTIONAL SCHEME AND APPLICABILITY IN INDIA

Srishti Sori*

Abstract

The research paper focuses on the study of the doctrine of pith and substance, its origin and meaning, and how this already established principle of interpretation has been incorporated under the Indian Constitution. With the help of a study of judicial decisions, the paper will also analyse how the Supreme Court applies the doctrine of pith and substance in India. In India, this doctrine is regarded as one of the important principles of interpretation. The Indian Constitution being a federal constitution with separation of powers, this paper will analyse the success of the doctrine of pith and substance in resolving the dispute between the centre and the state arising on account of the separation of powers between the two.

Keywords: *Collective Investment Schemes, SEBI, Collective Investment Management Company, Securities Law.*

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INTRODUCTION

The Indian Constitution is Federal Constitution and one of the essential features of a federalism is distribution of powers between the centre and the state. The Constitution of India performs a very important function of demarcating the centre and state functions from each other. Each the union and the state are endowed with the subject matters and functions on which they have duty and right to exercise their power in the field assigned to them. This is made possible by the Indian Constitution with the incorporation of Seventh Schedule[1], it deals with the division of power between the centre and the state notified with subject matters provided in the three lists provided in the seventh schedule namely:

List I- Union List

List II- State List

List III- Concurrent list

The areas of subject matter are clearly divided between the centre and the state but despite this there are lot of problems which arises on the ground that one is encroaching in the sphere of another resulting in conflict between the centre and the state in relation to the law-making power on a particular subject matter. Few doctrines are used by the judiciary as principles of interpretation to resolve such conflicts and one of them being an age-old doctrine of Pith and Substance.

ORIGIN AND MEANING

[1] The Indian Constitution, art. 246

The Doctrine of Pith and Substance is a Canadian Doctrine. Canada also has federal structure of government with its power divided between the Parliament of Canada and its Provincial Legislatures. The Constitution of Canada that is Constitutional Act, 1867 which was previously known as The British North America Act, 1867 introduced two list under section 91 and 92 in which powers were assigned to the Dominion Parliament and the Provinces respectively. They both cannot legislate into the field of another but there was certain overlap between the subject matters in the list and inevitably it gave rise to the conflict between the Dominion Parliament and the Provincial Legislatures. To clear this doubt the Privy Council came up with the Pith and Substance Doctrine which stated that the statute must be analysed in accordance with its true nature and character. The case of *Cushing* v. *Dupuy*[2] laid the foundation for this doctrine with discussion of incidental or ancillary encroachment concept. In another case of Russel v. The Queen[3] the privy council stated that a statute must be analysed to identify the 'true nature and character' of the legislation in order to ascertain the class of subjection to where it really belongs. It was in the case of Union Colliery Company of British Columbia v. Bryden (1899) where the idea of 'true nature and character' was captured by Lord Watson in a metaphor where speaking for the Privy Council he said that the object was to identify "the whole pith and substance of the enactment"[4]. The phrase did originate in Canada but has its place in the Constitution of other countries as well such as India and Australia to settle the dispute which arises as a result of federal structure of government with separation of power between the

[2] 1880 UKPC 22

[3] (1882) 7 App Cas 829

[4] Tony Blackshiled, "Working the Metaphor: The Contrasting use of "Pith and Substance" in Indian and Australian Law" 50 Journal of Indian Law Institute 518-568 (2008)

Union and the States.

The literal meaning of pith is 'an essence of something' or 'true nature of something' and the meaning of substance is 'matter' or it can be interpreted as 'most important and significant part'. In legal sense it means to analyse the true nature, character or the significant part of a legislation in case of conflict.

DOCTRINE OF PITH AND SUBSTANCE UNDER INDIAN CONSTITUTION AND ITS APPLIBACLITY

India has a quasi-federal form of government and as stated above one of the essential features of federal form of system is Distribution of powers between the centre and the state. This distribution of power between the centre and the state is done on basis of some factors prevailing in one's country like local and political background. In America the subject of common interest is entrusted to the Central Government and the rest to the Sovereign States hence the American Constitution enumerates the power of the central government and leaves the residuary power to the states. Australia followed the same pattern of America. Canadians were conscious of unfortunate happening in USA culminating in Civil War of 1891 and they were aware of the shortcomings of the weak centre and hence they opted for strong centre.[5] India has also federal system with strong Centre. Where Australia has only one list Canada has two lists, India added one more list to it that is the Concurrent List. These three lists were already enumerated in The Government of India Act, 1935, as Federal, Provincial and Concurrent and this method was adopted by the present Constitution of India which

[5] Dr. J.N. Pandey, Constitutional Law of India (Central Law Agency, Allahabad 56th edn, 2019)

divided the power between the Union and the States on subject matters mentioned in the Union List, the state list and the Concurrent list.

This demarcation is laid down under Article 246 of the Indian Constitution stating the subject-matter of laws made by Parliament and by the legislatures of the States. The article refers to the three lists in the Seventh Schedule.

The Union list consists of 97 subjects and the subject matter mentioned in the list are of national importance like foreign affairs, union duties, taxes, banking currency, union duties etc. The State List consists of 66 subjects matters of local importance such as public order, police, local government, public health, agriculture, sanitisation etc. The Concurrent List has 47 subjects, in this list both centre and the state can make laws. However, in case of conflict over subject matter mentioned in the Concurrent List, the Central law will prevail as we follow federal system with a strong Centre. The Concurrent list was added to avoid rigidity between the Union and the State List.

A special provision[6] was also inserted by the Constitution's (One Hundred and first Amendment) Act 2016 with respect to goods and service tax as the subject matter.

Though the three list covers all the important subject matter but there may be such matters which are not mentioned in State List or Concurrent List. This residuary power to make laws on such subject matter lies with the Parliament under Article 248 of the Constitution. Entry 97 in the Union List also lays down that Parliament has exclusive power to make law with respect to any matter which are not mentioned in the Concurrent list or the

[6] Article 246A

State List. The Indian Constitution through its provisions clearly state that it leans towards federal structure with strong centre just like the Canadian.

The above Constitutional provisions dived the power between the Centre and the State, but the problem arises when there is overlap and conflict between laws made on same subject matter by the Parliament or the State, this is where the role of Supreme Court enters to resolve the conflict through the principles of interpretation and Pith and Substance is one of them.

APPLICABILITY

The Union and the State Legislature are supreme in their own sphere to make laws but if a law is passed which encroaches upon the sphere of another then to resolve the matter the court applies the Doctrine of Pith and Substance where the court interprets if the pith and substance of the law i.e., the true object of the legislation. The Doctrine was applied by the Privy Council in the case of *Prafulla Kumar Mukherjee* v. *Bank of Khulna*.[7]

In Bengal, Bengal Money Lender's Act, 1940 was passed by the State which set a limit on amount of money above which no money lender can collect the money from the borrowers[8]. Interest of the loan was limited and therefore this Act was challenged by the Moneylenders. It was challenged on the ground that law on Money lending and Money lenders effected the promissory notes and banking which is subject matter reserved for Federal

[7] AIR 1947 PC 60

[8] Bengal Money Lender's Act, 1940 Section 30 provided 'Notwithstanding anything contained in any law for the time being in force, or in any agreement, no borrower shall be liable to pay after the commencement of this Act more than a limited sum in respect of principal and interest or more than a certain percentage of the sum advanced by way of interest.

Legislature (Union) under entry 28 and 38 of List I and therefore the law is void on account of being ultra vires as it encroaches to the subject matter of the Union.

The Privy Council decision delivered by five judges Coram comprising of Lord Wright, Lord Poeter, Loerd Uthwatt, Sir Madhvan Nair and Sir John Beaumont JJ. As follows:[9]

The Bengal Money Lenders Act is not void either in whole or in part as being ultra vires the provincial legislature. It is valid because it deals in pith and substance with money lending. Whether it be urged that the Act trenches upon the federal list by making regulations for banking or promissory notes, it is still an answer that neither of that matter is its substance. It must inevitably happen from time to time that legislation, though purporting to deal with a subject in one list, touches also upon a subject in another list and the different provisions of the enactment may be so closely intertwined that blind observance to a strictly verbal interpretation would result in a large number of statutes being declared in valid because the legislature enacting them may appear to have legislated in a forbidden sphere. Hence the rule whereby the impugned statute is examined to ascertain its pith and substance or its true nature and character for the purpose of determining whether it is legislation with respect to matters in this list or in that list. The extent of invasion into another list is no doubt an important matter to be considered, not because the validity of the Act can be determined by discriminating between degrees of invasion, but for the purpose of determining the pith and substance of the impugned Act. The provisions of a provincial legislation may advance so far into

[9] 1947 SCC Online PC 6

federal territory as to show that its true nature is not concerned with provincial matters, but the question is not, as it trespassed more or less, but if the trespass, whatever it be, such as to show that the pith and substance of the impugned Act is not moneylending but promissory notes or banking. Once that question is determined, the Act falls on one or other side of the line and can be seen as valid or invalid according to its true content."

Hence the Privy Council held that the pith and substance of the Bengal Money Lenders Act is moneylending and the fact that money lending affects the promissory notes as they are taken as security for loan in a money-lending transaction does not affect the applicability of the Act as true nature and substance of the transaction is money-lending and promissory notes is the instrument for securing the loan.

In another important case of *State of Bombay* v. *F.N. Balsara*[10] the constitutional validity of The Bombay Prohibition Act, 1949 was challenged. The Act was applicable to foreign liquors which prohibited sale and possession of liquors in the State because it encroaches upon the power of the Dominion to make laws on import and export. The issue before the court was that whether the State Act encroached upon the Central subject.

In the Judgement delivered by Justice Fazl Ali it was stated that it is a well settled principle that the validity of an Act is not affected it incidentally trenches on matters outside the authorised field, and therefore it is necessary to inquire in each case what is the pith and substance of the Act Impugned.[11] It was further stated that if the true nature and character of the legislation or its pith and substance is not import and export of intoxicating

[10] AIR 1951 SC 318
[11] AIR 1951 SC 318

liquor but its sale and possession then it is not feasible to declare the Act to be invalid. In the present case if the prohibition on purchase, use, possession, transport etc. will affect its import then also this interference is only incidental in nature and therefore it cannot affect the competence of the Provincial Legislature to enact the law in question.

In the case of *K.T. Plantation Pvt Ltd* v. *State of Karnataka*[12], the constitutional validity of Roerich and Devika rani Roerich Estate (Acquisition and Transfer) Act, 1996 passed preserving the paintings, artefacts and other valuables and also for setting up Art-Gallery-cum Museum in public interest and the legal validity of section 110 of Karnataka Land Reform Act, 1961 and content of Article 300-A of the Constitution were involved. The issues inter alia before the Supreme Court were:

- Whether the Roerich and Devika Rani Roerich (Acquisition and Transfer) Act, 1966 was protected by Article 31 C of the Constitution of India and

- Whether the Acquisition Act was violative of Article 300 A as the Article is not by itself a source of legislative power but such power of State Legislature being traceable only to Entry 42 of List III of 7th schedule Acquisition and Requisition of Property" which excludes expropriation and confiscation of property.

The Supreme Court held that the Land used for Linaloe cultivation being governed by the provisions of Land Reforms Act was protected under Article 31-B of the Constitution for its inclusion in the IX Schedule.

[12] AIR 2011 SC 3430

The Acquisition Act was held to fall under Entry 18, List II as the dominant intention of the legislature was to preserve and protect Roerich's Estate covered by the provisions of Land Reforms Act on the withdrawal of exemption in respect of land used for Linaloe cultivation. The Act incidentally fell under Entry 42 of List III as well for the acquisition of paintings, artefacts and other valuables belonging to Roerichs. The Act was different was different form the Land Acquisition Act, 1894 which fell exclusively under Entry 42, List III enacted for the acquisition of land for public purpose, for companies and for determining the amount of compensation to be made on account of such acquisition. Therefore, no assent of the President was required under Article 254(2) to sustain the impugned Act which fell under Article 31-A (1) (a) for which the assent of the President was obtained. The Act was therefore not invalid for repugnancy. A Provision in one legislation to give effect to its dominant purpose may incidentally be on the same subject as covered by the provisions of the other legislation but such partial coverage of the same area in a different context and to achieve a different purpose does not bring about repugnancy intended to be covered by Article 254(2). The Acquisition Act being an estate under Article 31 A (2) was protected from challenge under Article 14 and 19 of the Constitution.

INCIDENTAL OR ANCILLARY ENCROACHMENT

Incidental or Ancillary encroachment is the essential aspect taken into account whenever the Doctrine of Pith and Substance is applied by the court. It can also be referred as Doctrine of Ancillary or Incidental encroachment which is not separate but a part of Doctrine of Pith and Substance. Even though the subject matters on which Union and the State can make law are demarcated but still as proved through above cases while

making a legislation it can incidentally and indirectly encroach into the matter of other. This is an unavoidable situation and because of this encroachment the Doctrine of Pith and Substance is applied. The degree and extent of encroachment has nothing to do with the case. The privy council applied a "proportionality" test, where it was stated that the relevant factor for determining such encroachment shall be the extent of the invasion by the provinces into subjects enumerated in the Federal List further, they also made clear that degree of invasion was relevant only because it might bear on pith and substance[13]. Summarily degree of invasion was the relevant factor in applying the test of Pith and Substance. However later in another case decided by the Supreme Court Patanjali Shastri J denied that degree of invasion was relevant factor at all. If the legislation has passed the test of Doctrine of Pith and Substance, it will be valid even if it encroaches on the whole of the subject matter of Union List.[14]

RECENT JUDGEMENTS

In a recent case the Supreme Court held that Securitization and Reconstruction of Financial Assets and Enforcement of Security Act 2002 is applicable to cooperative banks.[15] The issue present case was related to the scope of the legislative field covered by Entry 45 of List I.

Banking and Entry 32 of List II od the Seventh Schedule. The main question was the applicability of Security and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI ACT) to the co-operative banks. The Constitutional Bench held that the Doctrine

[13] Subaramanyam Chettiar v. Muttuswami Goundan AIR 1941 FC 47
[14] State of Bombay v. Narottam Jethabhai, AIR 1951 SC 69
[15] Pandurang Ganpati Chaugule v. Vishwasrao PatilMuegud Sahakari Bank Limited, (2020) 9 SCC 215

of Pith and Substance will also be applied in the present case. The bench mentioned one to many cases in relation to Doctrine of Pith and Substance. It concluded that since banking in Pith and Substance is covered under Entry 45 of List I, incidental trenching upon the field reserved for State under Entry 32 List II cannot invalidate a legislation. Taking note of the Doctrine of Pith and Substance the court held that *the co-operative banks under the State Legislation and multi-State co-operative banks are 'banks' under section 2(1)(c) of Security and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. The recovery is an essential part of banking; as such the recovery procedure prescribed under section 13 of the SARFAESI Act, a legislation relatable to Entry 45 List I of Seventh Schedule to the Constitution of India, is applicable.*[16]

In another recent and important case of *Jayant Verma & Ors.* v. *Union of India & Ors*[17], section 21A[18] of the Banking Regulation Act, 1949, which prohibits courts from re-opening any transaction between a bank and its debtor on the ground of excessive rate of interest, has been held to be not applicable to agricultural debts in States where Sate Debt Relief Acts are in force. The judgement by Justices R. F. Nariman densely discusses the principles of interpretation of legislative entries, legislative competence, and harmonization of entries. The court applied the Doctrine of Pith and Substance and held that Section 21A fell within the scope of Entry 45 of List I. As the judgement discussed about the principles of interpretation, they reiterated that one of the principles of interpretation is that legislative entries should receive widest possible interpretation and keeping this in consideration it was held that entry relating to banking covered provisions protecting loan transactions from judicial intervention.

[16] Ibid.
[17] AIR 2018 SC 1079
[18] (2018) 4 SCC 743

CONCLUSION

In the federal structure of government where there is separation of powers, conflicts are bound to arise. Even if the subject matters on which the Union and State can legislate are divided by the Constitution, there can be encroachments into the subject matter of another. With the help of the discussion of the judgements above, it is clear that even if the state made a law on its subject matter, it incidentally encroached on and touched the subject matters that come under the purview of the Union, so it is clear that such kinds of conflicts are unavoidable. The Doctrine of Pith and Substance is a well-established doctrine from the time of its origin in Canada and India, and this principle of interpretation has also been well established. Whenever a law's validity is challenged on account that it encroaches upon the matters mentioned in the Union List, it cannot be declared invalid on this ground because the Doctrine of Pith and Substance tests the true nature and character of the law as a whole. The extent of encroachment is also not an important factor in this doctrine, because if the extent and degree of encroachment were considered important parts of the doctrine, then most of the legislation declared by the state will be invalid, and the point and substance of the legislation will have little to do with it. As a result, the doctrine is critical in assisting the Indian judiciary in maintaining harmony between the centre-state relationship and rationale.

THE BIOLOGICAL DIVERSITY (AMENDMENT) BILL, 2021 AND ITS CHALLENGES

Priyanka*

Abstract

India adopted the Biological Diversity Act in 2002 to prevent the loss of biodiversity. Recently, there has been a debate on the intention and public concern of the government regarding the Biological Diversity (Amendment) Bill, 2021. The Amendment, Bill 2021, failed to establish a clear picture of regulatory provisions and left many unanswered questions related to proposed provisions. There is uncertainty in the modification and replacement of several terms and definitions throughout the bill, which creates serious ambiguities among the readers. The proposed document also selectively addresses India's international obligations related to the CBD and Nagoya Protocol towards bio-conservation, potentially infringing the FEBS rights of local people and communities

Keywords: *Biodiversity, The Biological Diversity (Amendment) Bill, 2021, CBD, Nagoya Protocol, FEBS.*

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INTRODUCTION

Biodiversity[1] refers to the variety of flora and fauna such as plants – wild as well as cultivated, animals – wild as well as domesticated, their ancestors, relatives, and a variety of microbes found on Earth. However, biodiversity is not limited to the diversity of organisms but also includes the environment in which they live, which together make the ecosystem. Biodiversity refers to the number of flora and fauna found in each geographical area and is related to the types of plants, animals, and microorganisms.[2] Biodiversity is the measure of the relative diversity among organisms present in different ecosystems.[3]

Over the past decades, widespread loss of biodiversity has affected all developed and developing countries immensely. This has given impetus to the development of the **'**Global Biodiversity Governance'. Marginalized communities are at increased risk due to species extinction, over-harvesting, adoption of exotic species, habitat loss, pollution, and climate change.[4] These concerns of loss of biodiversity have led to a gradual re-evaluation of how resource availability is integrated and coordinated with the developmental needs of mankind.

In this context, efforts are being made at the national and international levels related to biodiversity to come out with a feasible ecological policy.

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[1] The term "Biological Diversity" and "Biodiversity" is used interchangeably.

[2] Pullaiah, T. (2019). *Global Biodiversity*, Volume 1: Selected Countries in Asia. Canada USA: Apple Academic Press.

[3]Verma, Ashok. (2017). *Genetic Diversity as Buffer in Biodiversity*. 4. 61-63. 10.21088/ijb.2394.1391.4117.9.

[4] Moore, Andrew. (2019).1 *Million Species Are At Risk Of Extinction — Here's Why It Matters*.NC State University. Available at:: 1 Million Species Are At Risk Of Extinction — Here's Why It Matters | College of Natural Resources News (ncsu.edu)

As a result of the rapid loss of biodiversity, countries from all over the world came together at the Rio Summit in 1992 to reflect on this cause. The Convention on Biological Diversity (CBD) came into force on 29 December 1993, largely driven by the growing commitment of the international community to sustainable development.[5]

The Convention on Biological Diversity (CBD) is a legally binding multilateral treaty, that has got three main goals that include- conservation of biological diversity (or biodiversity), sustainable use of its components and fair and equitable sharing of benefits from genetic resources. The CBD laid the foundation for an ethical ban on the inappropriate use of biodiversity by the goals. Also, Article 15[6] and Article 8 (J)[7] of CBD, the attention of the international community was drawn to its goals and priorities. With these guidelines in mind, most of the CBD signatories reunited in Nagoya, Japan in 2010 and adopted the "Nagoya Protocol" to contribute toward biodiversity conservation.[8] The purpose of this protocol is to give effect to the provisions of fair and equitable distribution of the CBD.

Similarly, India, a major macro-biodiversity country, adopted the Biological Diversity Act (BDA) in the year 2002 to prevent the loss of biodiversity as

[5] CBD, *Convention on Biological Diversity*. Available at:: https://www.cbd.int

[6] Article 15 of the CBD recognizes the right of states to their genetic resources such as Animal genetic resources for food and agriculture, Forest genetic resources and Germplasm genetic resources that are preserved for various purposes such as breeding, preservation, and research.

[7] Article 8 (J) recognizes the rights of communities to their traditional knowledge of pharmaceuticals, herbal medicines and other products.

[8] *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity*: text and annex / Secretariat of the Convention on Biological Diversity. Available at: https://www.cbd.int/abs/doc/protocol/nagoya-protocol-en.pdf

well as to reverse the effects of loss.[9] Till now, the BD Act has been regarded as a significant step toward the conservation of India's vast biodiversity. The Government of India took cognizance of the provisions of the CBD and realized the importance of conservation of biological resources which were falling fragile due to the pressure of biotechnological developments. As result, this umbrella law had been implemented in the year 2002 for safeguarding the ecology in a wider context. Now once again, there has been a debate on the intention and public concern of the government regarding the Biological Diversity (Amendment) Bill, 2021.[10] There are contentions which emphasize how this proposed amendment will demean the present legal safeguards provisions of the indigenous communities in India's biodiversity and empower multiple agencies like the National Biodiversity Authority (NBA) and the State Biodiversity Boards (SBBs).

In this context, the Indian Government is going to amend the Biodiversity Act, for which the Joint Committee of Parliament had sought objections or suggestions from the people. The Joint Committee of Parliament, in a public notice dated 16 December 2021, had sought public opinion on these amendments within 15 working days. That is, people must submit their opinion, and objections to these amendments by 31 January 2022. However, this question is still being asked in various circles as to why this important amendment was not referred to the Parliamentary Standing Committee on

[9] *National Biodiversity Authority*. Available at: http://nbaindia.org/content/20/35/1/bmc.html

[10] Tandon, Mridhu. Jain, Utkarsh. (2022). How Proposed Changes to the Biodiversity Act Lie on the Wrong Side of the Law. New Delhi: *The Wire: Science*. Available at: https://science.thewire.in/environment/bill-amendments-biological-diversity-act-benefit-sharing-protection-rights/

Science and Environment instead of the Joint Committee.[11]

It is noteworthy that this law only came into the form of law after a decade of intense deliberation across the country in 2002 which was needed since the 90s itself. In that sense, is just 15 days enough for so many radical amendments in it? Apart from this, this law is also a product of the United Nations convention that has taken place on biological resources. Therefore, the Indian government should strictly adhere to the objectives of all those international conventions and especially the 'Nagoya Protocol' because this law is also directly related to India's patent, intellectual property rights and sovereignty of the traditional knowledge related to local communities.

SPECIFIC LEGAL AND POLICY CONCERNS

The Biological Diversity (Amendment) Bill 2021 is the proposed amendment to the Biological Diversity Act, 2002. Now, it is facing some objections because of its certain provisions such as exemption to Ayurveda, Yoga and Naturopathy, Unani, Siddha, and Homeopathy (AYUSH) practitioners in the procedures for access and benefit-sharing (ABS) in terms of the biological resources such as medicinal and aromatic plants.[12] However, this bill represents clarity at some level (e.g., definition of terms such as 'Access'[13] in the Sec 3 (a) of this proposed amendment), but there

[11] Express News Service (2021). Refer Biological Diversity Bill to standing committee: Ramesh. Delhi: *The Indian Express*. Available at:: https://indianexpress.com/article/india/refer-biological-diversity-bill-to-standing-committee-ramesh-7678571/

[12] Bhutani, Shalini. Kohli, Kanchi. (2022). Why Amendments to India's Biodiversity Act Need a Public Debate. New Delhi: *The Wire*. Available at:: https://thewire.in/government/why-amendments-to-indias-biodiversity-act-need-a-public-debate

[13] The Biological Diversity (Amendment) Bill, 2021 defines "access" as collecting, procuring or possessing any biological resource occurring in or obtained from India or

are many amendments proposed in the bill that depict more confusion and it needs clarity.[14] All these present unclear or legal ambiguity demand a proper interpretation, otherwise, it will fail to address the real intent of the Biological Diversity Act.

The legal fraternity believes that some of the provisions in the proposed Act are proving to be a relaxation of the norms of protection of biodiversity, which can also be harmful to the ecology and go against the principle of sharing commercial benefits with indigenous communities.[15] Also, they have expressed their concerns that how the Biological Diversity (Amendment) Bill 2021 did not fulfil the requirements of the pre-legislative consultative policy. It has been introduced without any public deliberation which is the most important component in the policy decision making. In this sense, there is a need for proper consultations at the initial stage of any policymaking because it provides a platform for the public and various stakeholders to interact with the policymakers in a real sense and equips the policymakers with the perspectives and new ideas of people.

In addition, this proposed amendment emphasizes more foreign investment which will bring challenges to the local communities and biological resources in terms of commercial benefit sharing. As the Ministry of Environment, Forest and Climate Change of India has also specifically revealed the matter of focusing on the interests of institutions and agencies

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associated traditional knowledge thereto, for research or bio-survey or commercial utilisation.

[14] Supra note 10

[15] Nandi, Jayshree. (2021). Why legal experts are concerned about the Biological Diversity Amendment Bill 2021. New Delhi: *Hindustan Times*. Available at:: https://www.hindustantimes.com/india-news/why-legal-experts-are-concerned-about-the-biological-diversity-amendment-bill-2021-101639759979049.html

related to only four sectors, such as the seed-producing sector, industry sector and research sector and shared the intention of changes. Thus, this policy brings a conflicting situation in the protection of biodiversity and the rights of all the indigenous communities.[16]

It is an irony that this proposed amendment focuses on the commercialization and exploitation of biological resources instead of addressing the rights of indigenous communities and the conservation of biological resources. Along with, it will not be exaggerated to say that there was a lack of democratic decisions in taking this policy decision, because it was consulted only among the industrialists before presenting the amendments in the Parliament. In that sense, India should have considered local deliberations of all stakeholders to decide and determine the benefit-sharing of the Biodiversity Act while following international Access to Benefit Sharing (ABS) agreements. Therefore, the proposed amendment to India's Biodiversity Act needs a public debate in its true sense.

The proposed amendment describes that when it comes to the commercialization and exploitation of the bio-resources, whether by an Indian company/entity or a "foreign-controlled company", the impact on biodiversity does not matter. It is a matter of great concern that there is no proper justification available to protect the uncodified traditional knowledge in the proposed amendment.[17] This bill is advocating for relaxation of the pharmaceutical industry and significantly benefits the AYUSH Ministry in

[16] The Biological Diversity Act, 2002. Available at: https://www.indiacode.nic.in/bitstream/123456789/2046/1/200318.pdf

[17] Supra note 10

the usage of codified knowledge[18] to a large extent.

It is worth noting that India is a major mega-biodiversity country, where there is a vast store of genetic resources related to flora and fauna. We cannot deny that the Biological Diversity Act 2002 is a vital form of legislation which is the main instructor of biodiversity governance in the country. However, it has some ambiguities in regulation and mechanism which hinders the path of a just, equitable, humane, and sustainable society. Therefore, it is necessary that before taking policy decisions (The Biological Diversity [Amendment] Bill, 2021) related to biological diversity, an integrated re-evaluation of all human resource development and available resources should be done so that the importance of bio-conservation remains intact. In the same sequence, biodiversity governance must be ensured in such a way that the benefits of knowledge of biological resources reach the traditional communities directly. Therefore, this paper attempts to see the loopholes of the proposed amendments as there are so many unacceptable provisions which are contradictory to the Biological Diversity Act, 2002.

AN IRONY OF THE BIOLOGICAL DIVERSITY ACT IN INDIA

After 30 years of the Convention on Biodiversity, the Indian government still has not succeeded to fulfil the commitment toward Biodiversity law in the true sense because of poor regulatory mechanism and implementation. The recently proposed bill also created several challenges among policy experts and other stakeholders because of its absurd and objectionable provisions which are not feasible. As we know, the Biological Diversity

[18] According to the World Intellectual Property Organisation (WIPO) - Codified traditional knowledge is knowledge which is documented and is systematically arranged.

(Amendment) Bill 2021 (Bill No. 158 of 2021) was brought before the parliament by the Union Minister of Environment, Forest, and Climate Change (Mr Bhupinder Rawat) on 16th December 2021. It is still before a Joint Parliamentary Committee which to date conducted almost 10 sittings for discussions or deliberations with various stakeholders related to this bill. One more thing to notice is that this proposed bill selectively focuses on India's international commitment or responds to concerns of the industry which also ruin the objective of the principal act[19].

In addition to the discussion on biodiversity legislation in India, we found it is always a debatable issue since its inception. Before enacting BDA, 2002[20] also our parliamentarians did not show their genuine consideration or interest in this subject, there were only a few discussions that happened at that time which had depicted no serious attempt on the issues related to biodiversity and its challenges. The saddest part is that our parliamentarians still do not give attention to this subject and ignore its gravity, whereas this act is also interlinked with various other laws such as forest rights in India.

The recent Biological Diversity (Amendment) Bill, 2021 has also faced criticism by opposition parties and legal experts. Especially as how the amendments to the Biological Diversity Act were tabled in Parliament without consulting the Standing Committee on Science and Technology, Environment, Forests & Climate Change. According to the Chairman of the above-mentioned standing committee, this step is a "deliberate insult to the standing committee."[21] Similarly, legal experts showed their concerns on this

[19] The Biological Diversity Act, 2002

[20] Parliamentary Debates Official Report: The Biological Diversity Bill, 2002

[21] Sirur, Simrin. (2021). Jairam Ramesh writes to Speaker as govt 'bypasses' standing committee on Biodiversity Act tweak. *The Print*. Available at:

point and said that parliamentary procedure should be followed in introducing any law. It is important to consider that the standing committee has the power of reviewing all the concerns related to the Environment, Forests and Climate Change as it is a permanent panel which is permanent and functional throughout the year. Whereas the select committee is a temporary panel related to this mentioned bill.

The Biological Diversity (Amendment) Bill, 2021, introduced in Lok Sabha, has been referred to the Joint Committee of Parliament for examination and report. Given the broader implications of the proposed bill, the committee, chaired by Dr. Sanjay Jaiswal (MP), has decided to solicit memoranda containing views and suggestions from the general public, as well as NGOs, experts, stakeholders, and institutions in particular. The Joint Committee on the Biological Diversity (Amendment) Bill, 2021, has 31 members. Following this initiative, the Joint Committee held 13 meetings with various stakeholders.[22]

Moving into the main part of this proposed amendment we have to consider that the Biodiversity Bill 2021, in its present form, has many flaws. However, the bill claims to the Convention on Biodiversity (CBD), 1992 but it seems that the spirit of the Convention is not put into practice. It is designed to ensure the conservation of biodiversity, its sustainable use and equitable sharing of benefits among the beneficiaries. Apart from this, this law is also a product of the United Nations conventions that have taken place on biological resources such as CBD. It cannot be denied that India

https://theprint.in/environment/jairam-ramesh-writes-to-speaker-as-govt-bypasses-standing-committee-on-biodiversity-act-tweak/783603/

[22] See, *PRS Legislative Research*. Available at: https://prsindia.org/parliamentary-committees/joint-committee-on-the-biological-diversity-amendment-bill-2021

recognizes the objectives of these international conventions and the "Nagoya Protocol". This law is also directly related to India's patent, intellectual property rights and sovereignty.

In this amendment act, Union Environment Minister, on behalf of his ministry, has given its objectives in total 7 points in the last part of this draft[23]. In the first 4 points, concerned minister has explained the importance of this law and its relevance and coming to the fifth point, he says, "But due to all these features, the present form of this law is related to the medical sector related to biological resources, seed production. It is being repeatedly said on behalf of various stakeholders like sector, industry sector, and research sector that there is a need to simplify this law and reduce the conditions contained in it so that for joint research and investment, local communities can be benefited. Along with it, the scope of sharing of benefits can be increased and the conservation of biological resources can be further encouraged."

It is noteworthy that the Union Environment Minister did not mention in this draft that the existing law has any problem with the local communities, the tribals who have traditionally used these biological resources and other communities or gram sabhas living in the forest etc. Where the geo-politics of the country has reached, the interests of the organized sectors and the local communities have been turned against each other in every respect. As such, these amendments should also be viewed from this point of view.

However, the Ministry has introduced this draft of amendments only at the

[23] See, *Statement of Objects and Reasons in the Biological Diversity (Amendment) Bill, 2021*. Available at: https://prsindia.org/files/bills_acts/bills_parliament/2021/Biological%20Diversity%20(Amendment)%20Bill,%202021.pdf

request of the beneficiaries of these special sectors or areas, whose declared main objectives are given in point 6, which are as follows-

(i) It is necessary to reduce the pressure and dependence on wild medicinal plants and for this, it is necessary to encourage the cultivation (production) of medicinal plants.

(ii) To promote the Indian system of medicine.

(iii) To use the biological resources, present in India in such a way as to expedite research, patent application process, transfer of research results, without compromising with the United Nations Convention on Biological Diversity and its NAYOGA Protocol.

(iv) To absolve of offenses contained in certain provisions.

(v) To bring in maximum foreign investment keeping in view the research, patent and commercial interests of the range of biological resources without compromising on the interests of the country.

The above-mentioned changes of this proposed amendment have created many contentions. As concerned Minister has said while explaining the need for changes in this law, the present form of this law has objections to the institutions and agencies related to the medical sector, seed-producing sector, industry sector, and research sector. Therefore, it is certain that these proposed amendments are being brought keeping in mind the interests of these four areas. In this regard, we have to look into all these areas minutely to figure out the idea behind this legal attempt in a true sense.

Medical field- Indian system of medicine and AYUSH department of the government have been cited for this, but, on the pretext of this Ayurveda, one non-profit trust has established control of the country's market in a

very short time on the biological wealth of the country. This thing is not hidden from anyone. The performance and utility of the AYUSH department are yet to be established.[24]

In this regard, a not-for-profit trust known as Patanjali (Divya Pharmacy Case) has been accused of exploitation of biological wealth and profit-sharing with local communities because of this law.[25] This current law gives special importance to local traditional knowledge and puts their interests first, which poses difficulties for such commercial but self-professional establishments to plunder organic wealth. So, these apprehensions are reinforced as to what these amendments are ultimately trying to pave the way for in the medical field.[26]

In the annual report of the Protection of Plants Variety and Farmers Rights Authority, it has been told that in the year 2021 a total of 602 applications have been received by the authority which 237 applications are from the private sector, 193 are from the public sector and 172 are from farmers. Of these applications, 242 applications were received for crops that are becoming extinct (based on shared knowledge), 186 applications for seeds

[24] Dutta, Ritwick. (2022). Corporate control over biodiversity? That's what this new Bill would like to see. *Frontline*. Available at: https://frontline.thehindu.com/environment/a-corporate-turn-biological-diversity-amendment-bill-favours-corporate-control-over-biodiversity/article65464082.ece

[25] Jojan, Alphonsa, (2019). Developing Bio-Cultural Jurisprudence for Securing Rights of Indigenous Peoples and Local Communities – Divya Pharmacy v. UoI. *SpicyIp*. Available at: https://spicyip.com/2019/03/developing-bio-cultural-jurisprudence-for-securing-rights-of-indigenous-peoples-and-local-communities-divya-pharmacy-v-uoi.html

[26] Dr Marla, Soma. (2022). Free access for pharma corporates to loot rare forest wealth. *The Leaflet*. Available at: https://theleaflet.in/free-access-for-pharma-corporates-to-loot-rare-forest-wealth/

of new crops and 2 applications for gene production.[27] These figures create a picture that the private sector or the public sector, ready to go into private hands tomorrow, is looking at its future in the field of biological property. Undoubtedly, coming here, the important purpose of these amendments is also to encourage foreign investment.

There is also a special provision in this Act that if a "seed company" of any group of farmers has obtained rights or permission under the Protection of Plant Variety and Farmers' Rights, 2001, then that group would not need to be licensed again under the Biodiversity Act. It is noteworthy that the Protection of Plant Variety and Farmers' Rights, 2001 gives seed companies intellectual property rights to the seeds they have developed and also gives these rights to farmers on the seeds they have traditionally protected.

A cursory glance at the said bill reveals that the main objective of the proposed bill is to promote ease of doing business for those areas which are prominently dependent on biological resources. It appears to be a policy problem that the bill has only a footnote that mentions protection and benefits to local communities. The strangest thing is that the bill does not explicitly consider these communities and forest dwellers to be "stakeholders". Therefore, it is fair to say in this context that this proposed bill in a way intends to undermine the positive development of India's biodiversity regime to ensure democratization.

If we look at the industry sector, then it was prevalent about the disputed three agricultural laws of last year that they have been brought only for the

[27] Protection of Plant Varieties and Farmers' Rights Authority. (2021). *Annual Report:2020–21*. Available at: https://plantauthority.gov.in/sites/default/files/final-annual-report-2020-21.pdf

unfettered possession of the industrialists on agriculture and farming, for which the government of the country could not give any concrete answer. However, the government hurriedly put an end to the discussion, basing it on practical politics and impending elections. But the above proposed Act of Biodiversity has once again exposed the intention of the government that it is giving more importance to the capitalist class.

This proposed amendment should also be seen from the point of view that by amending this law for big multinational corporate houses eager to invest in forest-based food items and agricultural products (agri-commodity), how much for their business profit. There will be a golden opportunity that they will be able to make uninterrupted progress. The recently released "Global Canopy Report Forest 500"[28] data provides us with important information in this direction. It talks about such a big business which is completely based on the destruction of forests and which has also been included in our daily lives forever to meet the food needs. So far, the business of such industries/companies in the whole world has been worth 500 trillion dollars, which is twice the total GDP of the United Kingdom. Although this business is mainly focused on palm oil, soya, dairy and timber, ultimately its basic need is uninterrupted control of natural forests. It is not a coincidence that industrial initiatives are also taking place in making seeds and jeans, whose eyes are also on these natural forests.[29]

[28] Burley, H. & Thomson, E. (2021). A climate wake-up: but business failing to hear the alarm on deforestation. *2022 Annual Report: Global Canopy*, Oxford, UK. Available at: https://forest500.org/sites/default/files/forest500_2022report_final.pdf

[29] Ropes & Gray (March 8, 2022) Pending and Proposed Deforestation Legislation Will Add New Supply Chain Due Diligence and Reporting Requirements – An Overview of U.K., *EU and U.S. Federal and State Initiatives*. Available at: https://www.ropesgray.com/en/newsroom/alerts/2022/March/Pending-and-Proposed-Deforestation-Legislation-Will-Add-New-Supply-Chain-Due-Diligence

If we consider the point of the "research sector" under the proposed Bill, we find that the scope of research is very wide. Therefore, it is very important to decide first of all what are the objectives of any kind of research related to bio-resources? It is also no longer hidden from anyone that only large private and business classes come in the role of investors in making these activities meaningful. In other words, it is not difficult to understand whose interests it ultimately serves to promote all such joint research (e.g., big private entity/ multinational corporation).

It should always be remembered that the sharing of research results among different agencies is a complex process in the existing law, but in many cases, violation of law is also considered criminal. Regarding which the present proposed amendment is taking the opposite stance and is moving towards giving it the name of "civil offense" instead of considering it in the serious category of offenses. In this sense, it seems appropriate to say that this bill is also showing the intention of giving tremendous relaxation in the field of India's existing patent law, intellectual property rights and biopiracy. The ministry is looking at the possibilities of attracting foreign investment with this effort, which in a way is inviting new challenges for the country's bio-resources and their associated communities.

Apart from these apprehensions and issues, some other provisions such as a large-scale overhaul of the National Biodiversity Authority are also seen as a threat to its democratic nature. But it includes Agricultural Research and Education, Ministry of Agriculture and Farmers Welfare, AYUSH, Biotechnology, Forest, Environment and Climate Ministry, Forest and Wildlife, Forestry Research Institute, Earth Science, Panchayati Raj, Science and Technology, Scientific and Industrial Research, involving representatives of the Ministry of Tribal Affairs, etc can be a multipurpose

initiative, with mixed reactions to it.

But the success of such decisions cannot be overstated. However, this structural change makes it clear that the Ministry of Forest, Environment and Climate Change is trying to tighten its grip on this biodiversity authority. This can be estimated from the fact that as the Member Secretary of the Ministry of Forests and Environment, his importance in this authority will be much more.

However, now the matter is with the Joint Committee of Parliament and its report is awaited. It is to be expected that the Committee, after due deliberation on these amendments, will consider all its references transparently and try to maintain it in the interests of those who have the purpose for which this act came into existence.

CONCLUSION

In short, the Biological Diversity (Amendment) Bill, 2021 does not provide appropriate solutions to the problems of biodiversity on the ground. It defeats the intents of the Biological Diversity Act, 2002, the Convention on Biodiversity, 1992 and the Nagoya Protocol, 2010 by increasing access but decreasing benefit sharing. The major concern with the amendment bill is that corporate or foreign interests may exploit the loopholes in the permissions granted to traditional medicine and use it for commercial purposes, without sharing the benefits with the custodians of biodiversity. The recent Bill does not utter a single word about the protection of biodiversity and deliberately ignores the traditional rights of indigenous people.

In addition, the proposed amendment suffers from many ambiguities

related to its own regulatory and punitive provisions. Especially, the drafting of this Bill failed to reflect the status of international obligation and India's commitment to conserving the bioresources. Also, in the absence of a clear legislative framework, the bill is lacking vision which does not address substantive issues related to Indian biodiversity.

There are various concerns regarding this proposed amendment which need to be addressed in ensuring the democratization of biodiversity governance in the country. No public debate or consultations were done before presenting this Bill in the parliament which disconnects the relevant stakeholders and public at large from the legislature in the policy-making process.

This Bill is prioritizing trade over bio-conservation. Moreover, AYUSH Practitioners no longer need to seek approval for exemption, this will pave the way for "Bio-Piracy". The trade of biopiracy is the practice of exploiting naturally occurring genetic or biochemical material. In this way, this Bill decriminalizes violations like biopiracy and curtails the deterrent powers of the principal act which will create a big challenge in controlling the wildlife hunting, poaching, and smuggling and the illegal trade of all types of wild species.

The proposed amendments allow State Biodiversity Boards to represent BMCs to determine the terms of profit-sharing which is a sign of disempowerment of Biodiversity Management Committees. Whereas under the Biodiversity Act 2002, National and State Biodiversity Boards are required to consult Biodiversity Management Committees (constituted by each local body) while taking any decision relating to the use of biological resources.

The Bill gives an exemption for cultivated medicinal plants from the purview of the Act. However, it is practically impossible to know which plants should be cultivated and which plants are wild. So, this system needs to be elaborated further. No doubt, this provision may allow large companies to avoid the need for prior approval under the Biological Diversity Act's scope and benefit-sharing provisions, or to share profits with local communities. In this way, the proposed amendment bypassed haphazardly the concerns of the local community and corporatized its biological diversity along with all the traditional knowledge.

Finally, the Bill is not showing harmony with the traditional knowledge and rights of the indigenous communities regarding the commercial utilization of biological resources whereas local opinions matter judiciously in Biodiversity planning or legislation at large. There is a strong need to acknowledge the knowledge of local communities and promote them, also need to establish a two-way channel with the local communities.

EDUCATIONAL RIGHTS OF MINORITIES UNDER ARTICLE 30: A CRITICAL APPRAISAL

Manish Kumar*

Abstract

India is a diverse country where people are divided on the basis of race, religion, caste, culture, and socio-economic factors. The preamble to the Indian Constitution guarantees equality, which cannot be provided without protecting or safeguarding the rights of minorities. This paper focuses on the meaning of "minority" and the classification of minorities in India and examines whether Article 30 of the Indian Constitution prevents the state from imposing reasonable restrictions to make the administration of minority institutions transparent. It also examines the critical appraisal of Article 30, whether it is fulfilling the real idea as laid down by the framers, or whether it has been deviated from its real objective and affects the rights of the majority. Finally, it attempts to provide a conclusion and suggestions for balancing the educational rights of minorities and majorities in India.

Keywords: *Constitution of India, Minorities Rights, Article 30, Education.*

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INTRODUCTION

India is a diverse country where people are divided on the basis of race, religion, caste, culture, and socio-economic factors. The preamble of the Indian Constitution guarantees equality, which is a fundamental feature of the constitution, as well as the provisions of Articles 14-18. Equality cannot be provided without protecting or safeguarding the rights of minorities under Article 30 of the Indian Constitution, which provides for the preservation of minorities' rights.

Concept of Minority

The word "minority" has its origins in the Latin word "minor," which means smaller. A minority or minority group is a population or group having unique social, religious, racial, ethnic, or other characteristics that are different from those of a majority group.

International Law

Article 1 of the United Nations minority declaration defines minorities as groups based on cultural, ethnic, religious, and linguistic identity and provides a duty on states to protect their existence. Despite the fact that there are no internationally agreed-upon groups that constitute minorities, according to international law or United Nations declarations on minorities. Being a minority is a question of fact, showing that the definition of minorities must have objective as well as subjective factors. The reason behind not having a common definition of minorities is the various situations in which minorities live. Some live in well-defined areas and are

eliminated from the majority population, whereas others are excreted throughout the state.[1]

The expression "minorities," as used in the United Nations human rights system, refers to religious, ethnic, and linguistic minorities. Different states have different minority groups within their state territories designated by their own religious, linguistic, or ethnic identity that is different from that of the majority population.

Recently, in the year 2019, the United Nations General Assembly reviewed the approaches and jurisprudence on the concept of minorities in order to provide clarity for a better understanding of the term and for their stakeholders, with the goal of upholding minorities' human rights.

United Nations General Assembly

An ethnic, religious, and linguistic minority is any group of persons that constitutes less than half of the population in the entire territory of a state and whose members share common characteristics of culture, religion, or language, or a combination of any of these. A person can freely belong to an ethnic, religious, or linguistic minority without any requirement of citizenship, residence, official recognition, or any other status.[2]

Constitution of India

[1] UNHR, "*Minority Rights: International Standard and Guidance for Implementation*" (HR/PUB/10/3), para: 568

[2] "*Concept of minority: Mandate definition*", Available at: https://www.ohchr.org/en/special-procedures/sr-minority-issues/concept-minority-mandate-definition

The term "minorities" is not clarified in the Indian Constitution. One can try to derive certain ideas regarding minorities from the various articles in the Indian Constitution and reports from the government. Article 29 (1) declares that anyone with "a distinct language, script, or culture of its own has the right to conserve it."[3]

From the words of this very article, we can understand that groups or communities having distinct language, script or culture fall under Minority Communities. But in many cases, such as *Bal Patil* v. *Union of India*[4] and the *Islamic Academy of Education* v. *State of Karnataka*,[5] the apex court has laid down other factors to decide whether a community is Minority or not. Such as economic welfare.

People of the Muslim, Sikh, Christian, Buddhist, Parsi, and Jain faiths have minority community status in India, according to the Indian Gazette of January 27, 2014. Section 2 clause (c) of the National Commission on Minorities Act declares six communities as "minority communities." They are as follows:[6]

1) Muslims, 2) Christians, 3) Buddhists, 4) Sikhs, 5) Jains; and 6) Zoroastrians

In general, the term "minority" or "minority group" in law usually refers to a group of people who are subjected to oppression and discrimination by those who are in the majority or have more power in society.

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[3] Constitution of India, Art. 29(1)
[4] (2005) 9 SCC 352
[5] (2004) 13 SCC 3
[6] Shikha Goyal, '*Minorities Rights in India*', Jagran Josh, 18 December, 2020; Available at: https://www.jagranjosh.com/general-knowledge/minorities-right-day-in-india-1576589222-1

Classification Of Minority Under Article 30

Minority can be based on ethnicity (ethnic Minority), Race (Racial Minority), Religion (Religious minority), sexual orientation (Sexual minority) or Linguistic Minority.

The minorities which are covered under Article 30 of the constitution of India are:

(a) Religious Minority and (b) Linguistic minorities.

Religious Minority

The Union Government of India has designated these six communities as minorities in India. They are - Muslims, Christians, Sikhs, Jains, and Zoroastrian. India is a secular country. In India there are many religious groups some of these are greater in number and in dominant position hence considered as majority group.[7]

For example, In India Hindus are at dominant position and greater in population thus considered as majority group and Muslim Christians Sikh etc. are laser in terms of population and hence considered as minority group. India is a diverse country having multi religion it is very important for the government to safeguard and protect the religious rights of minorities.

In 1992 to the National commission for minorities was established by the central government to protect the religious rites and other rights of minorities in India.

[7] Ibid.

Linguistic Minority

Linguistic minorities are the group of people having a different language or mother tongue from those of the majority group the Indian Constitution protects and safeguard the rights of linguistic minorities. In the original constitution of India there was no provision with respect to the special officer for linguistic minorities. Article 350 was inserted in the Constitution by the seventh constitutional amendment act 1956.

Article 350B provides that the President of India shall appoint a special officer for linguistic minorities for the purpose of investigation in matters relating to the safeguard provided for linguistic minorities

Article 350A of the Constitution of India imposes an obligation on the state to provide adequate facilities for instruction in the mother language of children belonging to the linguistic minority community at primary level of education.[8]

No State Wise Minority Classification

The Supreme Court rejected the PIL filed by BJP leader and lawyer Ashwani Kumar Upadhyay seeking from the court to lay down guidelines to Accord minority status based on State wise population of a community. The supreme court held that religion must be considered Pan India. The court said that religions don't have state borders. The petitioner argues that in several eastern states Hindus are in minority and Hindus community is deprived of benefit.

Currently in India Linguistic minorities were identified on a State wise basis

[8] Constitution of India, Arts. 350, 350A & 350B

and linguistic minorities were determined by the state government. On the other hand, religious minorities are determined by the central government. However, the supreme court held that states are created based on languages. Languages are restricted State wise, but religion cannot be restricted State wise.[9]

The term 'Minority' under Article 30 of the constitution of India, must be one based on religion or language i.e., religious minority and Linguistic minority. The Supreme Court of India, by judicial interpretation, also tries to resolve the dispute of the word Minority since it is not defined in the constitution of India for the purpose of Article -30.

In *Re Kerala education Bill Case*, The Supreme Court held that minority means a community or group whose population is less than 50% of the total state population[10].

In *A.M Patroni* v. *Kesavan*, The Kerala High Court held that the word minority is not defined in the constitution so any community religious and linguistic which is less than 50% of the state population is entitled to fundamental rights guaranteed under article 30 of the Indian Constitution.[11]

In *St. Stephen's College* v. *University of Delhi*, The Apex court has held that minorities under Article 30 consist of those who form a distinct or

[9] Ashish Tripathi, *Supreme court notice to center on plea against law on recognizing minorities to run educational institutions*, Deccan herald, 28 August 2020, Available at: https://www.deccanherald.com/national/sc-notice-to-centre-on-plea-against-law-on-recognising-minorities-to-run-educational-institutions-879181.html

[10] *Re Kerala Education Bill,* AIR 1958 SC 956

[11] *Aldo Maria Patroni* v. *E.C Kesavan*, AIR 1965, Ker

identifiable group of citizens of India.[12]

Article 30 of The Constitution of India,1950 and its Interpretation

Article -30 of Indian constitution has two clauses. Article-30(1), guarantees to all linguistic and religious minorities, the right to establish and the right to administer educational institutions of their own choice, the right guaranteed under Article 30 (1) is provided only to two types of minorities namely Religious or linguistic.[13]

The above-mentioned article contains the words "establish" and "administer". The word establish means the right to bring into existence and the right to administer an institution means the right to manage and control the affairs of the institution. This indicates that the management of the minority educational institutions must be free of unnecessary control and restrictions over such institutions by the state. The purpose behind establishing such institutions is to protect the religion, culture, or language of minorities and for providing general education to their children in their own language.

Article 30 (2) prohibits the state from discriminating in the matter of providing it to any educational institution on the ground that the institution is managed and done by religious or linguistic minorities.[14]

The above-mentioned article restricts denial from providing aid to minorities institutions. If any state makes such discrimination in the matter of providing aid to any educational institution on the grounds that such

[12] *St. Stephen's college* v. *University of Delhi* ,1992 ,1 SSC 558
[13] Constitution of India, Art. 30 (1)
[14] Constitution of India, Art. 30 (2)

institution is managed and run by a minority will be considered as violation of Article 30(2). Article 30 applies to both citizens and non-citizens.

The Constitution 44th Amendment Act, 1978

Right to property as fundamental right under Article 19(1) (f) and 31 of the Indian Constitution was abolished by constitutional 44th amendment act, 1978. In consequence, Article 19 (1) (f) and 31 from part III of the Constitution was omitted. However, the legislature has taken due care that the elimination of the right to property from the list of fundamental rights would not averse the right of minorities to establish and minister educational institutions of their choice. To ensure this clause 1A was added in article 30 of the Indian Constitution by the same amendment, i.e., 44th Amendment Act, 1978. clause 1A of article 30 of Indian constitution declares that, in formulating any law for the compulsory acquisition of any property which belongs to education institution of minority mentioned under clause 1A of article 30, the state shall ensure that the amount prescribed under such law for the acquisition of any such property is such as would not abrogate or infringed the right guaranteed under clause (1) of article 30.[15]

Relationship Between Article - 29 (1) And Article - 30(1)

In the case of *St. Xavier's College* v. *State of Gujarat*, The Apex court has elaborately examined the inter-relations of Article 29(1) and Article 30 (1). In this case, the petitioner who was running St. Xavier's College of arts and commerce in Ahmedabad challenge the section 33A, 40, 41, 51A, 52A of the Gujarat University Act, 1949 as amended by Act of 1973.The state

[15] Constitution of India, Art.19(1)(f), 30(1) & 30(1A)

argued that the protection to minorities was not provided to this college under Article 30(!), the reason behind the same is that the college was not founded for the protection of language, script or culture as provided in article 29 of the constitution the court after examining its earlier decisions in *Re Kerala Education Bill*[16], *W. Proort* v. *State of Bihar*[17], *Siddhraj Bhai* v. *State of Gujarat*[18], held the institutions communicating general secular education were covered under Article 30(1). The motive behind Article 30(1) is to provide education to children of minorities in such a way that they go out in the world fully prepared. It Will not be true to read Article 30(1) as the right of minorities to establish and administer educational institutions of their choice only in cases related with language, script and culture of minorities. Article 29(1) and 30(1) should be taken as two different Rights.[19]

Article 29(1) is general protection provided to all citizens to preserve their language, script, or culture whereas Article 30(1) declares a special right to minorities to establish and administer educational institutions of their choice.

Mentioned below are the following distinctions between Article 29(1) and Article 30(1)

Article 29(1) guarantees the right to citizens of any section which includes majority sections also whereas Article 30(1) guarantees the right to citizens who are minorities based on language or religion.

Article 29(1) is related only to three subjects which are language, culture, or script whereas Article 30(1) deals with minorities based on language or

[16] AIR 1958 SC 956
[17] AIR 1968 SC 475
[18] AIR 1963 SC 540
[19] *St. Xavier's College* v. *State of Gujarat*, AIR 1974 SC 1389

religion.

Article 29(1) is not restricted to education as such whereas Article 30(1) deals only with the establishment and administration of educational institutions.

Article 29(1) is related to the right to conserve script, language, or culture whereas Article 30(1) guarantees the right to establish and administer educational institutions of their choice by minorities.

Hence, protection of language, script or culture under Article 29(1) may be by any means which are wholly not connected with educational institutions and likewise establishment and administration of educational institutions by minority may be not connected with any aim to protect language script and culture.

DOES ARTICLE 30 OF THE INDIAN CONSTITUTION PREVENT THE STATE FROM IMPOSING REASONABLE RESTRICTION TO MAKE ADMINISTRATION OF MINORITY INSTITUTION TRANSPARENT?

The Hon'ble Court in the Matter of *Christian Medical College Vellore Association* v. *Union of India & Others*,[20] delivered by three judge bench of supreme Court comprising Mr. justice Arun Mishra, Mr. justice Vineet Saran and Mr. justice M R Shah held that the provisions of Act and Regulations cannot be declared to be ultra-virus or derogation with the right conferred by constitution of India under Article 30(1) read with article 19 (1)(g), 14 ,25, 26 and 29(1). The petitioner in this case has challenged four notifications first dated 21-12-2010 notified by the medical council of India and the other

[20] (2020) 8 SCC 705

dated 31.05.2012 notified by Dental council of India. The medical council of India amended the regulation on graduate medical education amendment regulation 2010 to revise the postgraduate medical Examination regulation, 2000. Other side the Dental council of India via notification dated 31.05.2012 regarding admission in BDS and MDS courses. While exercising power under section 33 of Indian Medical Council Act, 1956 the medical council of India modified clause 5 of chapter II of the regulation. Class 5 under chapter II of the regulation laid down the procedure for selection of medical aspirants to MBBS courses. The Supreme Court of India while disposing the matter held, the regulatory measures under the act and the regulation cannot be deemed to be against the interest of an aided minority institution and such reasonable measures can be created. Moreover, these regulatory measures do not affect the fundamental rights of institutions under article 14,19(1)(g), 25 and 30(1) of the constitution. For the very existence of all such institutions whether they are run by minority or majority, the institutions are bound to the provisions which lay down the reasonable conditions of recognition and affiliation. Without following such measures institutions cannot exist and convey education the conditions are reasonable and cannot be declared to be in derogation with any of the constitutional rights of minority institutions. The centralized entrance examination cannot be declared to be unreasonable as the terms and conditions for recognition and affiliation for professional medical colleges and such examination. If examinations like National eligibility cum entrance test are not permitted to conduct aspirant of medical profession who is good at studies and is keen to join the medical profession will have to appear at different examination in different state conducted by different medical colleges and if he fails to get admission in any one college then that candidate will be deprived from the chance to get to get admission into

another college whereas National eligibility cum entrance test will facilitate all students opportunities to get admission on the basis of merit list in different colleges. Hence, the right guaranteed under article 19(1)(g) and 30(1) of the Constitution does not prohibit the measures of securing transparency and recognition of merits in the matter of admissions; it is the authority of the state to regulate qualification and courses of study for securing education standards and imposing reasonable restrictions in the national and public interest.

Consequently, it was said by the Supreme Court of India that there is no infringement of right of the unaided or aided minority to establish and administration institutions under Article 19(1)(g) and 30(1) of the Indian Constitution by introducing the uniform National level entrance examination that is need for admission to professional courses of MBBS and BDS and MDS.[21]

CRITICAL APPRAISAL OF ARTICLE 30

The constitution of India advocates The provisions of the Indian Constitution guarantee everyone equality before the law and prohibit discrimination or inequality. Despite that, some laws apply unequally. The right to manage educational institutions is an instance of it. As we know, every coin has two faces: merits and demerits; similarly, Article 30 also has advantages and disadvantages. It is true that on one side, it provides advantages to minority communities in the country, but on the other side, it has some disadvantages also. One of the major drawbacks is the government's control over granting a minority status certificate. The minority institution has to request the government for a grant of application

[21] *Christian Medical College* v. *Union of India,* (2014) 2 SCC 393

or incorporation of minority character; if the government refuses to provide such status, then NCMEI comes into the picture, and three members of the committee of such a commission have to decide the matter regarding the status of the minority institution and pass a decision, which is final and binding. The problem in this whole process is that, ironically, the three members who decide the matter belong to the minority community itself. It is not wrong to say that they are judges in their own case. On the one hand, Article 30 guarantees certain rights to minorities to establish and administer educational institutions of their choice, but on the other, it affects the rights of students studying there by not providing them with transparent administration.

Now the question comes to mind: does the majority community have similar rights as minorities have under Article 30(1)? On numerous occasions, the Supreme Court has ruled that the Hindu or other majority shall have a similar right under Article 19(1)(g), which grants every citizen the right to work, etc.

However, if we see the source of these two rights, Article 30(1) is free from any reasonable restrictions and free from exceptions, whereas Article 19(1)(g) has reasonable restrictions mentioned at Article 19(6) of the Indian Constitution, and there is no special provision for the conservation of languages, cultures, and religions of the majority community in the Indian Constitution.

There is a village in Meghalaya named Kong Thong, also called the "whistling village of Meghalaya" by many people. In Kong Thong, which is a tiny village of 567 people, there is a special culture. Here, the people call one another by a name instead of their names. In Kong thong, every mother

prepares a special tune for her baby, and they call him by this tune instead of his name; however, due to technological advancement, the culture of Kong thong is drastically changing day by day, so there is a need for the conservation of language, script, and the majority culture as well.

A Rajya Sabha MP from Bihar named Rakesh Sinha once raised this issue in Rajya Sabha, but unfortunately, till now, no progress has been witnessed in this field.

When the UPA government was in power, they provided direct and instant incorporation to some students at Central University as minorities. There is very little control over minority educational institutions in terms of regulation by the government; the minorities have full control over their institutions. However, if any malpractices occur in that type of institution, the government has the authority to take action despite such institutions. In practice, it is often witnessed.[22]

Another example of inequality is that, according to the RTE Act of 2009, minority institutions are exempt from the requirement of reserving 25% of their seats for the poor. The responsibility for educating the children of economically disadvantaged sections is solely placed on the shoulders of the majority educational institutions. Section 13 of the RTE Act 2009 says that no school or person may collect any capitation fee while admitting a child and prohibits screening of that child, his guardian, or his or her parents while admitting such a child into the institution.[23]

[22] Sakshi Vaishnav, "*Educational rights of minority -a prime source of inequality"* Available at: https://legalserviceindia.com/legal/all_aricles-505-sakshi-vaishnav-.html
[23] The RTE Act 2009, Sec. 13

It means that the institution cannot screen to determine whether the child will fit into such a school or not. It does not mean that the non-minority institution does not want to provide 25% of its seats to two students, but the problem is that they don't match the atmosphere of such a school and hence create difficulties in managing the institution, whereas minority institutions have complete freedom in selecting students.

The supreme court has mentioned in several judgements that a minority institution may make their own rules regarding admission, but those rules must be fair, transparent, and non-exploitative, and as far as higher education is concerned, admission will be based on merit.

The purpose behind introducing Article 30 under Part III of the Constitution of India is to make sure the minority should be treated equally, but now the situation is just the opposite, and this article is violating the rights of the majority guaranteed by Part III of the Constitution, or, it's better to say, this creates an imbalance between the majority and minority communities.

The present scenario of Article 30 is disappointing as it loses its aim. The aim of this article is to encourage minorities, but now the government's behaviour towards minorities is not encouraging but rather tolerating.

CONCLUSION

India is a land of diversity. As the world's largest democracy, India faces numerous challenges in balancing the rights of the majority and minority groups. Since the constitution of India guarantees equality, which is mentioned under Part III of the constitution, Equality cannot be provided

in its true sense without protecting the rights and interests of minorities; hence, the constitution's drafters drafted Articles 30 and 29 to protect and safeguard the rights of minorities. Article 29 guarantees all citizens the right to protect their language, culture, and script, whereas Article 30 guarantees minority groups the right to establish and manage educational institutions of their choice. The main objective behind introducing Article 30 is to ensure that minorities are not discriminated against or denied equal treatment. Article 30(1) provides rights to minorities based on religion or language to establish and administer institutions of their choice, but the term "minority" is not defined either under the constitution or any other act for the purpose of Article 30, but one must be a religious minority or a linguistic minority. The linguistic minority is determined in relation to the states in which the educational institution is sought to be established. The view behind this is that the states are formed based on languages, and the supreme court in its several decisions held that the religious minority will be determined based on Pan India because religion has no boundaries. The term "establish and administer" encompasses several rights, including the right to admit students, the right to establish a reasonable fee structure, the right to form a governing body, the right to appoint a staff, and the right to act if an employee fails to perform his or her duties.

Previously, there was a conflict regarding the regulation of a minority institution; there was a dispute over whether the state could make regulations to control a minority education institution or not, but now there are several landmark Supreme Court judgements in which the court has held that rights under Article 30(1) of a minority-aided institution are not an absolute right and that the government may regulate the procedure for admission and the selection of staff, but that repression of repression is

prohibited. A minority institution may admit students from other communities along with a minority community, and it will not affect the status of such an institution; however, the court held that a minority educational institution may have its own procedure and method of admission. But that must be fair, transparent, and non-exploitative.

But with the passage of time, Article 30 deviates from its path. The aim that article 30(1) wants to achieve is to protect the rights of minorities to establish and administer educational institutions of their choice, but if we look at the current scenario, article 30 has lost its objective. Although the government has very little control over minority educational institutions, whatever control the government has, they don't want to exercise it in a proper way. The current scenario of Article 30 is very disappointing, as it only supports the tolerating behaviour of the government towards minority educational institutions rather than an encouraging one. The government's control over minority educational institutions is much less than that of non-minority educational institutions.

The main reason behind introducing Article 30 is to provide equal opportunity to minorities to impart knowledge to people in their community so that they will not trail in society because of the simple fact that they are fewer in number. But now a few minority institutions are using it as a weapon for their own profit, and commercialization of education is going on in the name of the rights of minorities to establish and administer educational institutions guaranteed under Article 30(1). For instance, the Ryan International Group of Institutions, founded in 1976 by Dr. A. F. Pinto, has over 130 institutions today in India and abroad. There are several issues that New India has witnessed regarding minority educational

institutions, which have turned Article 30 into a source of inequality and discrimination against non-minority communities. Even if we assume that Article 30 (1) benefits the Minority community, why do they require this protection after 71 years of independence? The harsh reality is that it has failed to truly uplift the minority; rather, a small number of people in the minority community are using it to run their businesses and make unnecessary profits. The government is not taking any initiative for political reasons, but the poor sections of society must suffer because other sections of society, who are affluent or have resources, admit their children into a good school or college, and the poor, who may belong to a minority community, must suffer because minority educational institutions are misused and administered.[24]

SUGGESTIONS

Article 30 of the Indian Constitution was introduced in 1950, and since then, almost 71 years have passed, but the situation of the minority community is almost the same as far as education is concerned. Few gentry persons in such a minority community are practising their business in the name of rights guaranteed under Article 30, and education is commercialized. For instance, Ryan International Group Being part of a global search network, Christian schools receive foreign donations, for example. The Warangal catholic dioceses gave the Tirunelveli diocesan trust association Rs. 3.72 crores in 2015-2016 and Rs. 2.89 crores in 2016-2017.[25] No one at the time of drafting Article 30 of the Constitution imagined that

[24] Sanjeev Nayar and Hariprasad Nellitheertha, *"How Hindus rights have been seriously damaged by Article 30 and RTE Act"*, Swarajya 16 December 2019, Available at: https://swarajyamag.com/ideas/how-hindu-rights-have-been-seriously-damaged-by-article-30-and-rte-act

[25] Ibid.

this article would be misused in such a way and that there would be foreign donations and other resources available to minority educational institutions. Arihant Pawariya wrote about the admission process for the central entrance test for B.Ed. courses in Andhra Pradesh universities and colleges on sawarajyamag.com. The supreme court held that 67 out of 206 students in NCE, Nizamabad, and 19 out of 136 students in RC E, Kurnool, were admitted based on a baptism certificate, and that in most of these cases, the candidates declared themselves to be Christian after filing their application for the entrance test. Former Infosys director T.V. Mohandas Pai wrote in "The Economic Times" that two families whose children attend a school managed and run by a minority community and has a minority status raised their fees, and because they were unable to pay the increased fee, they converted because they were told that if they converted, their fee would be waived, and thus they converted.

Even if we presume that there will be a special law, does Article 30 make a difference? The literacy rate of Muslims continues to be hideously low. The reason behind this is a deficiency in government policies and provisions and a lack of secular education. Many developed countries in the world have rectified their wrongs, which were committed in the past, or, it's better to say, they have abolished obsolete rules that no longer work in this era.[26]

The former President of India, Dr. S. Radhakrishnan, once said, "When India is said to be a secular state, we hold that no one religion should be given preferential status." But today, the minority communities are given preferential status, so Article 30(1) comes up for consideration. Either it

[26] Aditya Sharma, "The *Anti -Secular nature of Article 30"*, eSamskriti, April 2014; Available at: https://www.esamskriti.com/e/National-Affairs/For-The-Followers-Of-Dharma/The-Anti~Secular-Nature-of-Article-30-1.aspx

should be deleted from the constitution permanently or amended in such a way that it will eliminate the inequality between the minority community and non-minority community, and hopefully the language in future versions of Article 30 will be like this.

"All citizens shall have right to establish and administer educational institution of their choice." The Supreme Court in *Mudgal* v. *Union of India*[27] said that those who choose to reside in India after partition fully knew that the Indian leaders did not believe in the two-nation theory and there was to be only one nation - the Indian nation and no community could claim to remain separate entities based on religion.

[27] AIR 1995 SC 1531, para 35