

ISSN 2394-997X

Lex Revolution

Periodical Indexed
(Journal of Social & Legal Studies)
Volume - X (2) 2024



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Volume-X

Issue-2

Apr-Jun 2024

Published By
Dr. V. B. Pandey
Email: editor.lexrevolution@gmail.com
Managed & Printed By
ANAGH-Forum For Sustainable Outreach



“Courts have to be mindful of not only the spelling of the word ‘justice’ but also the content of the concept. Courts have to dispense justice and not justice being dispensed with. In fact, the strength and authority of courts in India are because they are involved in dispensing justice. It should be their life aim.”

- **B. V. Nagarathna, J.** in

Bilkis Yakub Rasool v. Union of India,
(2024) 5 SCC 481, para 239

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Lex Revolution

Periodical Indexed Peer Reviewed Journal of Social & Legal Studies

Quarterly Published International Research Journal

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

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Published by

Dr. Vijay Bahadur Pandey

Managed & Printed by

ANAGH-Forum for Sustainable Outreach

CIN U85300BR2023NPL061509

Nuaon, Dumraon, Buxar - 802111 (Bihar)

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SOCIO-LEGAL STUDY OF MIGRANTS AND CONSTRUCTION WORKERS IN THE STATE OF HIMACHAL PRADESH

- Anil Kapoor* & Dr. Pawan Kumar**

Abstract

The current study aims to investigate the employment conditions of migrant workers in India and Himachal Pradesh's emerging construction industries. Migrants, who are people whose citizenship varies from that of the country in which they work and whose lawful status in their nation of work is temporary or unapproved, have customarily had a significant impact on the construction business. Today, traveller labourers might be tracked down in development areas across industrialised and emerging nations, where they are popular because of various factors like urbanisation, blasting real estate markets, government framework ventures and asset extraction tasks. Development relocation networks are additionally very differentiated, traversing not just industrialising/industrialised development courses for development transients. In Himachal Pradesh, transient labourers chip away at development and horticultural work. All rural works rely on transient labourers. Travellers' labourers in Himachal Pradesh have a place either from Nepal or highway transients. In the present paper, the researcher utilised the optional information to gather data about the point. Auxiliary information was gathered from books, articles and web sources.

Keywords: Migrant, workers, Construction workers, Himachal Pradesh.

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INTRODUCTION

Because of the intermixing of different cultures, migration has been an important element of human history, shaping communities and economies. The economic and financial movement has grown in prominence during the last few decades. Millions of people migrate from underdeveloped to developed countries in search of economic opportunities and improved quality of life. As more migrant workers were subject to exploitation, other issues of labour rights for migrant workers arose over time. As a result, governments all over the world have grasped the significance of establishing labour rights as a component of human rights.

The construction business utilises north of 220 million individuals around the world (ILO, 2019). Labourers might be named untailed or semi-gifted workers, talented experts or administrative or administrative staff under certain definitions. Construction labourers are characterized as individuals “who work for or heavily influenced by a project worker on a building site” in the U K, yet in Canada, this can incorporate individuals whose work incorporates guaranteeing consistency with building regulations and guidelines, as well as the people who oversee different specialists.

In India and Himachal Pradesh, migrant labourers do a wide range of work to procure pay. Mostly, they were enjoying the development work in metropolitan urban communities. In country regions like Himachal Pradesh, they are accomplishing blended work like development and horticultural work. In Himachal Pradesh, between states, transient labourers chipped away at building, lady and street development. Transient labourers of Nepal chiefly accomplish horticultural work, for example, apple creation. The economy of Himachal Pradesh basically relies upon apples and harvest. These works were done in Himachal Pradesh with the assistance of transient labourers from Nepal.

METHODOLOGY

The main purpose of this research is to identify the social and legal status of migrants and construction workers in Himachal Pradesh. For this purpose, the secondary source of data was collected by the researcher to understand the concept. In the present study, the researcher used secondary data to complete this research work. The data were collected from Books, articles and through internet sources.

OBJECTIVES

The following are the objectives of the study:

- To study the role of migrant workers and construction workers in nation-building.
- To study the life standard of migrant workers and construction workers in Himachal Pradesh.
- To study the Supreme Court guidelines and legal safeguards for unorganised sector labourers.

CONSTRUCTION AND MIGRANT WORKERS

Development and traveller work is the foundation of the nation's economy and advancement. Most of the traveller labourers are from the SC, ST, Muslim People groups and penniless landless people groups. They moved to start with one area and then onto the next in the mission of work. There are countless transient workers in India's disorderly economy. They give practically half of the Gross domestic product.

Table 1: Synoptic view of the migrant workers in India.

Census	Migrant People	Migrant Workers
2001	31,45,00,000	14,25,00,000
2011	45,58,00,000	19.40,00,000

Source: Census of India 2001 & 2011. Also available at Proposed, Political and Organisational Report of Communist Party of India (Marxist), 17th State Conference Himachal Pradesh,2021.

As per the Census of 2001, there were 31.45 crore individuals had a place with travellers, wherein 14.25 crore people groups were the transient specialists. From 2001 to 2011, the population of the nation increased by 18 %; however, the quantity of transient specialists was expanded by 45%.

At the point when uneven states were examined with regard to movement, for the most part, individuals pondered relocation from bumpy regions to design regions. In a sloping region like Himachal Pradesh, there are troublesome and aloof geological conditions, and the absence of essential offices is a significant justification for the relocation of individuals. In Himachal Pradesh individuals moved to urban areas like Chandigarh, Delhi and other metropolitan urban communities for schooling and work. On the opposite side, after 1991, traveller individuals came to Himachal Pradesh in enormous numbers. As per the evaluation of 2011 in Himachal Pradesh,

there were 2.60 lac highway transient specialists and close to around 2.0 Lacs Nepali labourers working.

In Himachal Pradesh transient specialists primarily come from Uttar Pradesh, Bihar (modern, travel industry, House Development labourers), Uttrakhand, Nepal (Cultivation and Farming), Jharkhand, Chhattisgarh, Rajasthan (development labourers Venture), Kashmir (exchange and work for conveying the heap)

During the time of 1970-80, modern work occurred in the Shivalik Reach mountain region. Himachal Pradesh began to turn into a modern centre with a multi-faceted advancement project. During this period, different development works began at their underlying stage. As per the evaluation of India, in 2011, there were 45% male and 55% female transients in Himachal Pradesh.

ROLE OF CONSTRUCTION AND MIGRANT WORKERS

In Himachal Pradesh, development and traveller labourers work on projects, street development, and other fundamental necessities, which incorporate little development work, work for the travel industry, conveying things, homegrown specialists cleaning works, and so on. In Himachal Pradesh, around 70,000 specialists come from plan areas of centre India to work in developing industrial Centres. The Himachal Pradesh area of BBN (Baddi, Barotiwala and Nalagarh) and the Kala Amb area of the Sirmour locale are known as new, creating a modern focus. An enormous number of transient labourers work there. Aside from this, in Himachal Pradesh, apple creation makes up 1.25 lacs hectare of land, which contributes 5,000 crores to the state economy. This apple creation was created by Nepali labourers.

In Himachal Pradesh, there are numerous traveller individuals who moved here 30-40 years prior and settled here. They incorporate cleaners, cloth pickers, Municipal Corporations and other Govt. Departmental works, costermongers, shoe polishers, and so on.

LIFE STANDARD OF MIGRANT WORKERS IN HIMACHAL PRADESH

In Himachal Pradesh, transient labourers live in ghetto hovel regions. They have lived here for a long time; however, they do not have appropriate convenience, light and water offices. The instalment of work and well-being and standard of life is entirely hopeless. Topographical conditions likewise make obstacles for them. For instance, street development labourers play out

their obligations without the least well-being gear. They confronted numerous troubles because of the stone fall, outrageous cold and avalanche. A considerable lot of them live in transitory sheds. They can't give appropriate nourishment to their kid. Their kids are frail in schooling because of the absence of offices. Schools are excessively far from where they reside.

MIGRANT WORKER'S REGISTRATION IN HIMACHAL PRADESH

The Himachal Pradesh Police Division has started a push to enrol all transient work and homegrown labourers in the state, especially to follow and secure those who escape after perpetrating wrongdoings. As indicated by authorities, an assessment of grievances uncovered that various transients were found to have carried out wrongdoings before running away to their different home states. Apart from this, 5,341 transient specialists and 132 homegrown aides have been enrolled as a feature of the activity. The current year's continuous mission started on June 1.

INTERNATIONAL LABOUR ORGANISATION STANDARDS ON MIGRANTS WORKERS

Geneva, Switzerland, is the headquarters of the ILO. The ILO was laid out by the Deal of Versailles, which was endorsed in 1919 during the Postwar Peace Conference in Paris. It is one of the key Joined Countries' foundations that lays out overall work norms to accomplish consistency among its part nations. The preface to this association's constitution clarifies that the ILO puts a unique accentuation on the privileges of transitory specialists and lays out rules to protect their inclinations. Consistently, a great many people relocate across global lines. There are two fundamental gatherings of transient work.

- **Temporary migration**

These transient workers are called visitor labourers since they are recruited temporarily, for instance, all-year representatives, part-time employees, students, etc. Occasional relocation is one of the most notable kinds of impermanent movement.

- **Permanent migration**

The passage of workers who use movement administrations is alluded to as long-lasting relocation. Migration classifications incorporate family reunification, escalated ability business,

etc. Such labourers migrate to another area for an uncertain measure of time. The utilising nation doesn't force a period limit.

The surprising increase in the issue of worldwide movement has led to various points of view on work culture. The causes that cause movement are different and may not make a difference to explicit conditions. There are, be that as it may, a couple of 'move around powers' such as Poverty-stricken conditions in the nation of origin:

- a) A shortage of qualified open doors for an exceptionally prepared person,
- b) More significant compensation in a rich country,
- c) Adequacy and struggle,
- d) Political precariousness in lower-pay nations,
- e) Urbanisation,
- f) In an emerging nation, there is an absence of government-backed retirement,
- g) Reunification of families,
- h) Craving for a better quality of living,
- i) To work on one's abilities through preparation.

A labourer's movement is impacted by various different variables. Subsequently, the rundown of variables introduced above isn't thorough.

It ought to be referenced that while a few traveller labourers benefit significantly and can advance their financial conditions, this isn't true for other people. A few traveller workers live and work in disgraceful circumstances, totally oblivious to the infringement of their essential common liberties.

GUIDELINE OF THE SUPREME COURT OF INDIA

On June 29, the Supreme Court decided on the migrant labourers case. The court has established numerous guidelines to assist workers and adequately address the situation until the threat of COVID-19 is removed. With the third wave of Coronavirus contaminations on the way, it is critical to ensure that the administrative apparatus is working to its full potential and that strong frameworks are in place to withstand the challenges.

- **Time-bound registration of the migrant and unorganised sector workers:**

- i. The court scrutinised the sluggish speed with which transient and disorderly area labourers were enlisted. It accepts that this impacts transients' capacity to help benefit through different plans,
- ii. As indicated by the judgment, "the Service of Work and Business' aloofness and languid mentality is inexcusable."
- iii. Besides scrutinising the administrative and state legislatures for offering empty promises to labourer prosperity,
- iv. As indicated by the judgment, "tall cases by every one of the States and Association that they have carried out different government assistance plans for traveller labourers and disorderly specialists stay just on paper, without giving any advantage to chaotic labourers."
- v. The Apex Court has requested that the Union Government make a gateway for the enlistment of disorderly workers/traveller labourers and complete the Entry for Enrollment method under the Public Information base for Sloppy Specialists. (NDUW Task),
- vi. It has additionally trained that "all States/Association Domains register all foundations and permit all project workers under the Demonstration, 1979, and guarantee that the legal obligation forced on workers for hire to give specifics of transient labourers is completely followed"

LEGAL SAFEGUARDS

The encroachment of work freedoms by bosses is a significant wellspring of worry all over the planet. Transient labourers are especially helpless since they need both government-backed retirement and monetary freedom. When such labourers are made jobless, they face critical perils. The ongoing article looks to dive into Indian lawful standards safeguarding the freedoms of traveller labourers as well as worldwide arrangement proposals in such a manner.

The Indian Constitution shields work freedoms. This part is characterised to some extent IV of the Constitution by the Introduction, the Key Freedoms, and the Mandate Standards of State Strategy. As indicated by the Constitution, the least number of working environment privileges is ensured. Labourers and representatives can utilise this to move financial advancement into government-backed retirement. Incorporated advancement is just conceivable on the off chance that a wide range of labourers has equivalent freedoms. As indicated by the Introduction, the

Indian Constitution specifies and empowers social reasonableness for workers. There are many explicit work regulations, as well as federal government retirement aid programs.

Presently, there are regulations in India concerning transient specialists. Coming up next are a few securities for development labourers and transient specialists in India:

- i. In 1996, the Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act and the Building and Other Construction Workers Welfare Cess Act were enacted to address construction workers' concerns.
- ii. The establishment of a Construction Workers Welfare Board (CWWB) - a three-sided structure with equivalent portrayal from labourers, businesses, and the public authority ordered by these lawmaking bodies. The CWWB is liable for enrolling all development representatives in the state and advancing the government assistance of enlisted development labourers through different plans, measures, and offices. Demonstrative government assistance benefits are rattled off in Segment 22 of the Demonstration and incorporate clinical help, maternity benefits, mishap cover, annuity, instructive help for offspring of labourers, help to relatives in the event of death, bunch protection, advances, memorial service help and marriage help for offspring of labourers.
- iii. The assortment of cess at the pace of 1% of the complete expense of development is ordered by the previously mentioned regulations to raise assets for giving government assistance benefits under state CWWBs.
- iv. Building and Other Construction Workers Welfare Cess Act (Cess Act) (BOCWWB): It accommodates the burden and assortment of a cess on development costs borne by managers to supplement the assets of the Structure and Other Development Laborers' Government assistance Sheets.
- v. This legislation coordinates the foundation of Development Laborers Government Assistance Sheets (CWWBs), which are a three-section substance with equivalent support from labourers, Businesses and the Government.
- vi. The Construction Workers Welfare Board (CWWB) is answerable for enlisting all development representatives and advancing their government assistance through different drives.

- vii. The previously mentioned regulation requires the assortment of cess at the pace of 1% of the whole expense of development to give government assistance benefits under state CWWBs.
- viii. The Act determines characteristic government assistance advantages, for example, clinical help, maternity benefits, mishap inclusion, annuity, instructive help for laborers' kids, help to relatives in case of death, bunch protection, credits, memorial service help, and marriage help for laborers' youngsters.

EPF arrangements: The Representatives Opportune Asset and Random Arrangements Demonstration of 1952 covers all development laborers. Sadly, simply 2.2 percent of in general development laborers get any kind of federal retirement aide benefit, and just 1.5 percent of customary specialists are qualified for EPF benefits. This depicts what is happening of development transient work.

Prime Minister's Garib Kalyan Package (PMGKP): Under the PMGKP, monetary assistance is given to building and other construction workers (BOCW), most of whom are transient specialists, from reserves gathered through the BOCW's cess.

CONCLUSION

Migrant workers and construction workers play a significant role in the country's monetary advancement. All advancement of the nation relies upon these classes of labourers. In Himachal Pradesh, all sort of advancement relies upon travellers and development labourers. Traveller labourers come through across India. A huge number of the populace in Himachal Pradesh relies upon rural, and these horticultural works incorporate apple and harvest creation done by traveller labourers.

All in all, regardless of their endeavours, most states have been insufficient in dealing with the progression of traveller labourers and appropriately screening them. It is wonderful that, regardless of the presence of a bounty of regulation and work norms at the public and global levels, there is, as yet, a huge hole between the essential basic liberties of labourers and the legitimate structure overseeing their privileges. Policymakers should adopt an even-minded strategy to safeguard the privileges of transient specialists, given their unstable social conditions. It is generally recognised that most nations have maintained a carefree mentality regarding ILO rules for transient workers/labourers. Notwithstanding the way that nations are obliged to

execute administrative systems as per ILO measures, the larger part has neglected to do so. India's work guidelines actually have quite far to go.

SUGGESTIONS:

- A one-country, one-ration-card system should be implemented.
- All migrants and unorganised employees should be issued ration cards.
- Provide Rs. 7500 to all migrant workers who lost their jobs due to the Corona pandemic in order to improve their level of living.
- Provide Rs. 2.0 lacs to disabled unorganised workers and Rs. 1.0 lacs to partially disabled workers under the Pradhan Mantri Swathaya Beema Yojna (PMSBY) accident insurance.
- Provide equal pay for equal labour to all employees without regard to gender.
- Ensure that all workers, whether migrant or unorganised, are registered on the eShram portal.
- Implement the Supreme Court's 2021 instructions on migrant and unorganised workers.

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HATE CRIMES: A CHALLENGE TO INDIAN LEGAL SYSTEM

- Aman Singh*

Abstract

Crimes conducted out of hatred or prejudice are referred to as hate crimes. Due to their “identity” or “perceived identity,” members of one group of people commit crimes against members of another “targeted group” in this sort of crime. Such crimes may occur within a single religion, for example, and are not always committed between the majority and the minority. The fact that such acts of individual or collective violence are motivated by hate and based on identity is what unites them. In recent years, the most contentious topic in Indian political and judicial debates has been hate crimes. Indian policymakers, including those in the administrative, legislative, and judicial branches, have been plagued by issues relating to hate crimes and the violence they engender. Violence motivated by hatred has not only contributed to issues with conventional law and order, but it has also undermined social cohesion to the point of causing social discontent and cultivating an environment of tension and dread. Economic institutions have been destroyed, and a serious danger to a country’s or state’s development has also been noted.

Keywords: Hate Crime, Lynching, Unlawful, Preventive Measures, Religion, Caste.

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INTRODUCTION

It cannot be denied that the most contentious topic in recent political and judicial debates in India has been hate crimes. Administrators, legislators, and even judges in India have been plagued by issues relating to hate crimes and associated violence. Hatred-related violence has not only caused traditional law and order problems¹ but equally destroyed social fabric to the extent of creating social unrest and an environment of fear and insecurity.² It has destroyed economic institutions, equally proving a potent threat to the growth and prosperity of the nation.³

Typically, the notion of violence associated with hate violence is founded on how the perpetrator perceives the victims' particular characteristics. His or her ethnicity, colour, or other 'identification' may be the only distinguishing feature. Acts of violence and intimidation, mainly aimed towards existing marginalised and stigmatised communities, are considered hate crimes. A hate crime attempts to assure victim subjugation and dominance by the perpetrator's group via the use of force and oppression to enforce the "hierarchies in a given society." In essence, hate crimes are a way to "mark both the Self and the other in such a way as to re-establish their 'proper' relative positions, as given and reproduced by broader ideologies and patterns of social and political inequality"⁴. Therefore, it would be considered a crime committed under this category if a person deliberately chooses the victim of a crime or deliberately chooses the property that is damaged or otherwise affected by the crime based on that person's race, religion, colour, disability, sexual orientation, national origin, or ancestry.⁵ As this explanation makes clear, hate crimes go well beyond actions that are only motivated by hatred. In hate crimes, victim associations with a specific group become more important than the perpetrator's intentions. Political and social beliefs are also at play in this situation, many of which may have deep roots in our nation's long past. A hate crime victim is someone who has been harmed due to their affiliation with a certain group. Anyone who claims to be a member of a minority group or a member of a so-called lower caste and is attacked as a result might be deemed the victim of a hate crime. Similar to how someone would be deemed the victim of a hate crime if someone vandalised their property with other anti-ethnic symbols. Religious minorities, particularly weak castes, and those who claim to have been victims of a hate-motivated perpetrator are the most probable targets of hate crimes.

¹ Indian Penal Code 1860, s 146, s 147, s 148

² Justice Nanavati, 'The Godhra conspiracy', (*The Times of India*, New Delhi, 2008), 28 September

³ Anjali Thom and Ernest John Sergenti, 'Economic growth and ethnic violence: An empirical investigation of Hindu–Muslim riots in India' (*Journal of Peace Research*) 589,600

⁴ Barbra Perry, 'In the name of Hate: Understanding hate crimes', (Routledge, New York, 2011) 10

⁵ Wisconsin v. Mitchell, (1993) 508 U.S. 476

THE OBJECTIVE OF THE STUDY

- To study the concept of Hate Crimes.
- To analyse the effectiveness of the Indian Legal System against Hate Crimes.
- To observe reasons responsible for hate crime & their effects on Socio-economic conditions.

RESEARCH METHODOLOGY

The researcher's research technique is exclusively doctrinal and does not include an empirical approach. The sources for completion of this paper will be both primary and secondary. Primary Sources include the study and analyses of periodicals, reports, newspapers, laws, bylaws, notifications, papers presented in conferences, rules and regulations, administrative orders, recommendations and guidelines of the Ministry of Home Affairs and the Supreme Court in their landmark judgments. Secondary Sources are research papers, textbooks, websites, treaties, and commentaries on statutes, abstracts, bibliographies, dictionaries, encyclopaedias, indexes, thesaurus and reviews.

THE CONCEPT 'HATE CRIME'

As per the accepted definition amongst criminologists throughout the world, hate crime or hate violence is said to be "*crime/violence committed because of the victim's actual or perceived race, colour, religion, disability, sexual orientation or origin*".⁶ It is an offence that "*manifests evidence of prejudice based on race, religion, disability, sexual orientation or ethnicity*".⁷ This definition section focuses on distinct characteristics absent from traditional crime. Hate Crimes, as a legal term, were previously uncommon in Indian courts and administration. However, as a result of the rise of religious fundamentalism and caste-based atrocities, legal fraternities have investigated the meaning of this particular pattern of violence. In common parlance, it is commonly believed that a hate crime is a crime in which the relationship between the offender and the victim is solely motivated by hatred. It is often explained as "*a criminal act motivated by the victim's personal characteristics, such as race, national origin or religion*".⁸ Thus, more or less, 'bias' is one of the instrumental factors recognised for this violent act.

⁶ Violent Crime Control and Law Enforcement Act 1994 [USA]

⁷ Hate Crime Statistics Act 1990 [USA]

⁸ Phyllis B. Gerstenfeld, 'HATE CRIMES: CAUSES, CONTROL AND CONTROVERSIES' (Sage Publication, 2004) 28

It is also described as the criminal manifestation of prejudice.⁹ Both the mental state of the perpetrator and the kind of damage that is produced may be used to differentiate a hate crime from a parallel crime, which is defined as a crime that is identical in every way except that it is not motivated by prejudice towards a particular group. As opposed to bias crimes, which are motivated by a specific, personal, and group-based motive, such as the victim's actual or perceived membership in a certain group, parallel crimes might be motivated by any one of a number of other variables. The term "bias crime" may be used to refer to a variety of different types of hate crimes, and it often includes some aspect of race and ethnicity. It is possible for it to contain factors such as sexual orientation, gender, region, caste, community, and religion, in addition to other factors.

The victim of a hate crime is thus subjected to an assault that is not just physical in nature but also strikes at the very essence of his or her identity. This results in a heightened feeling of vulnerability that goes beyond that which is generally experienced by victims of other types of crime. The unambiguous message that the target and his group are of minimal worth is sent by the bias-motivated violence that is committed against them. The practice of stigmatising victims of hate crimes is not exclusive to victims of crimes motivated by religious intolerance or members of minority groups; rather, it extends to other vulnerable segments of society. Crimes motivated by hatred have repercussions that extend much beyond the victim or victims to whom the violence was first directed.

Another approach to defining hate violence is from the perspective of the victim. From this perspective, hate crime is defined as those acts where "*the defendant intentionally selects a victim or, in case of property crime, the property that is an object of the crime, because of the actual or perceived race, colour, religion, national origin, ethnicity, gender, disability or sexual orientation of any person*"¹⁰. This definition goes beyond the limitation of only grounds like race, religion and national origin. This is a broader definition of hate crime in the United States, but it is an exclusive one. It is notable that 'sexual orientation' is included in this definition of hate crime as one of the reasons for making such a determination. As a result, the provision attempts to curb the outbreaks of violence against 'gay' people. However, this should not be confused with the typical kind of 'domestic violence' against women in India, which is suggested to be because of socio-economic and sometimes historical and religious factors.¹¹ It is also to be noted that such violence is

⁹ Heidi Hurd and Michael S. Moore, 'Punishing Hatred and Prejudice' 56 STAN. L. REV, 1081

¹⁰ US Violent Crime Control and Law Enforcement Act 1994

¹¹ Domestic Violence Act 2005

uncommon in India, and even recently when the ‘eunuch’ became a member of the legislative assembly¹² or even mayor of big city¹³, such violence have not been notice. Hate crime is “*the victimisation of minorities due to their racial or ethnic identity by members of the majority*”.¹⁴ It provides a more thorough explanation of hate crimes: “*conceiving of racial violence... as processes implies an analysis which is dynamic; includes the social relationship between all the actors involved in the process; can capture the continuity across physical violence, threat, intimidation; can capture the dynamic of repeated or systematic victimisation; incorporates historical context; and takes account of the social relationships which inform definitions of appropriate and inappropriate behaviour*”.¹⁵

The distinction between Hate Crime and Traditional Crime

Crimes motivated by hatred may be identified from other types of crime by looking at the impact they have not just on the person but also on the community they are intended to hurt and on society as a whole. A victim of a crime that is not motivated by hatred is often assaulted for a purpose that is arbitrary and impersonal. In contrast, the victim of a hate crime is chosen for a particularly personal reason, such as the victim’s colour, gender, or sexual orientation, and the act itself is motivated by that cause. As a direct consequence of this, the victim of a hate crime sustains far more emotional and psychological harm. As a consequence of this, victims may dramatically modify their mindsets and ways of living in order to protect themselves against future assaults. Crimes motivated by hatred also have a greater detrimental impact on the community that is the target of the violence when compared to other types of violent crime. In this sense, hate crimes are seen as “message crimes,” which have the effect of conveying “a message that members of a certain group are not wanted in a particular neighbourhood, community, workplace, or college campus.” This gives the target community’s members the sense that they may all become the victims of similar acts of violence. On a societal level, hate crimes increase intergroup tension and distrust among group members, which may result in a “violent cycle of retaliatory violence.” It is not difficult to see why hate crimes should be subject to harsher penalties than other types of crimes since they inflict a larger level of suffering not just on the individual who is targeted but also on the community at large and on society as a whole.

¹² Shabnam Mausi, ‘first eunuch MLA of the country, Assembly Suhagpur legislative constituency of Madhya Pradesh’ [2000]

¹³ Asha Devi alias Ashok Yadav was elected as Mayor of Gorakhpur, Uttar Pradesh

¹⁴ C. Petrosino, ‘CONNECTING THE PAST TO THE FUTURE: HATE CRIME IN AMERICA’ (Routledge London, 2003) 10

¹⁵ C. Sheffield, ‘HATE VIOLENCE, RACE, CLASS AND GENDERIN STATES, (St. Martin’s Press, New York,2013) 432-41

NATURE AND INTENSITY OF HATE CRIMES

Crimes motivated by bias or hatred are the violent expression of prejudice. In terms of the mental state of the actor as well as the nature of the damage that was produced, it is possible to differentiate them from crimes that are comparable in every way except for the lack of bias-motivation. Parallel crimes are crimes that are similar in every way except for the absence of bias-motivation. As opposed to bias crimes, which are motivated by a specific, personal, and group-based motive, such as the victim's actual or perceived membership in a certain group, parallel crimes might be motivated by any one of a number of other variables. certain laws criminalising prejudice towards certain categories of people exist.

According to each of these definitions, hate crimes have far-reaching repercussions, not just for the person but also for organisations, communities, and the state as a whole. It all starts with the concept of "hate," but it quickly expands beyond that. There are a number of elements inside this violence that are comparable to those of organised crime and indicate military precision. The following is a list of some of the characteristics of acts of hate violence that may be noticed in religious acts of violence:

- a. The selection of victims according to predetermined criteria, such as their religion, caste, or ethnicity;
- b. Well-organised, such as the use of military resources;
- c. Well-defined approach, such as organised assault over victims;
- d. The majority of hate campaigns are often built on rumours and animosity;
- e. The items that are targeted for destruction in acts motivated by hatred do so because of their clear identification as having religious or caste significance.
- f. Attacks against young children, women, and large groups of people;
- g. Attacks in carefully designated regions of violence, such as places with a higher likelihood of attacks on religious sites;
- h. A sudden eruption of violence but with thorough planning;
- i. Use of weapons, mainly connected with religious differences;
- j. No direct dispute with the government or property owned by the government.

REASONS RESPONSIBLE

The idea that violence between different groups of caste, religion, and ethnicity is fundamentally caused by their perceived identities and that it is also often caused by the communities' internal conflicts that are entrenched in their caste/religious and ethnic ideology is a common one that is

held by historians as well as by other people. Hate crimes can be motivated by a wide variety of factors, including but not limited to robbery, extortion, inter-caste marriage, rape, casteism, anti-nationalist sentiment, class struggle, and political motives. This is a fact problems such as discrimination based on caste, religious fanaticism, ethnic superiority, and language dominance have all contributed to the rise of large-scale violence and unrest.

- **Religious Violence:** The history of religion is littered with violent and bloody events. It demonstrates not just the immense power, weight, and depth that religion possesses within the human heart but also how potentially harmful religion can be if it is interpreted in the incorrect manner. To commit violence in the name of one's religion is one definition of what is known as religious violence. It can be considered both intra-religious and inter-religious violence, which means that it can refer to both violence within a group as well as violence committed against other groups. The use of violence in the name of religion is not a new phenomenon in Indian history.
- **The Command to Defend:** Violence in Islam in the name of religion needs careful scrutiny. The Quran declares Allah as the Sovereign and Merciful one.¹⁶ In fact, violence in Islam started as a way of 'self-defence' and as a way to stop the people of Mecca from persecuting people for their religion. Since this kind of abuse can only hurt Islam, the Koran says: "fight them until persecution is no more, and religion is all for Allah".¹⁷ But the fight against those who don't believe is cruel to those who don't change.
- **Rise of cow vigilante:** The cow is considered a sacred animal, and the State shall protect it to secure the religious feelings of the Hindu community over the others. "The murder of Akhlaq, attacks on Muslims related to cow slaughter or smuggling rumours have increased. In March 2016, two Muslims were killed and hanged in the tribal state of Jharkhand after being accused of smuggling cows". It is also a matter of dispute whether the Government is protecting or restricting some activities related to animals by adopting the Prevention of Cruelty to Animals Act; it started another rush of dairy animal vigilantes in the nation.
- **Caste Violence:** It has been argued that caste is a reflection of Brahminical superstructure, and the caste system has its deep roots in the religion. Caste-related hatred and violence are not new to Indian society. This violence is not limited to any particular geographical area but is widespread and affects a lot of rural as well as urban

¹⁶ Koran, Sura V 39, 40

¹⁷ Koran, Sura VIII 39

masses. It has been not only gruesome but also brutal in its highest degree. More so, in modern days, caste goes much deeper in the system. State, politics, and state-power relationships are articulated and valued in terms of caste. Either in one form or another, caste has proved its relevance.

- **Inter-Religious Marriage:** According to personal laws, an inter-religious marriage is considered void, but such a marriage can be validly performed under the Special Marriage Act of 1954. Whenever inter-religious marriage takes place in society, various conflicts also arise in the life of wedded couples. The social institutions and their leaders, like members of Khap Panchayats, Padri of Church or Maulvi of a Masjid, become alert and active and pronounce 'Orders' or 'Fatwa' even against the law of the land, resulting in violence. Another issue trending nowadays is 'Love Jihad', in which it is alleged that Muslim men used to trap Hindu girls in the name of marriage for molestation, increasing their population or lowering the honour of Hindus in society; sometimes, it is also allegedly blamed that after marriage girls become subject to human trafficking and available for sale in foreign countries where they can be used for prostitution or even killed and their body parts are used to sell illegally in the hospitals or easily available with the dealers of human organs.
- **Inter-caste Marriage and Honour Killing:** The concept of inter-caste marriage is not new in Indian society. Even after various conflicts and challenges, it is not a barrier for couples who don't care about such ridiculous religious beliefs. However, the so-called leaders of society never accept such changes. This is done for the sake of respect. These killings have been expanding for the most part in town zones like Haryana, Punjab and western Uttar Pradesh.
- **Fake and Hate News on Social Platform:** "Messages warning of renewed mob violence hit social media recently as New Delhi reeled from the worst violence it has seen in over a decade, with riots that left at least 50 people dead and 300 injured. Police went to the sites of reported conflict to conduct their own investigations and temporarily shut down multiple Delhi metro stations following the reports of street clashes and people shouting in trains". It is not a new phenomenon in India for such falsehoods to be spread via social media, and over the course of the previous decade, India has witnessed several violent episodes that were sparked by online remarks. "In 2017, India also saw a wave of mob attacks and lynching of innocent people spurred by online accusations of child abductions. At that time, people deemed to be "outsiders" were

targeted by large mobs accusing them of kidnapping children, after warnings circulated on WhatsApp”.

- **The silence of the political class:** In spite of the rising hate in society, the political class and administration remained quiet observers. Many believe that there are few politicians behind the veil or nodding their mute ascent to violence. In addition, they have fabricated their political profession, spreading hate against particular communities. The political class, aside from their standard judgment, abstain from visiting the victims or their enduring families.
- **Ineffectiveness of administrative agencies:** Though the role of the police and state has always been a subject matter of criticism since they also work under the larger social and political order, such allegations are inherent in the system. It is because of this that one has to look into the larger perspective of hate violence. These crimes cannot be limited to traditional crime. In fact, they are a reflection of overall socio-economic conditions and political upheavals, as it is suggested by Nanavati Commission,¹⁸ Banarjee Commission,¹⁹ Librahan Commission²⁰; hate violence does have a close connection with political development.
- **Complicated and delayed justice system-** “The rule of law cannot exist without an effective judicial system, which is capable of enforcing rights in a timely and proportionate manner in a way that inspires public confidence in the administration of justice”. Unfortunately, ineffective governance has created barriers to accessing justice, which has resulted in granting certain sections of society only limited access to the full range of socioeconomic and civil-political rights available. There are some ‘external factors’ such as monetary, cultural or geographical barriers, and some internal factors, such as procedure technicalities, which affect everyone in the system.

MAJOR INCIDENTS

The social structure of India is extraordinarily intricate and varied. India’s composite culture and civilisational impetus are the source of India’s socio-cultural diversity’s strength and sustainability. Although the presence of diversity and heterogeneity does not generate conflict in and of itself, there is always the possibility that it will do so.

¹⁸ Commission appointed by government of India to examine Anti Sikh Riots of 1984

¹⁹ Commission appointed by Ministry of Railway for Godhra Incidents, 2002

²⁰ Commission for examining demolition of disputed Mosque at Ayodhya in 1992

- **Gujarat Riots (1969)-** The 1969 Gujarat riots were an after-effect of common animosity among Hindus and Muslims. The viciousness was Gujarat's first significant mob that included butcher, fire-related crime and plundering on an enormous scale. As indicated by the official figures, 66 individuals were executed, 1074 individuals were harmed, and more than 4800 lost their property.
- **Sikh Massacre (1984)-** Due to the assassination of then Prime Minister Indira Gandhi by her Sikh bodyguards at her residence. Anti-Sikh riots broke out in several locations on October 31, 1984, after the murder of Indira Gandhi. These disturbances lasted for several days and resulted in the deaths of more than 3,000 Sikhs in New Delhi and an estimated 8,000 throughout India.
- **Conflict in Kashmir (1990s)-** This is a reflection of the fact that the situation in Punjab has similarities to the struggle in Kashmir. As a result, the traditional idea of Kashmiri identity, known as Kashmriyat, has been supplanted with the concept of communal struggle, in which Muslim militants have driven Hindu Kashmiris out of the valley.
- **Ayodhya Riots (1991)-** It is quite probable that these various patterns of conflict development and containment, including resolution, will continue to exist in the future. For instance, a communal and fundamentalist dispute like the fight between a Hindu temple and a Muslim Mosque in Ayodhya seems to have lost its militancy and violent drive after reaching its apex in 1990-1991.
- **Godhra Riots, Gujarat (2002)-** On the morning of February 27, 2002, Coach S6 of the Sabarmati Express was set on fire, killing 59 of the passengers who were riding in it. At that moment, the train had just arrived at Gujarat's Godhra station. There were 10 children and 27 women among the victims. 48 other passengers on the train sustained injuries.
- **Lynching of Khairlanji (2006)-** In India, the principal detailed episode of mob violence is the lynching of Khairlanji committed in 2006. This mob violence was the prevailing Kunbi rank, and the solitary survivor needed to battle for 10 years to get equity.
- **The lynching of Mohammed Akhlaq (2015)-** The exceptionally secure feature of Mohammed Akhlaq's lynching on 28th Sep.2015 in Dadri²¹, where an old Muslim person was killed merely on supposed utilisation, possession and consumption of meat. The

²¹ A Vatsa, Dadri: Mob kills man, (Indian Express, 25 Dec 2015) <<http://indianexpress.com/article/india/indiaothers/next-door-to-delhi-mob-kills-50-year-old-injures-on-over-rumours-they-ate-beef/>> accessed on: 1 November

declaration was produced using a nearby sanctuary by allegedly expanding meat. U. P. Govt. requested an authoritative inquiry into the issue.

- **Palghar Lynching, Maharashtra (2020)-** Three persons, including two saints and one driver of the van, were killed by the mob on midnight of 16 April 2020 by alleging child lifters. 115 persons, including 9 minors, were arrested for the heinous crime; the matter is pending, and justice is still awaited.²²

Data gathered by the National Crime Record Bureau (NCRB) and published as ‘Crime in India’ make it abundantly evident that crimes perpetrated against individuals and against certain groups of people, such as scheduled castes and scheduled tribes, are of a graver and more serious kind than previously thought. According to the official statistics that were compiled from 1990 to 2000, Dalits were responsible for a combined total of two and a half lakhs (exactly 25,2370 instances) of different crimes committed across the whole nation. “If we look at the type of crime and atrocities, we get to know that on an average (average for ten years): 553 Murders, 2990 Hurt cases, 919 Rapes, 184 Kidnapping/abduction, 47 Dacoity, 127 Robbery, 456 Arson, 1485 civil right violation under OCR ACT, 6174 atrocities under atrocities Act and 12, 995 other offences were registered every year by the Dalits. During the latest year 2000, the break-up of the atrocities and violence include 473cases of murder, 3139 of grievous hurt, 251 cases of arson and 992 cases of rape, 631 cases under PCR ACT, 6350 cases under the PA Act and 12149 cases of other offences.”²³ “Data from 2000 to 2009, collected by NCRB regarding crimes against SC/ST, makes no relief either to lawmakers or executing authorities. In fact, such crimes are unabated and have become more intense. From 2001 to 2009, precisely 2,70,578 crimes were committed against this particular community. Crimes under the head of the Protection of Civil Rights Act, 1956 and SC/ST (Prevention) of Atrocities Act, 1989, have no sign of decrease. In the year 2001, it was accounted as 13746 whereas in the year 2009, it was 11,311. Thus, there is no substantial change in the crime committed against this class of society.”²⁴

AFTERMATH OF HATE CRIMES ON SOCIETY

No nation, and particularly not one that is still in the process of growing like India, can afford to ignore the problem of hate crimes. In the case of *National Human Rights Commission v. State of Gujarat*²⁵ Hon’ble Apex Court observed, “Communal harmony is the hallmark of a

²² The Times of India, Delhi, 18 April 2020

²³ National Crime Record Bureau (2009)

²⁴ National Crime Record Bureau (2011)

²⁵ *National Human Rights Commission v. State of Gujarat*, [2009] 6 SCC 342

democracy. No religion teaches hatred. If, in the name of religion, people are killed, that is essentially a slur and blot on the society governed by the rule of law.”²⁶ The rule of law is essential to the functioning of a democratic government in any nation.

- **Social Impact:** The damage caused by such crimes extends well beyond the victim or victims of the criminal behaviour who are directly affected by the behaviour of the offender. There is not only a more extensive effect on the “target community” that shares the Group feature of the victim but also an even larger foundation of damage to the entire society as a whole. The members of the target community do more than just sympathise or even empathise with the victim of the current prejudiced crime. People who are a part of the community that has been the target of hate crimes interpret such crimes as if they were a direct assault on them personally. Any act of religious outburst, such as the burning of the Quran, Gita, or Cross, or the scrawling of a swastika, will not simply bring forth identical sentiments on the side of the opposite group. Rather, those who are a part of these target groups could have responses of genuine danger and assault as a result of this particular occurrence. The old adage “United we stand, divided we fall”²⁷ has a point. In India, hate violence or lynching generally reflects internal disputes between various racial communities. There are various impacts and effects of mob lynching on society-
 - ⇒ In this way, harmony in society and the possibility of unanimity in assorted varieties,
 - ⇒ It clearly indicates the environment of majority v/s minority
 - ⇒ It disturbs standing, class/category and collective contempt.
 - ⇒ It builds the degree of household strife and consequent military rules.
 - ⇒ Such acts show a loss of resilience in the public arena, and individuals are influenced by feelings, partialities, etc.
- **Economic Impact:** It is a well-known fact that hate crimes have repercussions not just for the victims but also for the economy. In addition to making matters worse in terms of law and order, it also gives a poor impression of the nation to the rest of the world. The 2019 Ease of Doing Business Index that was issued by the World Bank places India at the 63rd spot worldwide. In other words, companies still do not invest with the

²⁶ Ibid

²⁷ Winston Churchill, University of Rochester, (London, June 16, 1941)

<<https://www.nationalchurchillmuseum.org/the-old-lion-1941.html>> accessed 15 April 2023

utmost interest in India (for the objectives of their enterprises), and this is the case regardless of the reasons why. “The Rule of Law reflects a man’s sense of order and justice. There can be no Government without order; there can be no order without law.”²⁸

- Destruction of the local market.
- Disturbance in Production and Supply aspects.
- Migration of Capital and Labour Market.
- A gap in the Relationship of Supplier and Consumer.
- Effect over Investment in the Market.

LAWS RELATING TO HATE CRIMES

The Preamble of the Constitution primarily outlines the very core of constitutional democracy and the goals need to be attained for the future. The quest for ‘fraternity’ through ‘social, economic and political’ justice is the fundamental objective. “It also strives to provide ‘equality of opportunity’, thus making the future society egalitarian.”²⁹

- **Indian Penal Code, 1860:** The vast majority of hate crimes in India are investigated and prosecuted in accordance with the Indian Penal Code. Chapter VIII, which is titled “Of Offences against the Public Tranquillity,” safeguards the people of society as well as society itself from any potential disturbances to peace. According to Section 153A of the Indian Penal Code, anybody who promotes animosity between various groups on the basis of religion, race, place of birth, domicile, language, etc., and does activities that are harmful to the preservation of harmony may be punished. According to Section 153B, anybody who makes or publishes any imputation or allegation that is detrimental to the nation’s ability to function as a cohesive whole shall be subject to the appropriate penalties. In the Indian Penal Code, Section 295 forbids damaging or defiling any place of worship in order to avoid insulting the religion of any particular caste or community. Promoting feelings of hostility, animosity, or ill will between various religious, racial, linguistic, regional, caste, or community groups is the element that is shared by both of these charges.
- **Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989:** The purpose of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act,

²⁸ *Cardamom Marketing Corporation v. State of Kerala*, [2017] 5 SCC 255

²⁹ The Constitution of India 1950, Preamble

which was passed in 1989, was to create a law that would prohibit atrocities from being committed against members of scheduled castes and scheduled tribes. In *Dinesh alias Buddha v. State of Rajasthan*³⁰ the Supreme Court has made the observation that a violation must have been committed against a person on the basis that such a person is a member of the Scheduled Castes or the Scheduled Tribes in order for Section 3 to be applicable.

- **Code of Criminal Procedure, 1973:** Certain restrictions governing hate speech may be found in Section 144 of the Criminal Code. It is included in Chapter XI under the heading “Temporary Orders in Urgent Cases of Nuisance or Anticipated Damage.” In situations involving an immediate annoyance or “apprehended danger,” the clause grants the authority to immediately issue an order. In Chapter VIII of the Code of Criminal Procedure, there is a section called “Prevention of Offences” that explains how to stop crimes, disturbances of public peace, and other things that break the peace.
- **The Unlawful Activities (Prevention) Act, 1967:** It defines “unlawful activity” as any action through an act or by words intended to bring about the cession or secession of a part of India or which incites others to bring about such cession or secession.³¹ “It also includes such action which disclaims, questions, disrupts or is intended to disrupt the sovereignty and territorial integrity of India or to cause disaffection against India.”³² It says that a “unlawful association” is a group that wants to do something illegal, or that supports or helps people do something illegal, or that wants to do something that is punished under section 153A or section 153B of the IPC. The Central Government has the power to say that an organisation is illegal.

SUPREME COURT'S VIEWS ON HATE CRIMES

The apex court in India has ordered both the Central and State governments to pass stringent legislation to curb acts of violence motivated by hatred, as well as to take pre-emptive measures to halt the dissemination of material through web-based networking media platforms that may potentially encourage a mob to violence. The Supreme Court in India issued an order to the police, instructing them to file a First Information Report (FIR) under Section 153A of the Indian Penal Code as well as other statutes that are analogous against anybody who engages in such acts. The Supreme Court, in an effort to speed up the preliminary process, has suggested

³⁰ (2006) 3 SCC 771

³¹ The Unlawful Activities (Prevention) Act 1967, s 2(f)

³² The Unlawful Activities (Prevention) Act 1967, s 2(f), (i) & (ii)

that daily preliminary hearings be held in rapid track courts and that the accused be subject to the strictest possible punishment in instances involving mob violence.

In *State of Andhra Pradesh v. Destruction of Public and Private Properties*³³, “No one has the privilege to become self-designate watchman of the law and coercively oversee their elucidation of the law and others, particularly not with vicious methods”. “The Supreme Court ruled that states had a responsibility to guarantee that individuals or organisations did not take the law into their own hands in order to prevent unfortunate situations and criminality, which might involve property damage.”

*Tehseen S. Poonawala v. Union of India*³⁴, the Supreme Court’s landmark decision, is a significant step forward in the reform and protection of human rights. The Court condemned lynchings in crowds across the country, saying that it is the responsibility of both the federal and state governments to prevent, remedy, and treat lynchings. It declared, “Directing the Center and states to take serious steps to prevent lynchings, “It was also stated that “Wrongdoing knows no religion and neither the culprit nor the injured individual can be seen through the viewpoint of race, position, class or religion.” “The Supreme Court has said there is no room for hate crime in a secular country like India, and it is the primary duty of the state to protect its citizens from such crimes”³⁵.

In *Pravasi Bhalai Sangathan v. Union of India*³⁶, the Supreme Court of India outlined its definition of hate speech as “an effort to marginalise individuals based on their membership in a group which seeks to delegitimise group members in the eyes of the majority, reducing their social standing and acceptance within society.”

In the case of *R. Sukumar v. State of Tamil Nadu*³⁷, the court held that hate speech on social media platforms is not protected by the right to freedom of speech and expression. The court directed that First Information Reports (FIRs) should be registered and criminal proceedings initiated against the makers of hate speech “irrespective of their religion so that the secular character of the country is preserved”.

CONCLUSION

³³ [2009] 5 SCC 212

³⁴ AIR [2018] SC 3354

³⁵ The Wire, SC on Hate Crimes: Primary Duty of State Is to Protect Citizens, No Compromise At All’ <<https://thewire.in/law/sc-on-hate-crimes-primary-duty-of-state-is-to-protect-citizens-no-compromise-at-all>> accessed on 23 February 2023

³⁶ AIR 2014 SC 1591

³⁷ MANU/TN/4683/2010

The conflict that occurs between different groups and acts of violence each have their own connections and links. There are several aspects of violence that are often seen in traditional violence, such as the level of severity and the consequential influence that it has on issues pertaining to law and order. But in addition to that typical kind of violence, there are numerous more considerations. These include a wider effect on people in general, an increasing sense of distinction, and a more fundamental inquiry into one's identity. Hate violence does generate profound breaches in the social, cultural, political, and economic fabric. Hate crimes often result in the movement of labour and capital from one region to another, as has been seen on several occasions. In these kinds of circumstances, it is of the utmost importance to think about the consistent and equitable growth of each and every area of society and the linked market. It is possible to make the argument that if persons who have been victimised by hate violence are more likely to be victimised as a result of their unique state, then it is imperative to establish special provisions for their safety in the sense of commerce, business, and other professions. Concerns about social security and insurance culture, as well as issues regarding the social security of riot victims and the protection of their property, need to be the focus of legislation and state policy.

SUGGESTIONS

The state is required to exert the necessary effort across all fronts in order to achieve the goal of the equal development of society. Both the Sacchar Committee Report and the SC/ST Commission Report have made several references to the economic and social standing of India's Scheduled castes and Scheduled tribes throughout their respective reports. If there is a shift in the current of hatred and violence, these policies need to provide productive results for their country's economic growth. The following is one possible way to express them:

- The desire for social recognition and identification will increase the likelihood of hate crimes occurring in the future if such demands are not addressed with proper legal punishments.
- Hate crimes will continue to be fueled by inequalities in economic growth and a deepening of divides between groups.
- The role of politics and political parties, especially during elections for Panchayats, is providing an additional boost to hate propaganda, and this may further contribute to acts of violence motivated by hatred.
- The police system should be modernised, and the foundation of such changes

should be the “rule of law,” so that this agency may approach each crime as an individual offence, and so that it might potentially play a more constructive role in preventing crime and prosecuting those who commit crimes.

- As a result of the fact that acts of hate violence are motivated by concerns over religion and caste-related identities, it is necessary to combine these concerns with efforts to improve economic and political conditions in order to eliminate these identities and, as a result, curb the causes of acts of hate violence.
- The role of the National Human Rights Commission (NHRC) may be reevaluated, particularly in terms of rehabilitation and the provision of compensation to victims of hate violence.
- Specialised agencies should be established for the purpose of preventing hate violence since the police force has become highly politicised and people no longer have faith in this system.

PROTECTION OF FLORA AND FAUNA: A NATIONAL LEGAL PERSPECTIVE

- Dr. Shiv Shankar Singh*

Abstract

Reserving flora and fauna is a pivotal aspect of environmental conservation worldwide. This paper delves into the national legal frameworks safeguarding these invaluable natural resources by examining the legal landscape from a national perspective. At its core, protecting flora and fauna is anchored in legislation crafted to mitigate the adverse impacts of human activities on biodiversity. National legal frameworks encompass a spectrum of statutes, regulations, and policies tailored to address diverse ecological contexts and challenges. These laws often establish protected areas, regulate wildlife trade, and impose penalties for illegal exploitation, aiming to curb habitat destruction, overexploitation, and species endangerment. However, the effectiveness of these legal instruments is contingent upon robust enforcement mechanisms, public awareness, and stakeholder collaboration. The dynamic nature of ecosystems and emerging threats like climate change necessitate adaptive legal frameworks capable of addressing evolving environmental concerns. Despite these challenges, national legal perspectives on protecting flora and fauna have witnessed notable successes. Collaborative initiatives have yielded conservation milestones, including species recovery programs, habitat restoration efforts, and the establishment of protected areas networks. Furthermore, international agreements and conventions provide supplementary frameworks for transboundary cooperation and biodiversity conservation.

Keywords: Flora-fauna, Environmental Conservation, International agreements, Climate Change, Natural Resources, Challenges.

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INTRODUCTION

Since the Industrial Revolution, activities have increasingly destroyed degrading forests, lands, wetlands, and important ecosystems, seriously threatening human well-being. An astounding seventy-five percent of the Earth's ice-free surface has already been altered, with most of the oceans being dirty and over 85% of the wetlands being lost. This destructive behaviour towards ecosystems has resulted in 1 million species (500,000 animals and plants, and 500,000 insects) being under the threat of extinction over the coming decades to centuries, even though quite a few of these extinctions could have been avoided if we take steps to conserve and restore nature. It's impossible to overstate the significance of wildlife in our world today; it is deeply intertwined with human life on Earth, and the overwhelmingly evident facts indicate that it is facing devastation due to human activities at a rate that has never been seen in history.

Flora and fauna protection is critical to environmental law and policy in India, a country renowned for its rich biodiversity and unique ecosystems. Over the course of centuries, legal frameworks in India have developed to tackle the growing challenges posed by biodiversity loss, habitat destruction, and climate change. This essay aims to provide an in-depth analysis of the evolution of Indian legal viewpoints on protecting flora and fauna from the 25th to the 30th centuries, focusing on key legislative developments, constitutional provisions, and the challenge.

HISTORICAL CONTEXT

Colonial Era Legislation

The first legal statute for wildlife conservation in India was established by the British with the enactment of the Wild Birds Protection Act in 1887. This act granted the government authority to create regulations prohibiting the possession or sale of specific wild birds killed or captured during the breeding season. In 1912, the British government passed the Wild Bird and Animals Protection Act, which was later amended in 1935. This 1912 Act became the first law prohibiting hunting wild animals and birds, with violators facing legal penalties. The act empowered local governments to extend the provisions of the act to safeguard any wild bird or animal not specified in the schedule but deemed necessary to conserve or protect. Over time, the importance of preserving wildlife resources became increasingly apparent, leading to the development of numerous wildlife conservation policies and laws in India.

India's conservation efforts can be traced back to the colonial era, with the enactment of laws such as the Indian Forest Act of 1927 and the Wild Birds and Animals Protection Act of 1912. These laws primarily focused on regulating the use of forest resources and protecting specific wildlife species from hunting and poaching.

Post-Independence Legislative Developments

After gaining independence in 1947, India shifted its focus towards conservation by establishing national parks, wildlife sanctuaries, and conservation reserves. The Wildlife Protection Act of

1972¹ was a landmark legislation that repealed and replaced earlier colonial-era laws, providing comprehensive protection to wildlife and their habitats.

COMPREHENSIVE LEGISLATIONS

Wildlife Protection Act, 1972

Prior to 1972, the concept of modern wildlife conservation did not exist in the country. The Wildlife Protection Act of 1972 is India's cornerstone of wildlife conservation. The Wildlife Protection Act, 1972 and its amendments up to 2006 provide the legal framework for the conservation of wildlife in the country. It provides comprehensive protection to wildlife and their habitats by prohibiting hunting, poaching, and trade in wildlife and their derivatives.² The Act empowers the central and state governments to declare areas as sanctuaries, national parks, and conservation reserves, thereby facilitating the conservation and management of biodiversity.

Amendments to this Act

The Forty Second Constitution (Amendment) Act, 1976 moved wildlife along with forests from the state list (Seventh Schedule) of the Constitution to the concurrent list, enabling the Central Government to intensify its role in developing national wildlife policy.

An amendment to the Act in 1982 permitted the capture and transportation of wild animals for the scientific management of the animal population. Still, it was later realised that this was not sufficient. The Government then began enacting a comprehensive law that would include all aspects of wildlife, including plants.

In November 1986, a new chapter (Chapter V-A) was incorporated into the Wildlife (Protection) Act, 1972, which imposed an absolute prohibition on trade or commerce in trophies and animal articles derived from protected scheduled species. However, the wildlife trade continues to be the biggest challenge in wildlife conservation.

The Government amended the Wildlife (Protection) Act in October 1991 to bring specified plants under the protective umbrella of the Act. The amendments also envisaged the establishment of the Central Zoo Authority to regulate the management and functioning of the zoos. In 2002, exhaustive amendments were introduced to the law on wildlife, which came into force in 2003. As was the case in the past, a new board was called the National Wildlife Board instead of an advisory institution.

The Wildlife Protection Amendment Act, 2006 (39 of 2006) inserted two new chapters, Chapter IVB dealing with the National Tiger Conservation Authority and IVC establishing Tiger and Other Endangered Species Crime Control Bureau.

¹ Wildlife Protection Act, 1972. (1972). Government of India

² Ibid.

The Wildlife (Protection) Amendment Bill, 2013, provides for the protection and conservation of wild animals, birds, and plants, as well as the regulation of trade or commerce related to wildlife. The Wildlife Crime Control Bureau (WCCB) was granted statutory status under the Wildlife (Protection) Amendment Act 2018.

The Wildlife (Protection) Amendment Bill 2021 amends the Wildlife (Protection) Act of 1972 to increase species protection and implement CITES. Wildlife (Protection) Amendment Bill 2022 was implemented to strengthen protection for endangered species and enhance punishment for illegal wildlife trade.

Forest Conservation Act, 1980

The Forest Conservation Act of 1980³ aims to conserve India's forests by regulating *and* restricting the diversion of forest lands for non-forest purposes. Section 2 of the Act prohibits using forest land for any non-forest purpose without prior approval from the central government, thereby ensuring the sustainable management and conservation of forest resources.

Environment (Protection) Act, 1986

The Environment (Protection) Act of 1986⁴ is a comprehensive legislation that provides the framework for protecting and improving the environment. The Act empowers the central government to take measures to protect and improve environmental quality and prevent hazards to human beings, wildlife, and natural ecosystems. It also provides for the establishment of environmental standards and the regulation of industrial activities.⁵

Biological Diversity Act, 2002

The Biological Diversity Act of 2002⁶ was enacted to conserve India's biological diversity and promote the sustainable use of its biological resources. The Act establishes the National Biodiversity Authority and State Biodiversity Boards to regulate access to biological resources and associated traditional knowledge. Section 4 of the Act requires prior approval from the National Biodiversity Authority to collect biological resources for commercial utilisation.

National Green Tribunal Act, 2010

The National Green Tribunal Act of 2010⁷ established the National Green Tribunal (NGT) as a specialised forum for the effective and expeditious disposal of cases related to environmental protection and conservation of forests and other natural resources. The NGT has the power to

³ Forest Conservation Act,1980

⁴ Environment (Protection) Act, 1986

⁵ Tejasree Joshi, World Environment Day: India's biodiversity is under threat and we need to save it, *available at:* <https://www.indiatoday.in/environment/story/world-environment-day-indias-biodiversity-is-under-threat-and-we-need-to-save-it-2389035-2023-06-05> (last visited on: 12.04.2024)

⁶ Biological Diversity Act, 2002

⁷ National Green Tribunal Act, 2010

hear and dispose of cases related to environmental disputes, including those pertaining to the protection of flora and fauna.

Coastal Regulation Zone Notification, 2011

The Coastal Regulation Zone (CRZ) Notification of 2011⁸ regulates human activities in the coastal areas to protect and conserve coastal ecosystems and biodiversity. The Notification prohibits certain activities within the CRZ to minimise environmental degradation and safeguard marine and coastal flora and fauna.

Air (Prevention and Control of Pollution) Act, 1981

The Air (Prevention and Control of Pollution) Act of 1981⁹ aims to prevent, control, and abate air pollution in India. The Act empowers the central and state pollution control boards to take measures to improve air quality, regulate industrial emissions, and enforce emission standards to protect human health, wildlife, and ecosystems.

Water (Prevention and Control of Pollution) Act, 1974

The Water (Prevention and Control of Pollution) Act of 1974¹⁰ aims to prevent and control water pollution in India. The Act empowers the central and state pollution control boards to take measures to improve water quality, regulate industrial discharges, and enforce effluent standards to protect aquatic ecosystems and biodiversity encountered during the process.

CONSTITUTIONAL PROVISIONS

Fundamental Duties and Directive Principles

The Constitution of India underwent several amendments to incorporate environmental protection as a fundamental duty of every citizen and a directive principle of state policy. Article 48A and Article 51A(g) emphasise the state's responsibility to protect and improve the environment and safeguard wildlife and forests, thereby providing a constitutional mandate for environmental conservation.

Indigenous and Local Community Rights

⁸ Coastal Regulation Zone Notification, 2011.(2011),Ministry of Environment, Forest and Climate Change, Government of India.

⁹ Air (Prevention and Control of Pollution) Act, 1981

¹⁰ Water (Prevention and Control of Pollution) Act, 1974

Constitutional amendments in the late 26th and early 27th centuries recognised the rights of indigenous and local communities to their ancestral lands and natural resources. Article 371 and Article 244(2) provided special provisions for the administration and governance of tribal areas, emphasising the integration of traditional knowledge and practices into conservation strategies.

TECHNOLOGICAL ADVANCEMENTS AND INNOVATIVE CONSERVATION STRATEGIES

Digital Monitoring and Surveillance

Advancements in technology, particularly in the fields of biotechnology, remote sensing, and artificial intelligence, have played a significant role in shaping environmental law in the 30th century. The use of satellite imagery, GPS tracking, and drone surveillance has enhanced the monitoring and enforcement of environmental regulations, thereby strengthening the protection of flora and fauna.

Eco-Sensitive Zones

Eco-Sensitive Zones (ESZs) were introduced to regulate and manage human activities in areas surrounding national parks and wildlife sanctuaries. Section 3 of the Wildlife Protection Act empowers the central government to notify ESZs to minimise human-wildlife conflicts, protect biodiversity, and promote sustainable development.

INTERNATIONAL ASSOCIATIONS THAT SHAPED INDIAN REGULATIONS

India is a party to international conventions and agreements on protecting wildlife, flora, and fauna. These international agreements have influenced and are reflected in India's domestic laws and policies. Here are some key international conventions and agreements that have had an impact on wildlife conservation laws in India:

Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)

India is a signatory to CITES, and its provisions are reflected in the Indian Wildlife (Protection) Act, 1972. This act provides legal protection to endangered species and regulates their trade both domestically and internationally.

Convention on Biological Diversity (CBD)

India is a party to the CBD, which aims to conserve biodiversity, promote sustainable use of its components, and ensure the fair and equitable sharing of benefits from genetic resources. The CBD has influenced India's biodiversity conservation policies and the Biological Diversity Act, 2002, which provides a framework for conservation, sustainable use, and equitable sharing of benefits arising from biodiversity.¹¹

¹¹ www.yourlegalcareercoach.com (last visited on 15/03/2024)

Ramsar Convention on Wetlands

India has designated several wetlands as Ramsar sites, and the Ramsar Convention's principles are reflected in the Wetlands (Conservation and Management) Rules, 2017, which aim to conserve and manage wetlands and their biodiversity.

World Heritage Convention (UNESCO)

India has several UNESCO World Heritage Sites designated for their unique biodiversity and cultural heritage. The protection of these sites is governed by the World Heritage Convention and is incorporated into India's cultural and natural heritage conservation policies.

Agreement on the Conservation of Migratory Birds of Prey in Africa and Eurasia (Raptors MOU)

India is a signatory to the Raptors MOU, which aims to conserve migratory birds of prey and their habitats. The provisions of this agreement are reflected in the Indian Wildlife (Protection) Act, 1972, which protects migratory birds and their habitats.

Agreement on the Conservation of Asian Elephants (ACE)

India, being home to a significant population of Asian elephants, is a signatory to the ACE, which aims to conserve Asian elephants and their habitats. The Indian Wildlife (Protection) Act, 1972, provides legal protection to elephants and their habitats in India, reflecting the provisions of this agreement.

Convention for the Conservation of Antarctic Marine Living Resources (CCAMLR)

Although India is not an Antarctic nation, it is a member of CCAMLR and is influenced by the principles of its marine conservation policies and laws.

African Convention on the Conservation of Nature and Natural Resources (Algiers Convention)

India is not a member of this convention, but it has been influenced by the principles of the Algiers Convention in its conservation policies and practices, particularly concerning transboundary conservation issues.

These international conventions and agreements have played a crucial role in shaping India's wildlife conservation laws and policies, ensuring the protection and sustainable use of its rich biodiversity. India's domestic laws, such as the Wildlife (Protection) Act, 1972, the Biological Diversity Act, 2002, and the Wetlands (Conservation and Management) Rules, 2017, are aligned with the provisions of these international agreements to ensure effective conservation and management of wildlife, flora, and fauna in the country.

Rights of Nature

By the end of the 30th century, the concept of “rights of nature” had gained traction in Indian legal systems. Inspired by indigenous philosophies and ecological ethics, this paradigm shift recognised the intrinsic value of ecosystems and granted legal rights to nature itself. This transformative approach represented a fundamental reorientation of legal thinking, moving away from a purely anthropocentric view of the environment to a more ecocentric perspective.

CHALLENGES AND CONTROVERSIES

Rapid Industrialization and Urbanization

Despite these advancements, the rapid industrialisation and urbanisation of the 25th to 30th centuries posed significant threats to India's biodiversity. Habitat destruction, pollution, and climate change continued to degrade ecosystems and threaten wildlife populations, necessitating continuous adaptation and refinement of legal frameworks.

Enforcement and Compliance

Ensuring compliance with environmental laws and regulations remained a persistent challenge. Despite technological advancements, illegal logging, poaching, and wildlife trafficking continued to undermine conservation efforts, highlighting the need for more robust enforcement mechanisms and international cooperation.

Balance between Conservation and Development

The balance between conservation and development remained a contentious issue throughout this period. Governments and stakeholders grappled with reconciling economic growth with environmental protection, requiring careful negotiation and compromise.

CONCLUSION

The evolution of Indian legal perspectives on protecting flora and fauna from the 25th to 30th centuries reflects a profound transformation in societal values, scientific understanding, and governance models. From reactive and fragmented approaches to comprehensive and inclusive strategies, environmental law in India has evolved to address the complex challenges of biodiversity conservation in an increasingly interconnected and rapidly changing world. As we look to the future, the lessons learned from these centuries of legal evolution will continue to inform and inspire efforts to safeguard India's rich biodiversity for future generations.

Protecting flora and fauna through national legal frameworks is critical to environmental stewardship and sustainable development. This examination of the national legal perspective shows that while challenges persist, significant strides have been made in safeguarding biodiversity.

National legal frameworks are the cornerstone for addressing flora and fauna's myriad threats, including habitat loss, poaching, and climate change. These frameworks establish the legal basis

for creating protected areas, regulating wildlife trade, and imposing penalties for illegal exploitation. However, their effectiveness depends on robust enforcement mechanisms, adequate funding, and stakeholder collaboration.

Despite challenges like inadequate resources and conflicting interests, collaborative efforts between governments, NGOs, and local communities have yielded tangible conservation outcomes. Species recovery programs, habitat restoration initiatives, and establishing protected areas networks stand as a testament to the efficacy of concerted action.

Moreover, international agreements and conventions supplement national legal frameworks, providing avenues for transboundary cooperation and biodiversity conservation. By fostering dialogue and sharing best practices, these global initiatives enhance the effectiveness of national conservation efforts.

In conclusion, while there is still much work to be done, the national legal perspective on protecting flora and fauna offers hope for the future. By addressing legislative gaps, enhancing enforcement capacity, and fostering public engagement, nations can build upon their achievements and ensure the enduring protection of biodiversity for generations to come. Through continued collaboration and innovation, we can strive towards a harmonious coexistence between humanity and the natural world, preserving the rich tapestry of life on Earth.

IMPACT OF THE OCCUPATIONAL SAFETY, HEALTH AND WORKING CONDITIONS CODE, 2020 ON CONTRACT LABOUR: A COMPARATIVE ANALYSIS WITH THE CONTRACT LABOURER (REGULATION AND ABOLITION) ACT, 1970

- Jasmine Gill* & Arnav Goel**

Abstract

This research paper aims to analyse the provisions and implications of The Occupational Safety, Health and Working Conditions Code, 2020 (OSHWC Code) concerning contract labour and compare them with the provisions of the Contract Labour Act, 1970. The paper explores the changes introduced by the OSHWC Code and evaluates its effectiveness in safeguarding the rights and ensuring the safety of contract labourers in India.

Keywords: OSHWC Code, Contract Labourers, Welfare, Safety.

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INTRODUCTION

The labour market in India has witnessed significant regulatory changes over the years, with the enactment of various labour laws aimed at protecting the interests of workers. The Contract Labour Act, 1970, was one such legislation that aimed to regulate the employment of contract labour and ensure their welfare. However, with evolving labour dynamics and the need for comprehensive legislation, the Government of India introduced the Occupational Safety, Health and Working Conditions Code, 2020, which repealed and replaced several existing labour laws, including the Contract Labour Act, 1970. The primary objective of the Contract Labour Act of 1970 was to regulate contract labour in sectors where instances of abuse were particularly conspicuous. The legislation mandated contractor licensing, established service conditions, and sought to eliminate contract labour in specific processes deemed permanent and amenable to regular worker performance. Although this Act was crucial in providing contract labour with an additional layer of protection, it was frequently criticised for its inflexible implementation mechanisms, which failed to adequately adapt to the changing industrial environment.¹ In contrast, the OSH Code is an integral component of a more extensive endeavour undertaken by the Indian government to streamline and streamline labour regulations, thereby enhancing their uniformity and compliance. The impetus behind this reform was to decrease the number of definitions and governing bodies without compromising the fundamental protections provided to employees, including those who are contractually engaged. Significantly, the OSH Code broadens the regulatory scope to encompass all establishments that employ a specific minimum number of personnel, thus augmenting the inclusiveness of protective measures.

In addition, by implementing a streamlined registration process for establishments, a standardised licence for contractors engaged in multiple activities, and a web-based, transparent system for the submission of notices and returns, the OSH Code endeavours to optimise the compliance process. The implementation of this digital methodology not only mitigates the administrative workload but also endeavours to enhance labour law enforcement by means of real-time monitoring and compliance verifications. In brief, this comparative analysis will examine the potential reshaping of the regulatory landscape pertaining to contract labour in India as a result of the transition from the Contract Labour Act 1970 to the OSH Code, 2020.

This analysis will evaluate the extent to which the newly implemented code effectively reconciles the need to protect the dignity, safety, and welfare of contract workers with the desire to

¹ Jeet Singh Maan, *Liberating Labour Law* (Centre for Transparency and Accountability in Governance, NLU Delhi (New Delhi, 2023).

facilitate business operations. In doing so, it will make a valuable contribution to the wider discussion surrounding labour reforms in economies undergoing rapid development. This paper seeks to analyse the implications of these legislative changes, particularly concerning contract labour, and assess the effectiveness of the OSHWC Code in addressing the challenges faced by contract labourers.

BRIEF HISTORY OF THE CONTRACT LABOURER (REGULATION AND ABOLITION) ACT, 1970

In India, 'contract labour' differs from 'direct labour' based on the employment relationship and wage payment system (1st National Commission on Labour report, 1969, p. 418). The Contract Labour (Regulation & Abolition) Act 1970 defines contract workers as individuals employed temporarily by a service provider [Section 2(b)] based on job availability. Contract workers in India are typically on the edge of formality and informality due to the lack of a documented contract of employment. Put another way, they are indirect workers, people who are employed, managed, and paid by a contractor who is then paid by the establishment. Because contract workers are more flexible, less expensive, and typically unorganised than regular employees, this triangular employment relationship aims to protect companies from the whims of the job market and give them total control over the forces of production. It has always been difficult for policymakers to ensure higher labour standards because the country employs over 92% of its workforce in the unorganised sector. More specifically, since economic liberalisation (1991), direct employment has gradually replaced contractual work in the organised sector, while the size of the informal sector has remained constant. The Planning Commission included a number of proposals in the Second Five-Year Plan, including conducting research to determine the scope of the contract labour issue, gradually eliminating the contract labour system, and enhancing contract labourers' terms of employment. When the issue was brought up at various Tripartite Committee meetings, where State Governments were also represented, the general consensus was that the system of contract labour should be eliminated wherever it was practical to do so. If this was not possible, the working conditions of contract labour could be regulated to guarantee wage payment and the provision of necessities. The First National Commission on Labour 1966, which was headed by Justice P. B. Gajendragadkar, was set up with a major mandate to review the changes in conditions of labour since Independence and to report on existing conditions of labour. In the report submitted by the commission in the year 1969, one of the many recommendations was as follows -

A stricter regulation of contract work than at present is called for. The general direction of policy should be towards the abolition of contract labour in due course. The Central Bill provides for the regulation and abolition of contract labour currently under consideration should be enacted soon. In the backdrop of this, the Contract Labour Act 1970 was enacted to regulate the adequate functioning of the contract labourers and to prevent the exploitation of contract labourers by the hands of management.²

EVOLUTION OF LABOUR LAWS PERTAINING TO CONTRACT LABOUR

Our traditional industrial jurisprudence has been completely rewritten by the four labour codes that combine 29 central labour laws.³ The initial goal of creating labour codes was to encourage labour sector liberalisation. Central trade unions have long demanded that labour laws be made simpler and more codified. The proposed labour law reforms had significant negative social ramifications. There were numerous anti-worker provisions in the drafts. However, many changes that are advantageous to the workers have been implemented due to the opposition and ongoing communication between BMS and a few other unions and the government. The Labour Codes now contain a number of generous clauses that will advance industrial development as well as worker welfare. However, a lot of things still need to be accomplished.

The proposed labour codes were modeled after the labour reforms in Rajasthan, which were praised by numerous employer associations.⁴ Regarding the effect of liberal labour reforms on industrial advancement, there are two contradictory studies. According to the Economic Survey, 2018–19, changes to the labour laws have led to an increase in investment and employment in Rajasthan.⁵ However, in a 2017 detailed study report titled “Amendments in Labour Laws and Other Labor Reform Initiatives Undertaken by state governments of Rajasthan, Andhra Pradesh, Haryana and UP: An Analytical Impact Assessment,” published by the V. V. Giri National Labour Institute, it was discovered that changes to labour laws did not always result in a significant increase in employment, industrialization, or attraction of new investments.⁶

² P. Kumar & J. Singh 2018 *Issues in Law and Public Policy on Contract Labour in India*. Springer.

³ The Code on Wages, 2019, The Code on Social Security, 2020, The Industrial Relations Code, 2020 and The Occupational Safety, Health and Working Conditions Code, 2020.

⁴ Prashant K Nanda, *Economic Survey Cites Rajasthan's Labour Reform As Ideal Model To Boost Jobs, Productivity*, The Mint, Available at: <https://www.livemint.com/budget/economic-survey/adopt-rajasthan-labour-reform-model-to-boost-employment-economic-survey-1562234277334.html>, (last visited on May 2024).

⁵ Chapter 3, Economic Survey 2018-19, Available at: https://www.indiabudget.gov.in/budget2019-20/economicsurvey/doc/vol1chapter/epreface_voll.pdf, (last visited on May 4, 2024).

⁶ Dr. S. Upadhyaya and P. Kumar, *Amendments in Labour Laws and Other Labour Reform Initiatives Undertaken by State Governments of Rajasthan, Andhra Pradesh, Haryana and U.P. An Analytical Impact Assessment*, 48 (V. V. Giri National Labour Institute, 2017), available at:

CHALLENGES AND SHORTCOMINGS OF THE CONTRACT LABOURER (REGULATION AND ABOLITION) ACT 1970

The Contract Labour (Regulation and Abolition) Act of 1970 is the principal legislation that regulates and abolishes the rights of contract labour. The Supreme Court, in the 1974 Gammon India case, defined the purposes of the Act as follows: "The Act was enacted with the dual aim of curbing the exploitation of contract labour and establishing improved working conditions." Contract labour is regulated and abolished in accordance with the Act. The fundamental tenet of the Act is to eliminate contract labour whenever feasible and practicable. In cases where complete abolition is not possible, the Act stipulates that the working conditions of contract labour must be regulated in a way that guarantees wages are paid and essential amenities are provided. In reality, a careful examination of the Act demonstrates that its primary focus is on the "regulation" of contract labour, not its complete abolition. Section 10 of the act is the only minor provision that addresses the elimination of contract labour. The remainder of the Act is devoted to "regulation." In industrial establishments, the government may prohibit the use of contract labour under Section 10, in consultation with the central or state advisory board, if the 'contract' work is determined to be of a recurring nature and regular workers perform the exact same tasks.

Over the last twenty years, it has become evident that the government rarely invokes this provision. Furthermore, the advisory boards, which serve as the primary recommending authority for abolition cases, have been handled with such indifference that in the majority of states, they have not even been constituted, let alone requested to hold regular sittings. Regrettably, the judiciary has refrained from intervening to address the situation. Instead, it has adopted a technical and restrictive approach. For instance, in the Vegoils case of 1972, the Supreme Court determined that the government, not industrial tribunals, is liable for prohibiting contract labour to eliminate contract labour through the passing of "awards."

Notwithstanding the aforementioned, the Act did witness some advancements when contract labour unions attempted to dismantle the facade of fraudulent contractors-who were merely intermediaries established by the companies to transfer routine work to contract workers in order to avoid the liabilities associated with permanent employees. Section 7 of the Act mandates that, in accordance with the specific provisions of "regulation" of contract labour, the principal employer must register his establishment prior to employing contract labour. Likewise,

for the execution of contract work, only licensed contractors may be employed in accordance with Section 12 of the Act. The clear intent behind these provisions is to empower the government to closely monitor contract litigation and prevent its exploitation.⁷

PROVISIONS OF THE OCCUPATIONAL SAFETY, HEALTH AND WORKING CONDITIONS CODE, 2020

The Contract Labour (Regulation and Abolition) Act of 1970, which controls and regulates the employment of contract labour, is one of the thirteen central labour laws that are incorporated into the Occupational Safety, Health, and Working Conditions Code, 2020.

There will be substantial changes to the current system pertaining to contract labour once these labour codes are implemented. The following are a few of the significant modifications to contract labour that the OSHW Code has implemented:⁸

- ***Application:*** If at least 50 contract labourers are employed by a contractor or provided by that contractor, then the provisions of the OSHW Code pertaining to contract labour will now take effect and apply to that establishment. The threshold was 20 under the CLRA Act, with the exception of some States where it was 50.
- ***Single registration:*** The OSHW Code now mandates a single, common registration for all businesses with ten or more employees, regardless of whether they use contract labour. This registration can be completed online via the Ministry of Labour and Employment's Shram Suvidha portal (MLE). On the date the OSHW Code goes into effect, any establishment to which it applies that already has a valid registration under an existing law that applies to it or under any central labour legislation that the Central Government notifies it of will be able to use that registration to obtain a registration under the OSHW Code. As long as the establishment updates the registration details on the Shram Suvidha portal within six months of the OSHW Code going into effect, that is. Establishments employing ten or more people are required to obtain registration under the OSHW Code within sixty days of the OSHW Code becoming applicable, if no registration has already been obtained under any applicable laws or central labour legislation.

⁷ Legal Setback for Contract Labour, available at: www.jstor.org. https://www.jstor.org/stable/4397756 (last visited on: 05.05.2024).

⁸ Overview of labour law reforms, available at: <https://prsindia.org/billtrack/overview-of-labour-law-reforms> (last visited on May 4, 2024).

- ***Broadened definition of “contract labour”:*** The OSHW Code’s definition of “contract labour” now takes interstate migrant workers into account. Considering the difficulties faced by interstate migrant workers during the COVID-19 pandemic, stakeholders have responded favourably to this change. Additionally, under the OSHW Code, the monthly wage ceiling for workers in supervisory roles has been raised from INR 500 to INR 18,000. Thus, employees holding supervisory positions and receiving monthly compensation up to the enhanced limit are now covered by the Code.
- ***Single licence:*** The OSHW Code has instituted a “single licence” system, eliminating the need for contractors to obtain multiple licences each time they deploy contract labour. As mandated by the OSHW Code, contractors who engage 50 or more contract labourers across multiple establishments must obtain a single licence. Additionally, a contractor may only need one licence if he plans to provide contract labour in multiple States or the entire country of India. This licence will be granted by the Central Government-designated authority after consulting with State-designated authorities. This single licence, which is valid for five years, can be obtained electronically through the MLE’s Shram Suvidha portal. Additionally, a contractor can apply for a “common licence” in order to provide contract labour for beedi and cigar work to a factory, an industrial location, or any combination of factories and industrial locations.
- ***Non-engagement in core activities:*** The OSHW Code forbids the use of contract labour in an establishment’s core operations, which is comparable to the policy under the Andhra Pradesh and Telangana Amendments of the CLRA Act. “Any activity for which the establishment is set up and includes any activity which is essential or necessary to such activity” is what is meant to be understood as a “core activity” of an establishment according to the OSHW Code. The OSHW Code also enlists the activities that shall not be considered as ‘essential or necessary activity’ if the establishment is not set up for such activity, such as⁹
 1. Sanitation works include sweeping, cleaning, dusting, and collecting and disposing of waste.
 2. Watch and ward services, including security services.

⁹ Contract labour under the new regime - An Overview, available at: <https://www.lexology.com/library/detail.aspx?g=1edd951e-56d6-4e74-bd4b-39b32c205240> (last visited on: 04.05.2024).

3. Canteen and catering services; loading and unloading operations.
4. Running of hospitals, educational and training Institutions, guest houses, clubs and the like where they are in the nature of support services of an establishment; courier services which are in nature of support services of an establishment;
5. Civil and other construction works, including maintenance;
6. Gardening and maintenance of lawns and other like activities; housekeeping and laundry services, and other like activities, where these are in the nature of support services of an establishment;
7. Transport services including, ambulance services; or any activity of intermittent nature even if that constitutes a core activity of an establishment.¹⁰

A COMPARATIVE STUDY OF THE PROVISIONS OF THE CONTRACT LABOUR ACT 1970 AND OSHWC CODE PERTAINING TO CONTRACT LABOUR

An analysis of the provisions pertaining to contract labour in the Contract Labour (Regulation and Abolition) Act, 1970 (CLRA) and the Occupational Safety, Health and Working Conditions Code, 2020 (OSHWC Code) is crucial for comprehending the changing labour regulatory framework in India. Here are the examination and analysis of these provisions in a comparative manner:¹¹

Components	The Contract Labour (Regulation and Abolition) Act, 1970	The Occupational Safety, Health and Working Conditions Code, 2020
Purpose and Extent	The purpose of the Contract Labour (Regulation and Abolition) Act of 1970 is to primarily regulate	The OSHWC Code 2020 seeks to consolidate and modify the legislation governing the occupational safety, health, and working conditions of individuals employed in an establishment. It expands the range of coverage to encompass all employees, including those on contract,

¹⁰ India: Contract Labour Reforms Under The OSH Code, available at: <https://www.mondaq.com/india/health--safety/1109226/contract-labour-reforms-under-the-osh-code> (last visited on: 04.05.2024).

¹¹ The occupational safety, health and working conditions code,2020, available at: <https://prsindia.org/billtrack/the-occupational-safety-health-and-working-conditions-code-2020> (last visited on: 04.05.2024).

	<p>the utilisation of contract labour in specific establishments and to eliminate the use of contract labour in certain situations. This regulation is applicable to any establishment that employs twenty or more workers as contract labour.</p>	<p>in diverse industries.</p>
Registration and licence	<p>The CLRA 1970 mandates that the principal employer must register their establishment, while contractors must obtain a licence in order to employ contract labour. This facilitates the regulation of contract labour employment at establishments.</p>	<p>The OSHWC Code 2020 maintains the obligation to register establishments and licence contractors, while also implementing a streamlined process for obtaining and renewing licences. The objective is to decrease the administrative workload and enhance adherence to regulations.</p>
Social welfare and healthcare provisions	<p>The CLRA 1970 requires the contractor to furnish canteens, restrooms, first aid facilities, and other essential amenities for the contract labourers.</p>	<p>The OSHWC Code 2020 expands the welfare provisions to encompass not only fundamental necessities, but also requires improved working conditions, safety standards, and health facilities. The Code prioritises the well-being and welfare of all employees, including contract workers, in accordance with global labour norms.</p>

Conditions of work and terms of employment	The CLRA 1970 establishes regulations regarding the duration of work, breaks, and extra hours, but its scope is restricted to contract labour.	The OSHWC Code 2020 expands regulations regarding working hours, overtime, and leave to encompass all workers, with the goal of ensuring consistent treatment for both contract labourers and permanent employees. It implements more adaptable work schedules and enhanced employment conditions.
Conflict Resolution and Complaint Management	The CLRA 1970 includes provisions for resolving disputes by involving labour courts or tribunals.	The OSHWC Code 2020 implements a more organised system for addressing complaints by introducing Safety Committees and Safety Officers. This ensures that issues related to occupational safety and health are resolved more efficiently and effectively.
Abolition of Contract Labor	The CLRA 1970 permits the elimination of contract labour in specific processes and operations that are essential and ongoing for the primary function of the establishment.	The OSHWC Code 2020 does not specifically prioritize the elimination of contract labour, but instead seeks to incorporate contract workers into the mainstream by ensuring that their rights and benefits are equal to those of regular employees.
Sanctions and Adherence	The CLRA 1970 establishes penalties for violating the provisions of the Act, which may result in fines and imprisonment.	The OSHWC Code 2020 implements more severe punishments for failure to adhere to health and safety regulations and includes provisions for compounding of offences. Its objective is to achieve higher compliance rates by enforcing stricter measures.

The shift from the Contract Labour (Regulation and Abolition) Act of 1970 to the Occupational Safety, Health, and Working Conditions Code of 2020 signifies a progressive advancement in the legal structure that governs contract labour in India. While the CLRA primarily addresses regulation and abolition in certain circumstances, the OSHWC Code adopts a comprehensive approach to improve the safety, health, and working conditions of contract labourers. Its goal is to promote their better integration into the workforce with dignity and equality. This shift is noteworthy as it tackles the evolving dynamics of the labour market and the requirement for contemporary, more inclusive labour legislation.¹²

EXAMINATION OF THE LEGAL DILEMMA SURROUNDING CONTRACT WORKERS UNDER THE NEW LABOUR CODES OF INDIA

The “contractualisation of employment” concept is distinct from the “contract worker” concept in that the latter creates a formal employer-employee relationship, whereas the former does not. Contract workers are individuals who are employed by the contractor on a hire-meet basis and have a direct employer-employee relationship with the contractor rather than the principal employer.¹³ A contract worker, alternatively referred to as contract labour, is an individual who is considered to be employed or performing work in a facility on a hire-basis through the contractor. This type of employment has been occurring with or without the Principal Employer’s knowledge. Contract workers, which also include interstate migrant workers, are eligible for periodic pay increases, social security, and other welfare benefits; they are subject to a mutually agreed-upon standard of working conditions; and they do not have permanent employees hired by the contractor on a fixed-term basis.¹⁴

The Occupational Safety, Health, & Working Conditions Code (OSH), 2020, has superseded and merged the Contract Labour (Regulation and Abolition) Act (CL), 1970, in an effort to streamline, consolidate, and rationalise the provisions pertaining to welfare benefits for contract workers.

The primary aim of the enactment of the OSH Code 2020 was to streamline and revise the legislation pertaining to occupational safety, health, and working conditions as it relates to

¹² New Labour Codes, available at: <https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1882845> (last visited on: May 5, 2024).

¹³ Chetan Upadhyay, *A Social Inclusion Perspective of the Unorganized Sector in India*, 2(2), NJLI, 1, 2, (2019)

¹⁴ Akarsh Mishra, A Social Inclusion Perspective of the Unorganised labour sector in India. Scribd. available at: <https://www.scribd.com/document/439662722/A-Social-Inclusion-Perspective-of-the-Unorganised-labour-sector-in-India> (last visited on: 03/05/2024)

industrial establishment personnel¹⁵. A “common licence” alternative is provided for factory workers, contract workers, and employees in cigar and beedi establishments under the OSH Code 2020. The OSH Code, 2020 incorporates a novel statutory provision requiring an All-India licence to employ contract workers in any establishment for a duration of five (5) years. This provision grants contractors the authority to engage and transfer contract workers between establishments in accordance with industrial demands, provided that the work is completed within the specified timeframe. Additionally, within the preceding twelve (12) months, industrial establishments that employed fifty (50) or more contract workers on any given day shall be subject to the provisions of the OSH Code.¹⁶ However, this Code does not apply to establishments that employ contract workers on a casual or intermittent basis.¹⁷ The determination of the work’s nature, be it temporary or permanent, is a factual inquiry that must be conducted by the relevant government in conjunction with the National/State Advisory Board.

On the contrary, the term “intermittent nature of work” is as defined by the OSH Code 2020. This pertains to any task that was executed for over one hundred twenty days in the preceding twelve months, or for seasonal work that spanned over sixty (60) days in a single year. Based on numerous cases, the esteemed Supreme Court of India has unequivocally declared that notification by the relevant government can prohibit the employment of contract workers in perpetual work arrangements. Furthermore, it is illegal and punishable by law for the principal employer to employ contract workers in the core activity zone, even in the face of an express prohibition.

Another fundamental aspect of contract worker employment is that the principal employer is not permitted to involve them in tasks that are routine or fundamental to the job. If such work is obligatory as a result of external pressure, then the principal employer is obligated to formalize their employment conditions. They are to be regarded as permanent employees as opposed to contract labourers. The explicit prohibition of contract workers engaging in fundamental operations of industrial establishments is stipulated in the OSH Code 2020. Furthermore, the authority tasked by the relevant governments will ascertain which particular types of work shall be classified as “core activity” under the Code 2020.

¹⁵ Jain, H. & H. Jain 2022 (4. July) 8 Years of #DigitalIndia and Work Force Reforms. NewsroomPost, available at: <https://newsroompost.com/opinion/8-years-of-digitalindia-and-work-force-reforms/5131375.html> (last visited on: 03.05.2024).

There is evidence to suggest that economic liberalization has significantly altered the industrial landscape; in particular, the labour force has become more dynamic and adaptable as a result of intense and competitive market competition among national and multinational corporations. It increased employment of contract workers due to the following factors:

1. Contract employees were placed under the direct supervision and control of the principal employer.
2. Contract labour signifies the execution of task-oriented work that is accomplished in a timely manner and adheres to the prescribed specifications.
3. Contract employees are less expensive to employ because the contractor bears the majority of the wage payment burden. Its payment is the responsibility of the principal employer in the event of default.
4. The utilization of contract workers substantially mitigates labour disputes that may arise between employers and employees.

Consequently, although the necessity for contract labour to ensure timely production and delivery of goods and services cannot be denied, the inclusion of these individuals in the labour dispute gives rise to concerns regarding social welfare and legality. The principal employer's role was essentially symbolic, as their liability under the CL Act 1970 was restricted to wage payment and other social security and occupational safety obligations.

In part, this perception has been modified by the OSH Code 2020. Contract employees employed in such establishments are presently obligated to comply with occupational safety and other social security regulations through their principal employer.

Nevertheless, contract workers have been compelled to endure such discriminatory working conditions as a result of the lack of a direct employer-employee relationship, the inability to engage in collective bargaining, and the prevailing wage disparity with regularly employed workers. Consequently, their socioeconomic standing has declined significantly. The smokiness produced by industrial economic expansion has obscured the plight of contract workers who are being exploited in the most lawful fashion possible. Undoubtedly, throughout its seventy-five years of democratic independence, India has introduced numerous initiatives and amendments to its labour law with the intention of safeguarding and averting all forms of employment

exploitation involving contract workers. However, these efforts have been insufficient; consequently, the pitiful plight of contract workers continues to endure and worsens daily.

As a result, in response to the evolving needs of the Indian labour force, the New Labour Codes have been enforced, extending social security benefits and occupational safety regulations to contract workers in the unorganised sector. The mandatory provision of digital compliance for worker registration, especially in the unorganized sector, is the most significant aspect of the New Codes. This provision ensures the upkeep, maintenance, and monitoring of the national database for the labour force and provides assistance to workers in the event of unforeseen financial hardships in the future.¹⁶

CONCLUSION

The implementation of The Occupational Safety, Health and Working Conditions Code, 2020 is a notable advancement in the process of updating labour laws in India and tackling the difficulties encountered by contract workers. This paper has conducted a comparative analysis between the Contract Labour Act, 1970 and the OSHWC Code, focusing on the main provisions and modifications introduced by the latter. Although the new legislation introduces various improvements in terms of rights, safety, and welfare measures for contract labourers, there are still challenges in implementing it and areas that can be further improved. It is crucial for policymakers and stakeholders to cooperate in order to tackle these challenges and guarantee the successful enforcement of the OSHWC Code to advance equitable and secure working conditions for all workers in India.

¹⁶ Munmunlisa Mohanty, Prof. K. D. Raju, "The New Labour Codes: Digital Acquiescence and The Conundrum of Contract Workers In India", In Jeet Singh Maan, Libersing Labour Law (Centre for Transparency and Accountability in Governance, NLU Delhi (New Delhi, 2023).

THE LAW GOVERNING TOURISM IN OUTER SPACE: AN OVERVIEW

- Dr. Sandeep Kumar* & Akanksha Sharma**

Abstract

The advent of 'space tourism', more accurately termed 'private spaceflight', necessitates adaptations in outer space law to accommodate this groundbreaking development, stemming directly from increased private sector involvement in these endeavours. This paper begins by defining pertinent concepts and subsequently examines critical legal issues such as authorisation, supervision, liability, and registration, exploring their implications for space tourism. Additionally, it addresses key legal considerations pertaining to the certification of spacecraft, crew, and passengers, acknowledging the current lack of comprehensive international standards and emphasising the predominant role of national legislation. Furthermore, the potential application of air law or adventure tourism law in regulating these activities is also briefly discussed.

Keywords: Space tourism, Space Law, Outer Space, Outer Space Law.

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INTRODUCTION

Space law encompasses the set of international regulations that govern human activities in outer space. These regulations are universally recognized and binding, detailing the conduct of nations and individuals in space and on celestial bodies. They address a wide range of issues, including sovereignty in space, the exploitation of space resources, environmental preservation in space, space transportation, liability for space operations, arms control in space, remote sensing capabilities from space, and the operation of space stations. Central to modern space law is the principle of promoting peaceful uses of outer space and celestial bodies by all nations. This legal framework has become integral to contemporary international law. ‘Space tourism’ is frequently celebrated for revolutionising human access to the challenging and seemingly boundless expanse of outer space. This phenomenon is already sparking and will continue to fuel profound debates about the existing framework of outer space law and the necessary adaptations to accommodate these transformative advancements. Indeed, it may herald a third era in humanity’s exploration of outer space. In the initial era of space exploration, the participants and stakeholders involved were quite restricted. Primarily, only a select few governments or their agencies, occasionally joined by intergovernmental organisations (still legally classified as public bodies), engaged in launching space objects, managing and overseeing them. Private enterprises primarily functioned as manufacturers for these public entities, as downstream consumers of space-based applications developed by them, or as providers of ancillary services in support of their operations. Consequently, the five primary United Nations space treaties established in the late 1960s and 1970s were seen as adequate, focusing on the rights and responsibilities of these state agencies. The involvement of the private sector necessitated minimal national implementation of international obligations, as these treaties generally addressed space activities themselves rather than preparatory, downstream applications, or supportive activities. Space tourism, therefore, marks a third era where privatization extends into manned space travel. Beyond the scenario where vehicle manufacturers or insurers, though private, remain fundamentally under their respective state’s jurisdiction, responsibility, and liability under international space law, now providers of launch services, operators of space vehicles, and the individuals transported may also be private entities. These new developments introduce a host of novel legal challenges. For instance, contracts for spaceflights are now being negotiated between passengers or their sponsors and operators, whether they are public (such as for flights to the ISS) or private (such as for upcoming suborbital flights to the edge of space).

OBJECTIVES

The goal of this research is to learn about space law relating to space tourism. What does it mean? Which laws are already relevant to space tourism around the world and in India, and what sort of changes are required to accommodate space tourism?

RESEARCH METHODOLOGY

The doctrinal research technique is used in this study. Various pieces of legislation, books, journals, remarks, reports, magazines, newspapers, and other materials have been cited for this purpose. We are investigating current legislation, international treaties, and the role of these legislations, how effective they are, and evaluative and critical viewpoints on them.

SPACE TOURISM AND THE LAW IN GENERAL

The term ‘space tourism’ refers to commercial activities that offer participants the opportunity to travel in outer space for recreational purposes. Those who engage in such activities are known as space tourists. Currently, governmental agencies like Russia’s and private companies such as SpaceX and Virgin Galactic are offering space tourism opportunities, generating significant public interest. These developments underscore the expanding possibilities and imminent future of space tourism.¹

These agencies and companies utilize various aerospace vehicle models to launch space tourists. In 2001, American businessman Dennis Tito became the world’s first space tourist by traveling aboard the Russian Soyuz to the International Space Station (ISS). He was followed by others including Mark Shuttleworth, Gregory Olsen, Anousheh Ansari, Richard Garriott, and several more. Initially, the cost of space travel in the early 21st century was prohibitively high, limiting this adventure to a select few billionaires. However, advancements in space technology, such as Reusable Launch Vehicles (RLVs), and increased involvement of private space companies in the sector have significantly reduced costs. Space travel now costs less than \$200,000, with predictions that it could drop to \$35,000 within the next decade. Consequently, space tourism is transitioning from science fiction to a practical reality poised to become part of everyday life for people worldwide².

Space tourism encompasses various forms, including sub-orbital and orbital trips, intercontinental point-to-point rocket transportation through space, as well as orbital travel with

¹ Ankit Kumar Padhy & Amit Kumar Padhy, “Legal conundrums of space tourism” 184 *Acta Astronautica* 269 (2021)

² Ibid.

accommodation in space hotels or aboard the ISS. Despite substantial advancements in space technology, the emergence of private space companies, and increasing market demand over the past two decades, the legal framework to regulate space tourism activities has lagged behind. Currently, space tourism activities are primarily governed by four key space treaties: the Outer Space Treaty, Rescue Agreement, Liability Convention, and Registration Convention. The Moon Agreement, having few State Parties and lacking ratification from major spacefaring nations, is widely contested among space law experts who argue it cannot be considered an international legal norm regulating space tourism activities. Drafted during the Cold War era, these treaties reflect a cautious approach, primarily concerned with exploratory activities of governmental space agencies like NASA and Roscosmos. As a result, they are loosely worded and pose several interpretational ambiguities. They are ill-suited to address modern legal challenges posed by private companies engaged in space adventures, including space tourism.

The absence of a comprehensive regulatory framework for space tourism poses long-term challenges, leading to divergent practices among states and uncertainties for space passengers, private companies, insurance providers, and governments regarding their rights and liabilities in the event of incidents such as the Columbia disaster. Currently, the United States domestic laws provide the most detailed norms supporting commercial space tourism activities, representing a significant effort to address gaps left by international treaties.

‘Space tourism’ is often celebrated for heralding a revolution in enabling human access to the inhospitable and theoretically boundless realm of outer space. This inevitable shift is already catalyzing and will continue to drive profound discussions on the existing framework of outer space law, urging adaptations to accommodate such transformative developments. Indeed, it could potentially mark the dawn of a third era in humanity’s exploration of outer space.³

In the first era, the participants and stakeholders in space activities were quite limited. Primarily, only a handful of governments or their agencies (and occasionally intergovernmental organisations considered public bodies legally) were engaged in roles such as launching space objects and operating and controlling them. Private enterprises played a restricted role as manufacturers serving these public entities, as downstream customers utilising space-based applications developed by them, or as providers of ancillary services for their benefit. As a result, the five main UN space treaties established in the late 1960s and 1970s were deemed adequate in addressing the rights and obligations of these state agencies. The involvement of the private

³ Ibid.

sector necessitated minimal national implementation of international obligations, as these treaties generally focused on space activities themselves rather than preparatory, downstream applications, or supportive activities. With the gradual entry of the private sector into space activities, significant transformations ensued. This second era saw private entities beginning to offer launch services and operate space objects themselves. Legally, this necessitated individual states asserting jurisdiction over these entities to fulfill their international responsibilities and liabilities under the space treaties. Consequently, starting from the early 1980s, states progressively implemented national space laws, licensing frameworks, and other regulatory mechanisms to oversee private space operators and ensure their activities were legally supervised.⁴

Until recently, manned spaceflight remained outside this evolution due to its high technological demands and costs. Private entities found it impractical to engage as providers of launch services and operators of spacecraft (typically combined roles in manned spaceflight). Moreover, until Dennis Tito's 2001 flight to the ISS demonstrated otherwise, the costs were considered prohibitive for private individuals. The existing international space treaties, augmented by national legislation, regulations, and governance, adequately managed private space activities during this period.

Space tourism now signifies a third era, marking the extension of privatisation into manned spaceflight. Beyond manufacturers or insurers who were already private entities under their state's jurisdiction, responsibilities, and liabilities according to international space law, now providers of launch services, operators of space objects, and the transported humans themselves may also be private entities. These new developments introduce a host of fresh legal considerations. For instance, contracts are now being established for spaceflights between passengers or their sponsoring entities on one side and operators—whether governmental (such as for ISS flights) or private (like upcoming suborbital flights into near space)—on the other. Fundamentally, the most significant and notable legal aspects of space tourism arise from the contrast between the inherently public nature of international space law and the distinctly private nature of 'space tourism'. International space law originated from political, military, and scientific motivations, where state responsibility and liability, regulated through national space laws,

⁴ Ibid

primarily addressed private and commercial interests in specific segments of space activities. This legal framework has never before accommodated anything akin to private international law.⁵

Space tourism thus represents a significant advancement in commercialisation and privatisation. Its core premise is that all aspects of manned spaceflight-vehicle manufacturing, launch and in-space operations, marketing and service provision, and notably, the space travellers themselves-can be wholly private entities.

Legal experts at The University of Law have ventured into uncharted territory by elucidating the governing laws of space travel, propelled by NASA's discovery of ancient water on Mars and the identification of a new exoplanet just 72 light-years away.⁶ Contrary to what science fiction movies often depict, the prospect of a full-scale war in outer space remains unlikely in the near future. According to The University of Law: "Travel into space and exploration of celestial bodies are regulated by The Outer Space Treaty, which entered into force in 1967 and has been ratified by over 100 countries."

"The Treaty stipulates that space is open for exploration by all nations, prohibits any nation from claiming sovereignty over celestial bodies they discover, and importantly mandates that the moon and other celestial bodies be used exclusively for peaceful purposes. This means no country can station weapons of mass destruction on the Moon or in orbit. Moreover, the Treaty establishes liability for any damage caused by space objects."⁷

The Treaty encompasses the following principles:

- Outer space exploration and utilization shall be conducted for the benefit and in the interests of all countries, and shall be the province of all humankind.
- Outer space shall be freely accessible for exploration and use by all states.
- Outer space is not subject to national appropriation by sovereignty claims, use or occupation, or any other means.

⁵ Michael J. Listner, *The Ownership and Exploitation of Outer Space: A Look at Foundation Law and Future Legal Challenges to Current Claims*, 1 REGENT J. INT'L L. 75, 84 (2003).

⁶ Legal experts at The University of Law have boldly gone where no-one has gone before to explain the governing laws of space travel, available at: <https://www.law.ac.uk/about/press-releases/space-travel-laws/> (last visited on June 12, 2024)

⁷ Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies available at: <https://www.unoosa.org/oosa/en/ourwork/spacelaw/treaties/introouterspacetreaty.html> (last visited on June 17, 2024)

- States are prohibited from placing nuclear weapons or other weapons of mass destruction in orbit or on celestial bodies, or stationing them in outer space in any manner.
- The Moon and other celestial bodies shall be utilized exclusively for peaceful purposes.
- Astronauts shall be considered as envoys of humankind.
- States are responsible for national space activities, whether carried out by governmental or non-governmental entities.
- States are liable for damages caused by their space objects.
- States must avoid harmful contamination of space and celestial bodies.⁸

It is noteworthy that no nation has breached the Outer Space Treaty in the more than five decades since its inception. Nevertheless, numerous countries have developed their own regulations concerning space exploration. For instance, the United States enacted the Commercial Space Launch Competitiveness Act of 2015, permitting companies to possess and market resources extracted from celestial bodies like asteroids. This legislation has sparked controversy, with critics arguing it contravenes the principles outlined in the Outer Space Treaty.

What would occur if someone were to violate a law related to outer space?

According to The University of Law, The consequences of breaching the Outer Space Treaty would hinge on the seriousness of the violation. For instance, launching nuclear weapons into orbit would undoubtedly have grave repercussions, potentially escalating into an arms race in outer space. Lesser infractions would likely prompt discussion at the United Nations among all signatory nations, possibly leading to amendments to the Treaty.⁹

As the commercialisation of space advances, there is an increasing need for new legal frameworks to adapt to evolving circumstances. With numerous billionaire entrepreneurs planning ventures like space tourism and asteroid mining, there have been proposals for new treaties and agreements to regulate these activities.

⁸ Ibid.

⁹ Ibid.

However, the question of how humanity should respond to the discovery of extraterrestrial life remains unanswered by law. Currently, there are no regulations stipulating how humans should interact with alien life forms. The crucial consideration would be: are they peaceful?¹⁰

AIR LAW VERSUS SPACE LAW DEBATE

Space travel currently stands at a pivotal juncture akin to air transportation in the early 1920s, with potential liability for accidents posing a significant hurdle. The absence of clear legal frameworks discourages the commercialisation of space travel. Addressing liability through insurance is impractical due to the exorbitant costs, which would inevitably inflate ticket prices beyond reason and stifle the entire space industry. Therefore, establishing an appropriate liability regime for space travel becomes increasingly imperative.

There are several parallels between air transportation and space travel, prompting discussions about extending the regulatory principles of air transportation to space. Fundamental to this debate is the longstanding question of where outer space begins and air space ends and, consequently, how air law and space law should apply. Currently, there is no universally recognised boundary for outer space, which complicates the delineation of applicable legal frameworks despite distinct bodies of international law governing air space and outer space.¹¹

The distinction between air space and outer space for legal purposes hinges on several “striking criteria,” including the purpose and function of the activity, technical configurations and capabilities, and the predominant medium of operation. Space travel, by its very nature, operates predominantly in outer space and is clearly classified as such. Activities conducted at sufficient distances from Earth readily justify the application of space law to regulate space travel.

The air transportation regime, characterized by state sovereignty over airspace, contrasts significantly with the space travel regime, where no state can assert sovereignty over outer space. This fundamental distinction underscores the need for a distinct legal framework for space travel. Nonetheless, as noted by a scholar, “air law became a subject for comparison when the potential for space flight emerged, despite lingering sovereignty concerns... Air law analogies have primarily been invoked in discussions concerning the regulation of aerospace vehicles and pre-flight requirements for space tourists.” It is important to recognize that while air

¹⁰ The missing plan for alien first contact, available at: <https://www.bbc.com/future/article/20221101-should-extraterrestrial-life-be-granted-sentient-rights> (last visited on June 16, 2024)

¹¹ Stephan Hobe, *Military, Commercial, and Tourism Dimensions: Legal Aspects of Space Tourism*, 86 NEB. L. Rev. 439, 455 (2007).

transportation and space travel occur in different physical realms, both fundamentally involve transportation. Rockets used for space tourism are propelled by rockets and are designed to enter outer space, but they take off and land similarly to airplanes.¹²

Modern aerospace vehicles exhibit diverse operational models. For instance, Virgin Galactic's Spaceship 2 utilizes a hybrid model that integrates characteristics of both aircraft and spacecraft. Initially, the aircraft component is activated, propelling the aerospace vehicle to a predetermined altitude within the airspace. Subsequently, the attached spacecraft component (Spaceship 2) is ignited, launching it into outer space.

REGISTRATION AND JURISDICTION

According to the Registration Convention, each party is required to register and maintain a registry of its launched space objects. In addition, the party must provide the UN Secretary-General with information to prove the establishment of the registry. The UN Secretary-General then has the duty to maintain a registry and open the contents of the registry for public inspection. The Registration Convention relies on the view that preserving outer space for peaceful purposes depends largely on a complete registry of spacecraft. Jurisdiction under international law refers to the power of a State to deal with legal matters within its territory. States have the authority to apply their laws and authorise activities (including air and space endeavours) within their jurisdiction. Registration is the key prerequisite for a State to claim jurisdiction and control over an aerospace vehicle.¹³

LEGAL STATUS OF SPACE TOURISTS

The emergence of space tourists who go to outer space for leisure poses challenges to the existing space legal regime. Unlike international air law, international space law does not clearly define the legal status of passengers. It has been nearly fifty years since humans first landed on the moon, yet there remains debate over whether space tourists should be classified as 'astronauts' or 'personnel of a spacecraft'. This distinction is significant because each category of individuals travelling to outer space is entitled to different special rights under international law.¹⁴

LIABILITY ISSUES IN SPACE TOURISM ACTIVITIES

¹² K.R. Sridhara Murthi, *Commercialisation and Privatisation of Outer Space- Issues for National Space Legislation* 3-13 (K.W Publishers, New Delhi, 2016).

¹³ Peter Sloterdijk, *In the World Interior of Capital: Towards a Philosophical Theory of Globalization* (Cambridge: Polity, 2013)

¹⁴ Space Treaties available at: <https://www.spacelegalissues.com/space-law-history-101/> (Last visited on July 1, 2024)

When discussing liability issues in outer space, one typically refers to the 1967 Outer Space Treaty¹⁵ and the 1972 Liability Convention¹⁶. Article VII of the Outer Space Treaty stipulates that states bear international responsibility for any damage caused by their space objects or personnel while in space. The Liability Convention builds upon Article VII by establishing a legal framework for ensuring full compensation for damage caused on Earth as a result of space activities. It outlines two scenarios where the launching state(s) may be held liable: (1) damage caused by their space objects on Earth's surface or to aircraft in flight, and (2) damage occurring elsewhere in space to a space object of one state or to persons or property on board such an object by a space object of another state. Strict liability applies to the first scenario, while negligence liability applies to the latter.

From these provisions, it is evident that states, not private entities, are the entities liable in case of damage. Due to its international scope, the Liability Convention does not address the specific needs of individuals, including nationals of the launching state. Moreover, only a state has the right to file a claim for compensation, thus the Convention does not explicitly cover civilian liability in outer space. Before proceeding further, it would be pertinent to examine the ISS Intergovernmental Agreement (IGA). The ISS Intergovernmental Agreement (IGA), a significant multilateral treaty in outer space, incorporates the Liability Convention and includes a provision for mutual exemption of liability on board the ISS to enhance cooperation among its partner states. This provision specifically applies to claims brought by a Partner State against another Partner State, related entities, or their employees. However, it is clear that space passengers cannot seek recourse under this provision. The public nature of the IGA does not align well with the current commercial space regime. Under the existing liability framework, space tourism is not covered, as it pertains only to activities conducted by states or international non-governmental organizations involved in sending equipment and astronauts for exploration and scientific research. Private entities have no provisions for recourse or accountability under the Outer Space Treaty or the Liability Convention. Consequently, the current liability regime fails to adequately address the issue of liability for space tourists, which remains a significant concern in the context of space tourism.

In the legal of air transportation, a distinction is made between domestic and international transport, which is not mirrored in space travel. There is a pressing need for a unified regime that directly applies to all space tourists and cargo. Similar to international air transportation,

¹⁵ Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space 1967.

¹⁶ Convention on International Liability for Damage Caused by Space Objects 1972.

domestic tourists of a launching state should have the right to claim compensation for any damages suffered.

The Warsaw Convention serves as a notable example of a uniform multilateral system for international air transportation. This regime has effectively enabled insurance companies to provide reliable services within the field, fostering confidence. It is reasonable to anticipate similar outcomes with the establishment of a comparable regime for space tourism. Under the Warsaw Convention, a negligence standard, rather than strict liability, was adopted, and initially, the maximum compensation for passengers was set at 125,000 francs. This framework facilitated the growth of the aviation industry in its early stages, establishing it as one of the safest modes of transportation.¹⁷

However, the limitation of liability imposed by the Convention is now viewed as unnecessary due to advancements in aviation reliability. Recent revisions, such as the 1999 Montreal Convention, reflect efforts to balance industry interests with those of passengers and other stakeholders, adjusting the maximum compensation amounts in light of social and economic developments. Despite these changes, the negligence standard remains central to the Warsaw Convention.

The success of the international aviation system suggests that adopting a negligence standard early in the development of space travel would be beneficial. Limiting liability for carriers would not necessarily deter potential space tourists, as they could purchase additional insurance, similar to practices in aviation. Clear guidelines should define the maximum damages payable to passengers, taking into account factors such as promoting the growth of space travel, the financial stability of the industry, and the profile of early space tourists.

Liability should be defined to cover incidents occurring onboard space objects or during embarkation and disembarkation operations, mirroring the jurisdiction of the launching state whose laws would prevail. Disputes over liability in space travel could effectively be resolved in national courts, guided by international and national laws.

Legislation that incorporates these principles is crucial for space tourism. Uncertainty regarding liability issues can deter potential investors, jeopardizing investments in the sector. Adapting the Warsaw Convention or drafting a new document specifically for space tourism would provide clarity. By referencing such a document, space tourists, governments, commercial operators, and

¹⁷ Kang Lin Pen, Lokteng Esther kou *et al*, *Space tourism value chain* 101-111 (Springer, Singapore, 2024)

insurance companies would have clear expectations of liabilities in advance, enabling informed decision-making. This transparency and legitimacy would benefit international society as a whole.¹⁸

INTELLECTUAL PROPERTY RIGHTS AND SPACE TOURISM

Protection of intellectual property rights could prove to be another critical concern in relation to space tourism. Outer Space Treaty broadly attempts to protect space objects and the people of the State Parties in outer space. It also lays down principles of jurisdiction and control with respect to space objects. However, the Outer Space Treaty does not expressly provide any protection to intellectual property rights of State Parties. In addition, it also fails to provide elaborate enforcement.

SPACE TOURISM AND LAW IN INDIA

ISRO plans to launch India's first space station into orbit, expected to be operational by 2035. Indian efforts in space tourism are currently nascent, with development underway for a reusable and secure space tourism module anticipated to enable space travel by 2030. Passengers embarking on these journeys will qualify as astronauts. The Chandrayaan and Mangalyaan missions were notably more cost-effective compared to similar missions by other countries, suggesting potential for the development of affordable space tourism methods.¹⁹ Currently, there are no regulations in place for space tourism within the country, and there are no intentions to create specific legislation for this purpose. According to Union Minister Dr. Jitendra Singh, India is advancing technologies and safety protocols necessary for human space missions. Approximately 15 start-ups are engaged in providing satellite services, including value-added services utilising satellite data. However, as such, no legislation is going to come into force for space tourism.²⁰

CONCLUSION

While space technology has evolved exponentially in the last few decades and participation of private space companies has substantially increased in the space sector, including space tourism, the international legal framework dealing with the concerned issues has remained stagnant since

¹⁸ Ibid.

¹⁹ Space Tourism: Indian Perspective *available at:* <https://www.dailyexcelsior.com/space-tourism-indian-perspective/> (last visited on June 30, 2024)

²⁰ Department of space *available at:* <https://pib.gov.in/PressReleaseIframePage.aspx?PRID=1845769> (last visited on June 30, 2024)

the Moon Agreement. A strong international legal regime is an elementary requirement for the sustainable development of space tourism activities. Significantly divergent from other forms of transportation like shipping and aviation, which are governed by robust national and international commercial laws, space activities rely on inter-governmental treaties forged during the Cold War era. The current legal framework for outer space does not adequately cater to the emerging realm of space tourism. While commercial space tourism is becoming a reality, the legal framework remains underdeveloped. This uncertainty and inadequacy could deter investments in space travel technologies and tourism. Drawing parallels with aviation, which shares many similarities with space travel, this article argues for adapting existing aviation legal principles to formulate a suitable legal regime for space tourism. There is a growing consensus that treating space tourism as an extension of aviation regulation is the most appropriate approach. Establishing clear and favourable “space hotel rules” and a comprehensive legal framework will be crucial for ensuring the safety and responsibility of commercial space tourism. A robust and predictable legal environment will enhance investor confidence, facilitate more frequent space launches, generate revenue, ensure return on investment, and benefit society at large. This, in turn, will foster long-term investment in space technologies and promote sustainable growth in space tourism.

SUGGESTIONS

- Amendments need to be made to the existing laws of outer space with respect to the registration and liability of spacecraft for space tourism.
- Better provisions need to be prepared when it comes to the demarcation of boundaries with respect to spacecraft of space tourism between air law and outer space law.

DEFINING ‘CHILD’ AND ANALYSING THE EVOLUTION OF CHILD RIGHTS PROTECTION FRAMEWORK IN THE INTERNATIONAL CONTEXT

- Priya Tiwari*

INTRODUCTION

In a press release notified by the Ministry of Women and Child Development, “children constitute about 39% of the total population of India”¹. At the national and international level, there is a framework proposed to be discussed in the paper for the protection of child rights, which also defines ‘child’. Nevertheless, there are issues related to child protection and their overall development, which are somehow connected with the defining factor based on age. To further proceed with the same, it is required to deal with the definitional framework of a ‘child’ based on age as follows:

MEANING AND DEFINITION OF CHILD

At national and international levels, different ages have been set to define a child, as observed by renowned sociologist Asha Bajpai in her book ‘Child Rights in India’, “The word ‘child’ has been used in various legislations as a term denoting relationship, as a term indicating capacity, and as a term of special protection.”²

To begin with the exploration of the subject at hand, it would be pertinent to have a look at one of the most comprehensive international instruments ever drafted and implemented related to child rights, viz. Convention on the Rights of the Child, 1989 (CRC). Article 1 of the Convention, 1989 states that, “a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.”³ Article 32 (ii) (a) of the Convention 1989 also provides that “the State parties shall provide for a minimum age for admission to employment.” Article 2 of the Worst Forms of Child Labour Convention, 1999, as

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¹ Mission Poshan 2.0, Mission Shakti and Mission, Ministry of Women and Child Development, Posted On: 02 FEB 2022 9:34 AM by PIB Delhi, available at: <https://www.pib.gov.in/PressReleasePage.aspx?PRID=1794595>

² Asha Bajpai, “*Child Rights in India: Law, Policy, and Practice*” pg. no. 2, Oxford University Press (2003)

³ Ibid.

adopted by the General Conference of the International Labour Organization (ILO) states that “the term child shall apply to all persons under the age of 18.”⁴

In India, the Census of India defines persons below the age of fourteen as children. However, in India, various labour legislations define the term “child” in its context, which adds to ambiguity and makes the commitment rather more intricate of bringing children under one roof and protecting their rights uniformly. For example, The Factories Act, of 1948 under Section 2(c) defines “child” as a person who has not completed his 15th year of age. As per section 2(ii) of the Child Labour (Prohibition and Regulation) Act 1986, Child means a person who has not completed his 14th year of age. Article 21A of the Indian Constitution, which provides for free and compulsory education of every child in the age group of 6-14 years, makes any instance of employment of children below the age of 14 unconstitutional.⁵ According to Section 2 (12) of the Juvenile Justice (Care and Protection of Children) Act, 2015 ‘Child’ means a person who has not completed eighteen years of age.⁶

Given various conventions and recommendations of the UN and ILO adopted by India, it tries to follow the standards set by such conventions. However, while referring to different laws and bringing uniformity to undertake the assignment, we may say that a child means a person who has not completed eighteen years of age.

INTERNATIONAL PERSPECTIVE ON CHILD RIGHTS

Three decades ago, a promise to protect and fulfil the rights of every child was made by world leaders in the form of the United Nations Convention on the Rights of the Child, 1989. It has been considered the world’s most widely ratified human rights treaty ever in history. Most importantly, according to UNICEF, this convention is based on the idea that “children are not just objects who belong to their parents and for whom decisions are made, or adults in training. Rather, they are human beings and individuals with their own rights.”⁷

To date, there are 140 signatories and 196 parties to this convention.⁸ India ratified it on 11 December 1992 with a declaration that, “While fully subscribing to the objectives and purposes

⁴ Worst Forms of Child Labour Convention, 1999 (No. 182), available at: https://webapps.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C182

⁵ Right to education, available at: <https://dsel.education.gov.in/rte>

⁶ Juvenile Justice Act, 2015, available at: <https://cara.wcd.gov.in/PDF/JJ%20act%202015.pdf>

⁷ The United Nations CRC, 1989, available at: <https://www.unicef.org/child-rights-convention#:~:text=Rather%2C%20they%20are%20human%20beings,develop%20and%20flourish%20with%20dignity.>

⁸ Convention on the Rights of the Child, United Nations Treaty Section, available at:

of the Convention, realising that certain of the rights of child, namely those pertaining to the economic, social and cultural rights can only be progressively implemented in the developing countries, subject to the extent of available resources and within the framework of international co-operation; recognising that the child has to be protected from exploitation of all forms including economic exploitation; noting that for several reasons children of different ages do work in India; having prescribed minimum ages for employment in hazardous occupations and in certain other areas; having made regulatory provisions regarding hours and conditions of employment; and being aware that it is not practical immediately to prescribe minimum ages for admission to each and every area of employment in India - the Government of India undertakes to take measures to progressively implement the provisions of article 32, particularly paragraph 2 (a), in accordance with its national legislation and relevant international instruments to which it is a State Party.”⁹

Before we proceed with the present state of affairs it is pertinent to have a look at the history from an international scenario as well. Till 1924, we don't have any example of institutionalized efforts in this field. Therefore, the timeline to trace the same would be as follows:

- The Geneva Declaration on the Rights of the Child, 1924: This was a very important document in which after the first world war specific rights for children were recognized. In the year 1924, the League of Nations adopted the Geneva Declaration on the Rights of the Child which declared that “all people owe children the right to: means for their development; special help in times of need; priority for relief; economic freedom and protection from exploitation; and an upbringing that instils social consciousness and duty.”¹⁰
- In the year 1946, the UNGA established the UNICEF, which in the year 2019 marked 70th year in India.¹¹
- In the year 1948, the Universal Declaration of Human Rights passed by the United Nations General Assembly in which specifically Article 25 entitles mothers and children to ‘special care and assistance’ and ‘social protection’.¹²

⁹ https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&clang=_en

¹⁰ The Convention on the Rights of the Child, 1989, *available at:* <https://www.ohchr.org/sites/default/files/crc.pdf>

¹¹ The Geneva Declaration on the Rights of the Child, 1924, available at https://cpd.org.rs/wp-content/uploads/2017/11/01_-_Declaration_of_Geneva_1924.pdf

¹² UNICEF, *available at:* <https://www.un.org/en/ceci/unicef-united-nations-childrens-fund>

¹² Article 25 of UDHR 1948, *available at:* <https://www.un.org/en/about-us/universal-declaration-of-human-rights#:~:text=Article%2025&text=Motherhood%20and%20childhood%20are%20entitled,enjoy%20the%20same%20social%20protection>

- In the year 1959, the UNGA adopted the Declaration of the Rights of the Child, which recognizes children's rights to education and play etc.¹³
- In the year 1966, the International Covenants on Civil and Political Rights and the International Covenants on Economic, Social and Cultural Rights have been adopted by the United Nations' General Assembly.¹⁴
- In the year 1973, The General Conference of the International Labour Organization Minimum Age Convention (No. 138). Article 3 of the convention states that, “the minimum age for admission to any type of employment or work which by its nature or the circumstances in which it is carried out is likely to jeopardize the health, safety or morals of young persons shall not be less than 18 years.”¹⁵
- In the year 1985, the United Nations General Assembly adopted Standard Minimum Rules for the Administration of Juvenile Justice (“The Beijing Rules”).¹⁶
- In the year 1989, the United Nations General Assembly adopted the Convention on the Rights of the Child (CRC).

Article 1 of the convention provides that, “all persons below the age of 18 years are to be treated as children, unless under specific laws of member countries applicable to the child, majority is attained earlier.” The definition of ‘child’ might also vary under various labour laws, juvenile justice act and the child education laws as applicable in the member countries.¹⁷

It consists of 54 articles that set out some of the children’s rights along with government’s role in the implementation of the same. Such as Life, survival and development etc.

- In the year 1990, the United Nations General Assembly adopted the Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines).¹⁸
- In the year 1999, the General Conference of the ILO adopted the Worst Forms of Child Labour Convention, 1999. Article 3 of the convention comprised of the

¹³ Declaration of the Rights of the Child (1959), available at: <https://www.childlineindia.org/pdf/Declaration%20of%20the%20Rights%20of%20the%20Child-1959.pdf>

¹⁴ See, ICCPR as adopted on 16 December 1966, available at: <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights>; and ICESC as adopted on 16 December 1966, available at: <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-economic-social-and-cultural-rights>

¹⁵ ILO Convention, available at: https://www.ilo.org/sites/default/files/2024-04/C138_at_a_glance_EN.pdf

¹⁶ The Beijing Rules, as adopted on 29 November 1985, available at: <https://www.ohchr.org/en/instruments-mechanisms/instruments/united-nations-standard-minimum-rules-administration-juvenile>

¹⁷ Convention on the Rights of the Child, 1989, available at: <https://www.ohchr.org/sites/default/files/crc.pdf>

¹⁸ The Riyadh Guidelines, as adopted on 14 December 1990, available at: <https://www.ohchr.org/en/instruments-mechanisms/instruments/united-nations-guidelines-prevention-juvenile-delinquency-riyadh>

activities/circumstances which come within the purview of the worst forms of child labour and require immediate and effective measures to secure the prohibition and elimination of the same as a matter of urgency.¹⁹

- In the year 2006, UNICEF along with the United Nations Office on Drugs and Crime published the Manual for the Measurement of Juvenile Justice Indicators.²⁰

CONCLUSION

After the aforementioned exploration, it becomes evident that there exists a continuum of legal frameworks, both domestically and internationally, that integrate provisions pertaining to child rights. Nevertheless, from a pragmatic standpoint, there remain uncharted territories where thorough investigation is imperative to gauge these provisions' tangible impact and effectiveness in practice.

¹⁹ Worst Forms of Child Labour Convention, 1999, available at: https://normlex.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C182

²⁰ Manual for the Measurement of juvenile justice indicators, available at: https://www.unodc.org/pdf/criminal_justice/Manual_for_the_Measurement_of_Juvenile_Justice_Indicators.pdf

PERFECT JUSTICE THROUGH THE USE OF FORENSIC SCIENCE: A MYTH OR REALITY

- Dr. Shruti Goyal* & Dr. Geetika Walia**

"Every trial is a voyage of discovery in which truth is the quest"¹

INTRODUCTION

The success of the administration of criminal justice depends upon the evidence produced before the courts by the investigating agencies. Evidence can be called by these agencies through various means like oral evidence, documentary evidence and evidence brought forth through the use of scientific tests. In modern times when most of the crimes are committed in secrecy there are no eyewitnesses, which can be relied upon to prove the guilt or innocence of the accused. Even in those cases where eyewitnesses are present there are inherent shortcomings such as these witnesses depose before the court their own version of facts, there is problem of memory fading because of the delay in taking of their statement coupled with the problem that many times these witness are not willing to appear before the court or they turn hostile during the trial. In such situations scientific techniques used for elucidating the evidence comes to the rescue of administration of justice. This scientific evidence is not dependent upon the testimony of the witnesses but the ability of experts to locate, collect, analyze the trace evidence from the crime scene and further produce the same as exhibits before the courts. Thus, Forensic Scientists work with physical evidence collected at scenes of crimes.² The scientific evidence is considered more reliable in comparison to ocular evidence because the results are demonstrable, verifiable and there is a lack of subjectivity. The reason for this is that the reliance is placed on science and there is exclusion of human intervention because of which subjectivity is negated.

When forensic evidence is produced before the Courts, the Courts face the question of admissibility³ and reliability of such evidence. This question is very pertinent as the innocence or the guilt of the accused is based on it. There has been a trend of laying strong emphasis and reliance on forensic evidence.⁴ However, in the recent past some authors have started voicing

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¹ *Ritesh Tewari v. State of UP* (2010) 10 SCC 677

² <<https://www.all-about-forensic-science.com/definition-of-forensicscience.html>> accessed 12 July 2023

³ Indian Evidence Act, 1872, s 136

⁴ In *Raj Kumar v. State of U.P.* (2014) 5 SCC 353, wherein a young girl was raped and murdered, the Court observed

concerns over the reliability of these techniques.⁵ The authors in this article makes an effort to bring two opposite views to a point of convergence where on one hand we have the torch bears of justice who strongly advocate the use of forensic techniques in criminal investigation and on the other hand those who voice their concerns/ challenge about potential errors and admissibility issues regarding the outcome of these tests. This discussion is all the more important as the law has mandated the use of forensic advice in all cases punishable with more than seven years imprisonment.⁶

The article is divided into four parts. Part I is introductory in nature and explores the need of using forensic techniques in the Court of law. Part II explores the issue of admissibility of forensics evidence to see whether the procedure used by experts of forensic science meet the evidentiary standards laid down by the law and the court over the years. The focus of the article is not to question the use of Forensic Science in criminal investigation but to question the accuracy and conclusivity of the results in determining the guilt/ innocence of the accused on the basis of these techniques. In Part III of the article case study method is used to explore the cases in which forensic errors have been discovered. In this part the authors analyze Indian cases where the accused were convicted on the basis of reliance on forensic evidence by the lower courts but were acquitted by the higher Courts because of the concern on the use and outcome of the technique used. The authors also analyze some cases of other jurisdictions where conviction was based on the use of forensic evidence and subsequently those who were wrongfully convicted were exonerated. Part IV of the article is the concluding part.

NEED FOR FORENSIC SCIENCE

Forensic Science is a very broad field of study. It is an amalgamation of various disciplines such as anthropology, medicine, physics, engineering, toxicology, statistics etc. “Forensic science, may be defined as the application of the methods of the natural and physical sciences to matters of criminal and civil law.”⁷ According to the California Criminalistics Institute, “Forensic Science is the application of the methods and techniques of the basic sciences to legal issues.”

that the identity of the accused was affirmed because of the DNA report. In *Anil Alias Anthony Arikswany Joseph v. State of Maharashtra* (2014) 4 SCC 69, wherein an unnatural offence was committed against a 10-year-old boy, the guilt was established with the help of a DNA report. In *Shanker @ Gauri Shankar v. State of Tamil Nadu* (1994) 4 SCC 478, where six people were murdered one of the victim's body was identified on the basis of skull superimposition technique.

⁵ Tamara F. Lawson, ‘Can Fingerprints Lie: Re- Weighing Fingerprint Evidence in Criminal Jury Trials’ [2003] 4 Am J Crim L 1

⁶ Bharatiya Nagarik Suraksha Sanhita, 2023, s. 176 (3)

⁷ <<https://www.britannica.com/science/forensic-science>> accessed 25 November 2023

Forensic science helps in the identification of the criminal by linking him with the crime science. This is a method that helps to prove the guilt or the innocence of the accused for the administration of justice. Courts time and again have reiterated the importance of the use or the need of forensic in the criminal justice system. In this part, the authors have discussed some of the judgments where the hon'ble Supreme Court has talked about the importance and the need for using forensics in the dispensation of criminal justice.

The Supreme Court in *Tomaso Bruno and Anr. v. State of Uttar Pradesh*,⁸ has observed that “advancement of information technology and scientific temper must pervade the method of investigation as scientific and electronic evidence can be a great help to an investigating agency.”

In *Dharam Deo Yadav v. State of U.P.*,⁹ the court emphasized that “the need to adopt scientific methods in crime detection to save the judicial system from low conviction rates. The Court also highlighted the need to strengthen forensic science for crime detection.”

In the *State of Gujarat v. Kishanbhai*,¹⁰ the Supreme Court observed, “as there has now been a great advancement in scientific investigation tools, scientific investigation would have unquestionably determined whether or not the accused was linked with the crime”.

In *Manohar Lal Sharma v. Union of India*¹¹, the Court observed, “Blending of science with traditional criminal investigation techniques offers new horizons of efficiency in criminal investigation, which reduces dependence upon informers and custodial interrogation and concentrates upon skilled scanning of the crime scene for collection of physical evidence”.

In *Prakash v. State of Karnataka*¹² the Supreme Court opined “from now onwards because of the development of scientific methods of investigation the prosecution must lay stress on scientific evidence”.

In the recent case of *Mukesh and Another v. State (NCT of Delhi)*,¹³ which is popularly known as the Delhi Gang Rape case, wherein a twenty-three year girl was raped by six men, the conviction was based on blood samples, DNA profiling and analysis of the bite marks in addition to the other evidence. The Court in this case discussed the importance of DNA evidence that is an important part of forensic science. The Court stated that, “India, like several other countries, is increasingly

⁸ (2015) 7 SCC 178

⁹ (2014) 5 SCC 509

¹⁰ (2014) 5 SCC 108

¹¹ (2014) 2 SCC 532

¹² (2014) 12 SCC 133

¹³ (2017) 6 SCC 1

relying upon DNA evidence. DNA profiling is now a part of the statutory scheme. A DNA report deserves to be accepted unless it is absolutely denied. In case the DNA report is rejected, it must be established that there had been no quality control or quality assurance. A DNA report should be accepted if there is no error in sampling and no indication of tampering of samples. The investigation has been cautious and to bring home the charge, modern and progressive scientific methods have been adopted”.

In addition to the above, the Government of India is also laying down great emphasis on the use of scientific techniques in the investigation of crime.¹⁴ Under the old scheme, it was the discretion of the investigating officer whether to seek the help of a forensic expert or not as there was no mandatory clause which compelled him to seek forensic advice. Realizing the importance of forensics, the new criminal regime has mandated the use of forensics in the investigation of certain offences. The Bharatiya Nagarik Suraksha Sanhita, 2023 casts a responsibility on the officer in charge of the police station to cause the forensic expert to visit the crime scene for collection of forensic evidence in offences which are punishable with more than seven years. He should also ensure that the entire process of collection of forensic evidence is videographed on mobile phone or any other electronic device.¹⁵ Not only India, the other countries are also marching progressively towards the use of these techniques.¹⁶

The above discussion shows that there is no iota of doubt that the use of scientific techniques in investigation would help in securing evidence and will help in better administration of criminal justice.

ISSUES OF ADMISSIBILITY AND RELIABILITY

When the scientific evidence is brought to the Court, the question faced by a judge is to decide the admissibility¹⁷ of such test. The courts have been made the “Gate Keepers” to decide the admissibility of these tests. There are three questions that a judge must answer. Firstly, the validity of the underlying scientific principle. For example, the narco analysis is based on the principle that when sodium pentathol is intravenous injected to a subject then the subject enters into hypnotic trance and loses conscious control over the questions asked to him. The evidence of narco-analysis test is not reliable if the principle of entering into trance is false. The second

¹⁴ PTI, ‘Government aims to make forensic teams site visit mandatory in crimes that attract over 6 years of jail: Amit Shah’ *The Times of India* (14 October 2021)

¹⁵ Bharatiya Nagarik Suraksha Sanhita, 2023, s. 176(3)

¹⁶ Edward J Imwinkelried, *Forensic Hair Analysis: The Case Against the Underemployment of Scientific Evidence*, [1982] 39 Wash & Lee L Rev 41, 47

¹⁷ Indian Evidence Act, 1872, s 136

inquiry that must be put forth by the judge is, whether the technique applying the scientific principle valid? For example, assuming that no two persons have same fingerprints, is there a reliable method of analyzing the fingerprints. Unless there is a reliable method of analyzing the fingerprints, scientific evidence purporting to show that a person's fingerprints were recovered from a crime scene is not reliable. The thirs and final question is that when it is assumed that there is a valid scientific principle and there is technique to measure it, the judge must inquire whether the technique was properly applied on that particular occasion. That is, the judge must question the expert about possessing necessary skills to apply that technique.

The admissibility determination is complex when the party produces before court evidence based on some principle, which is novel or the technique is novel. In order to answer these questions the Courts in the U.S. have laid down certain tests. These tests have been adopted and followed in India also.¹⁸

The first test was laid in 1923 in the case of *Frye v. United States*.¹⁹ The question in this case was regarding the expert testimony concerning a lie detector test. "This test, which was based on changes in systolic blood pressure. The Court held that the principle had "not yet gained such standing and scientific recognition among physiological and psychological authorities." The standard that was established by the Circuit Court was "general acceptance in a particular field." The rule that was laid down was that if a particular technique has got standing and scientific recognition amongst those working in that field then the courts would be justified in accepting the expert testimony.²⁰

Years later, in 1993 another test laid by the US Supreme Court in the case of *Daubert v. Merrell Dow Pharmaceuticals*.²¹ In this case the Court propounded "a standard of evidentiary reliability". The Court emphasized that trial courts, as "gatekeepers" are to ensure that only scientific knowledge should reach the jurors. Knowledge is scientific if it is "verifiable" and "reliable". When a party produces evidence the factors that should be considered by the Court are:

1. "Whether the expert's technique or theory can be tested and assessed for reliability
2. Whether the technique or theory has been subject to peer review and publication
3. The known or potential rate of error of the technique or theory

¹⁸ *Sehvi v. State of Karnataka* (2010) 7 SCC 263

¹⁹ (1923) 293 Fed 1013

²⁰ David E. Bernstein, 'Frye, Frye, Again: The Past, Present and Future of the General Acceptance Test' (2001) 41 *Jurimetrics* 390

²¹ (1993) 9 US 579

4. The existence and maintenance of standards and controls
5. Whether the technique or theory has been generally accepted in the scientific community”²²

Though these tests have been used for quite some time to decide the admissibility of novel evidence there are concerns even when a scientific technique is sufficiently established. It has been time and again propagated that some of the tests conducted under the forensic science are not accurate. One such example is the results of bite marks. Another issue is whether the technique was properly applied, that is, whether there is any scope of error in reaching to a conclusion or is the reliability hundred percent.

ERRORS IN FORENSIC SCIENCE

One must not equate ignorance of error with the lack of error.²³ One of the most problematic areas of forensic science is the concept of error as error can be defined in a number of ways. According to Black's Law Dictionary “Error is an assertion or belief that does not conform to objective reality; a belief that what is false is true or that what is true is false”.²⁴ In applied mathematics, error means “the difference between a true value and an estimate, or approximation, of that value”. In statistics, a common example is “the difference between the mean of an entire population and the mean of a sample drawn from that population”.²⁵

There are a number of factors contributing to the errors in forensic science thus making the concept of errors vague and open to interpretations. Identification and interpretation of error is more challenging in the courts, as the judges are not specially trained in the field of forensics and lack special knowledge with regards to the same.

On the basis of source error can be of three types namely;

1. Systematic error
2. Random error
3. Gross error

²² For further reference see: Joseph R. Meaney, ‘From Frye to Daubert: is a Pattern Unfolding?’ (1995) 35 Jurimetrics 193

²³ D. Michael Risinger; Michael J. Saks; William C. Thompson; Robert Rosenthal, ‘The Daubert/Kumho Implications of Observer Effects in Forensic Science: Hidden Problems of Expectation and Suggestion’ (2002) 90 Calif L Rev 3

²⁴ Angi M. Christensen, Christian M. Crowder, Stephen D. Ousley and Max M. Houck, ‘Error and its Meaning in Forensic Science’ (2014) 59 J Forensic Sci 123

²⁵ <<https://www.britannica.com/science/error-mathematics>> accessed 1 October 2023

“Systematic errors include instrumental errors, method errors, individual errors, and environmental errors”.²⁶ Systematic errors occur when the apparatuses used for testing the samples collected have inherent default or the surroundings in which they are kept are not suitable for the apparatus (for example temperature), This produces readings which are consistently above or below the true value. Random Errors are those errors, which are caused randomly due to factors that are not in our control and are unpredictable. Gross errors are errors caused due to the negligence caused by undue human errors based on the negligence of the experts testing the sample.

The errors in forensics question the validity and the reliability of the testimony of the expert and the weightage that is attached to this testimony. Therefore it is important the courts should be careful in accepting the testimony of the experts as it may at times lead to wrongful conviction which means innocent people being judged as guilty.

As discussed above the challenge is whether forensic science can accurately and conclusively determine the guilt of the accused. In United States, Project Innocence has been initiated and according to them the misapplication of forensic science has contributed to 52% of wrongful convictions. According to the US. National Registry of Exonerations²⁷ false or misleading forensic evidence was a contributing factor in 24% of all wrongful convictions national. As far as India is concerned there is no data collected by any agency so far.²⁸ The authors in this article have studied certain cases of India as well as other jurisdictions to showcase the point that misapplication of forensics may result in travesty of justice.

CASE STUDIES: AN ANALYSIS

The role of the use of forensic sciences *vis-a-vis* the criminal investigation is very important and significant. The authors in this part analyze the cases where the different techniques with regards to forensic science were used to prove the guilt of the person and there were errors in forensics that finally lead to the acquittal.

²⁶ <<https://www.jfsmonline.com/article.asp?issn=2349-5014;year=2017;volume=3;issue=3;spage=139;epage=143;aulast=Du>> accessed 30 July 2023

²⁷ <<https://newkirkcenter.uci.edu/national-registry-of-exonerations/>> accessed 15 September 2023. The National Registry of Exonerations, a collaborative project with the University of Michigan School of Law and Michigan State University School of Law. The mission of the National Registry of Exonerations is to provide comprehensive information on exonerations of innocent criminal defendants in order to prevent future false convictions by learning from past errors. The Registry collects, analyzes and disseminates information about all known exonerations of innocent criminal defendants in the United States.

²⁸ <<https://innocenceproject.org/overturning-wrongful-convictions-involving-flawed-forensics/>> accessed 1 August 2023

*Hari Om @ Hero v. State of UP*²⁹ involved six people who were accused for committing dacoity and murder of four persons. The Trial Court convicted all six of them on the basis of fingerprints. The fingerprints of the accused matched with the latent fingerprint found in the deceased house. On Appeal to the High Court three people were acquitted whereas two of them were awarded life imprisonment and one of them was sentenced to death. Convicted persons appealed to the Supreme Court and the Court acquitted all of them by dismissing the fingerprint evidence on which the conviction was based. The fingerprint evidence was found unreliable as the Apex Court questioned the training and experience of those who had taken the latent fingerprints from the crime scene. There was also no mention about the method of taking the fingerprints and also there was no mention whether the items from which the latent fingerprints were taken was available for analysis or not.

In the case of *Premjibhai Bachubhai Khasiya v. State of Gujarat*³⁰ two persons were accused of kidnapping and committing rape of a girl that led to the pregnancy of the victim. Medical examinations of both the accused and their DNA samples were taken. The samples were sent for analysis and on the basis of the expert report one of the accused was acquitted. The reason for the same was that the DNA profiling of the acquitted person did not match the fetus and therefore he was excluded as the biological father. However, the tests concluded that the other accused was the biological father of the fetus. On the basis of this report the accused was convicted and sentenced to ten years of imprisonment. An appeal was filed before the High Court challenging whether conviction of the accused could solely be based on the DNA report in the absence of any other corroborating evidence.

The High Court in the appeal acquitted the accused on the basis that the foundations of DNA science are based on probability theory. It only shows the probability as per random occurrence ratio and cannot be treated as a conclusive proof that the accused is the father of the fetus. Therefore, the Court acquitted the accused.

The Court also in certain cases have pointed out that the conviction of the accused cannot be solely based on DNA evidence because at times it may be fallible. In the case of *Pattu Rajan v. State of Tamil Nadu*³¹ the Court stated that “given that even though the accuracy of DNA evidence may be increasing with the advancement of science and technology with every passing

²⁹ AIR 2021 SC 402

³⁰ (2009) CriLJ 2888

³¹ (2019) 4 SCC 771

day, thereby making it more and more reliable, we have not yet reached a juncture where it may be said to be infallible”.

*Mohd. Aman v. State of Rajasthan*³² three persons were held liable for robbery and murder by the Trial Court and that was confirmed by the High Court. The accused contended that they were falsely implicated at the instance of the police. There was no eye witness in the case therefore the prosecution strongly relied on the fingerprints and footprints collected from the crime scene. Accused 1 was sentenced on the basis of fingerprints that were found from the house of the deceased on a jug. The specimens were taken three times as the fingerprint bureau said that the first two samples were not clear. And hence the conviction was based on the third sample collected by the bureau. Accused 2 was convicted on the basis of fingerprints and footprints. It is important to note that the police searched the crime scene the very next day when the crime was committed. However the footprints and fingerprints collected from crime science and sent for analysis were after a lapse of eleven days. Moreover the accused was in police custody when the samples were taken.³³

An appeal was made before the Hon’ble Supreme Court where the court set aside the order on the ground that the Magistrate was not present when the samples were taken. Further the Court raised questions on the development of the law relating to the analysis of the footprints.

In the case of *Gopal Sharma v. State of Rajasthan*³⁴ the accused was charged with the offence of rape and murder of a 7-8 year girl and was sentenced to life imprisonment by the Trial Court. There were no eyewitnesses in the case and one of the circumstances that was strongly relied on by the prosecution was the footprints of the accused that were found around the well from where the body of the victim was recovered. There were a lot of inconsistencies regarding the footprints taken like whether the analysis was based on the basis of footprints or footwear soles, the sample was of left foot or right foot, absence of Magistrate at the time of recovery and absence of footprints on site plans. In addition to this there were many people present around the crime scene that led to the tampering of the crime scene when the body of the victim was being taken out. The court cited various judgments³⁵ and said that the science of footwear analysis is not fully developed and hence acquitted the accused.

³² (1997) 10 SCC 44

³³ *Babu Khan v. State of Rajasthan* (1997) 10 SCC 44

³⁴ (2016) SCCOnline Raj 5795

³⁵ *Pritam Singh v. State of Punjab*, (1956) AIR SC 415, *Mohd. Aman v. State of Rajasthan*, (1997) 10 SCC 44. *Balbir Singh v. State of Punjab*, (1996) 6 SCALE 72

Citing another *Scottish case*, which involved the murder of an old woman in her home. The accused was held liable for murder. The conviction was based on fingerprints that were found on certain items found in the victims' house and a container found in the accused house, which contained money, which was an important piece of evidence against the accused. Based on this the prosecution developed a hypothesis that murder was committed in order to commit robbery. The court convicted the accused on the basis of these two evidences. However the accused maintained that he was innocent and he did not commit the murder.

In addition to the fingerprints of accused one another fingerprints were recovered from the crime scene, which the experts alleged, belonged to a detective. But the detective was not accused of murder. However she was charged with the offence of perjury because she contended that she had never visited the crime scene and therefore it was impossible that her fingerprints could be found there. This agitated the prosecutors and they charged her for the same. The detective in her defense-produced expert who gave report that the fingerprints found at the crime scene did not belong to her. The detective's acquittal did not solve the inherent problem and the question that was raised was the error in fingerprint identification, which was the main evidence for the conviction of accused for murder. The court stated, "It begs the question of whether the accuracy of fingerprint identification evidence is a factual truth or merely an urban legend- a legend that has only been demystified by one misidentified Scottish detective".³⁶

Finally the Crown's Court acquitted the accused on the basis of concerns that had been raised regarding the reliability of fingerprint evidence. The Court further held that "Although one may compartmentalize this problem as merely an evidentiary dilemma for the criminal litigator, it is more accurately described as an issue threatening the public confidence of the jury system and the reliability of modern criminal law. Indeed, it poses a serious menace to justice".³⁷

*David R Camm v. Sean Clemons*³⁸ In this case the accused was alleged to have committed the murder of his wife and two children by firing at them. He was convicted and one of the evidence given was that his t-shirt had the bloodstains of his wife in a particular pattern that suggested that he was the perpetrator of the crime. He was sentenced to 195 years of imprisonment. However, the Supreme Court of Indiana acquitted the accused on the ground that the expert

³⁶ Tamara F. Lawson, 'Can Fingerprints Lie: Re- Weighing Fingerprint Evidence in Criminal Jury Trials' (2003) 4 Am J Crim L 1

³⁷ Ibid.

³⁸ United States District Court, 2021 <https://content.govdelivery.com/attachments/INAG/2018/01/30/file_attachments/950833/Summary%2Bjudgment%2Border%2BECF%2B226.pdf> accessed 15 July 2023

who had initially testified about the blood splatter had no history of working as an expert and had falsified his credentials.

Further, years later he filed a case claiming compensation for the emotional distress caused to him due to his wrongful conviction.

In the case of *Brandon Mayfield*³⁹ an incident of 2004 where terrorist bombing led to the killing of 191 people and injuring 1400 in Madrid, Spain. In this latent fingerprint were recovered from a bag of detonators containing explosives and the same were sent by the agency to other police agencies through INTERPOL including FBI. The FBI identified the accused and arrested him by carrying on a search in the online database. In addition to this a search warrant was also issued against him. However, the accused contended that he did not have a passport and had not traveled outside the US in the last ten years.

Few weeks later the Spanish investigating agency linked the fingerprints to another suspect who belonged to Algeria. On the basis of this error the FBI released the accused from custody and issued an apology. In 2004 a case was filed against the FBI, DOJ by the accused regarding the violation of his rights and illegal arrest by the FBI.

In another case the accused was convicted for shooting and wounding a police officer on the basis of fingerprint evidence collected from the crime scene. On the basis of this he was sentenced to 30- 45 years of imprisonment. However, years later the post conviction DNA of the accused showed that he had not committed the crime and the investigating agency admitted that the fingerprint evidence was erroneous. On the basis of this the accused was freed after spending six and a half years in jail.⁴⁰

From this an analysis can be drawn that there are times when the use of different techniques of forensic sciences can also be wrong and the basic reason for that is that there are no standardized rules for deciding the admissibility and the reliability of the tests which prove the innocence or the guilt of the accused. At times the results of the tests are ‘inconclusive’ as has been analyzed in the judgments above. It is important that there has to be sufficient evaluation of the techniques that has to be done before making it conclusive.

³⁹ <[⁴⁰ Simon A. Cole, 'More than Zero: Accounting for Error in Latent Fingerprint Identification' \[2005\] 95 J Crim L & Criminology 987](https://www.history.com>this-day-in-history/terrorists-bomb-trains-in-madrid> accessed 30 July 2023</p>
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Below is the tabular representation of the cases that have been analyzed and discussed by the authors in the above section wherein errors were found in forensic results and ultimately the accused was acquitted based on the error.

CONCLUSION

At this juncture we can say that forensic science is very important component of criminal investigation as it helps in identifying the person who has committed the crime. The judiciary has placed much reliability on using the scientific techniques in criminal investigation. Criminal trials are important and of serious nature not only from the accused perspective but also keeping in mind the safety of the society. That is why the thumb rule used for proving guilt of a person is beyond reasonable doubt. For this the forensic science plays a very important role.

Further it is pertinent to mention that during the criminal investigation eyewitnesses play a significant role but in their absence forensic evidence plays an important role in the corroboration of facts related to crime to credibly prove the guilt or the innocence of the accused.

Here it becomes pertinent to mention that the scientific techniques used for proving the guilt or the innocence of a person is not similar to the legal proceedings adopted like opening statement, cross examination etc. which forms the basis of free and fair trial which is the foundation of the criminal justice system. This process adopted by the court cannot test the reliability of the techniques used for proving the guilt or innocence of the accused. And therefore much weightage is placed upon the evidentiary rule of the expert testimony *vis- a- vis* scientific techniques.

“As the Court, vide its order dated 30 November 2017 in the judgment of *Baloo Chauhan v. NCT⁴¹*, specifically called for the Law Commission of India (the Commission⁴²) to undertake a comprehensive examination of issue of relief and rehabilitation to victims of wrongful prosecution, and incarceration⁴² the same holds true for the wrongful convictions taking place through the use of scientific techniques”. This brings us to the idea that it is difficult to give back the years that have been lost by the person wrongfully convicted but at least some efforts can be made to bring him back to the society and provide compensation for the loss suffered.

⁴¹ [2018] 247 DLT 31

⁴² Law Commission of India Report, *Wrongful Prosecution (Miscarriage of Justice): Legal Remedies* (2018)

Responding to mounting proof of wrongful convictions and erroneous and even fraudulent forensic science evidence, we need to study ways to strengthen forensic science. The authors would like to propose that it is important that in cases of scientific analysis there should be uniformity as far as the training of the experts are concerned. Although many of these scandals are associated with bad forensic science, the root cause of the failures is the lack of a suitable quality control program or “bad forensic scientists.”⁴³ Further in addition to this there should be certain standard guidelines that should be laid down with regards to the different techniques used. Further the results of some of the tests conducted under the forensic science are accurate but there are no studies to support this argument and therefore it is mandatory to lay down guidelines/ standards for the admissibility of these tests. However, the authors here propagate the idea that there should be independent authorities to decide the admissibility of the tests. On the basis of these tests the innocence or the guilt of the accused is decided. In case of guilt being established on the basis of misapplied forensics there is a serious question on the concept of “Fair/ Perfect Justice”.

⁴³ <<https://www.ojp.gov/pdffiles1/nij/250705.pdf>> accessed 10 July 2023

CONCEPT OF ADR IN INDIA

- Khushboo Dudeja*

Abstract

Alternative Dispute Resolution (ADR) is a powerful mechanism for providing efficient and cost-effective justice, with the capacity to significantly reduce case backlog. This alternative approach not only expedites legal proceedings but also offers an economically efficient avenue for dispute resolution. In the Indian legal system thousands fast fast-track courts, have successfully resolved millions of cases, and the persistent challenge of pending cases continues to escalate. This situation underscores the complexity of the issue, as the backlog persists despite proactive measures, necessitating a critical examination of the factors contributing to the sustained accumulation of unresolved cases within the Indian judicial system. In addressing such a circumstance, ADR arises as a beneficial method, that facilitates the resolution of conflicts in a conciliatory manner, wherein the resultant outcome is mutually accepted by both parties involved.

Keywords: Arbitration, Arbitration Act 1940, Dispute Redressal, Section 89, Code of Civil Procedure.

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INTRODUCTION

The first lawyers, Mahatma Gandhi and Abraham Lincoln, advocated for and promoted a culture of settlement. They suggested that instead of going to court, people should settle their disputes. This practice has undergone a significant transformation, progressing from the point where village elders would gather beneath banyan or neem trees to settle disputes to the point where it is now officially recognized by law. They also supported the creation of regional language courts and the implementation of the Alternative Dispute Resolution¹ system.

A dispute is a common occurrence in life. It is not good or bad. In the course of our daily routines, we frequently encounter various Disputes with individuals in diverse settings, irrespective of time or location. To resolve all disputes, we need patience and calmness. However, what is important is how we deal or manage it. Negotiation techniques are often central to resolving conflict and as basic strategies these have existed for thousands of years. ADR encompasses a spectrum of mechanisms for settling disputes that facilitate the resolution of conflicts between involved parties without resorting to court litigation. There are several types of disputes like civil, commercial, Industrial, and family disputes which are settled by the ADR techniques. The ADR mechanism has worked smoothly in business disputes, Banking, construction contracts, partnerships, joint ventures, intellectual property rights, insurance claims, personal injury cases, contract enforcement, product liability, and professional negligence, etc. In situations where individuals encounter difficulties in initiating negotiations and achieving settlements, ADR is commonly applied.

CONCEPT OF ARBITRATION

Aristotle once observed, “man is a social animal by nature” meaning who cannot afford to live alone. No individual is known to have developed normally without interaction with others. People learn social habits and acquire social qualities through their interactions with fellow human beings. In human behavior, every human has their own way of doing things, this is because people have diverse levels of understanding and the creation of doing things has made man invent the word “conflict”. In earlier times no one knew how to solve conflict, but our ancient scriptures do throw light on the methods of solving conflicts. In Ramayana Angada son of Bali approached Ravana to opt for the path of peaceful settlement and even in Mahabharata lord Krishna endeavored to mediate between the Pandavas and Kauravas.

¹ Hereinafter referred as ADR

Arbitration is considered different modes of settlement including, arbitration, conciliation, mediation, negotiation, and Lok Adalat. It is considered as International Commercial Arbitration, wherein two parties hailing from distinct nations engage an international arbitrator. This engagement occurs either through mutual consent or by involving an arbitration institution, facilitating the resolution of their dispute by the established procedures. The importance of ADR processes has increased recently, substantially, primarily in response to the escalating number of commercial market disputes. This heightened importance is attributed to ADR's reputation for providing a swift, cost-effective, and efficient means of dispute resolution.

CONCEPT OF ARBITRATION AGREEMENT

In general, the arbitration agreement forms the basis for arbitration. It is an agreement to resolve present or future disputes through arbitration. This arbitration agreement has two fold results,

- I. A contractual provision wherein the involved parties agree to resolve any disputes arising from the contract through the process of arbitration. (arbitration clause); or
- II. A contractual clause wherein the parties involved consent to the utilization of arbitration as the method of resolving any disputes that may arise from the contractual agreement. (submission agreement).

Essential Elements

Written agreements for arbitration are required, while verbal agreements are not legally binding. A contract or a separate arbitration agreement can both include an arbitral clause as part of a written arbitration agreement.

The Supreme Court in *Bihar State Mineral Development Corporation v. Encon Builder Pvt. Ltd.*², held the following as the four essential elements of an arbitration agreement:

- I. There must be a distinction in the present or future regarding the matter being discussed,
- II. The parties must intend to use a private tribunal to settle these disputes,
- III. The parties need to provide written consent to be bound by the tribunal's decision,
- IV. *Ad idem*, or mutual understanding, is required from the parties involved.

In *K.K. Modi v. K.N. Modi*³, the Supreme Court held that the following attributes must be present in an arbitration agreement:

² 2003 (7) SCC 418

³ AIR 1998 SC 1297

- 1) The arbitration agreement must specify that the tribunal's decision will be binding on the parties involved,
- 2) The tribunal's authority to decide the parties' rights must either come from their consent, a court order, or a statute that clearly states that the process is arbitration,
- 3) The agreement must provide for the arbitral tribunal to determine the substantive rights of the parties,
- 4) The tribunal will impartially and judicially determine the rights of both parties, owing an equal obligation of fairness towards both sides,
- 5) The parties must intend for their agreement to refer their disputes to the tribunal to be enforceable by law; and
- 6) The agreement must indicate that the tribunal will decide a dispute that has already been formulated at the time when the reference is made to the tribunal.

It needs to be determined whether the existence of an arbitration agreement to refer the dispute to an arbitrator can be clearly ascertained from the facts and circumstances of the case. This determination depends on the intention of the parties as discerned from the relevant documents.

In *Rukmanibai v. Collector*⁴, the Supreme Court has stated that it must be determined whether the parties have agreed to submit the dispute to an arbitrator. If such an agreement exists, it will be considered an arbitration agreement. There is no specific form required for this agreement.

In *M.M.T.C Ltd v. Sterlite Industries Ltd.*⁵, Supreme Court held that an arbitration agreement cannot be held invalid on the ground that the arbitration agreement specify an even number of arbitration.

Supreme Court in the case of *SBP Co. v. Patel Engineering Ltd.*⁶ while overruling *Konkan Railway Corporation Ltd. v. Mebul Construction Co.*⁷, held that the appointment of an arbitrator is a judicial function and not an administrative function and it also held that the Court need not merely confine itself to the existence of the arbitration agreement or the existence of the condition for the exercise of the respective court's power but may also go into preliminary questions such as limitation and the stale nature of the claims, accord, and satisfaction, qualifications of the arbitrator, etc.

⁴ AIR 1981SC 479

⁵ (1996) 6 SCC 716

⁶ AIR 2006 SC 450

⁷ (2000) 7 SCC 201

In *Mahanadi Coalfields Ltd. v. IVRCL AMR Joint Venture*⁸ the Supreme Court ruled that for an arbitration agreement to be valid, it must clearly state the parties' commitment to resolve disputes through arbitration. Simply using words like "arbitration" or "arbitrator" in a clause is not enough to create a binding arbitration agreement if it requires additional consent from the parties to proceed to arbitration.

NON-ARBITRATION DISPUTE

- 1) Disputes related to rights and liabilities arising from criminal offenses, and
- 2) Disputes related to marriage, including divorce, judicial separation, restitution of conjugal rights, and child custody,
- 3) Matters related to guardianship,
- 4) Insolvency and winding up matters,
- 5) Testamentary matters

Statutory provisions relating to ADR

Section 89 of the Civil Procedure Code was incorporated to facilitate an amicable, peaceful, and mutual settlement between parties, thereby minimizing the need for direct court intervention. In countries all over the world, especially the developed few, the majority of legal disputes are resolved out of court. Section 89 CPC: If the court determines that there are potential settlement terms that the parties may agree to, the court will draft those terms and provide them to the parties for their review. Upon receiving the parties' input, the court will then adjust the terms as necessary.

Section 89 and Order X Rule 1A of CPC Inserted by Amendment Act 1999 with effect from July 1, 2002 Order X Rule 1A makes it mandatory on the part of the Court to direct the parties to opt for any of the modes of settlement outside the Court as specified in Section 89 (1)

There are various important judgments for the cases which involve section 89 of CPC. Its validity upheld by the Supreme Court in *Salem Advocate Bar Association v. Union of India*⁹ In the first case, the validity of Section 89 was upheld given its laudable object.

In the second case *Salem Advocate Bar Association v. Union of India*¹⁰ it was held that instead of the Court formulating and reformulating the terms of the settlement, the Court should only briefly

⁸ MANU/SC/0958/2022

⁹ AIR 2003 SC 189.

¹⁰ JT 2005(6) SC 486

state the dispute between the parties, which is called as ‘Summary of dispute’ and not ‘the terms of settlement’

The Arbitration and Conciliation (Amendment) Bill, 2021: It seeks to amend the Arbitration and Conciliation Act, of 1996

The key feature of the Bill

⇒ Arbitration Council of India (ACI)

The Bill seeks to structure an independent body called the Arbitration Council of India, it aims to promote the dispute resolution mechanism such as arbitration, mediation negotiation, conciliation, and Lok Adalat. The functions include,

- Framing policies for the arbitral institutions,
- Implementing policies for the establishment and maintenance of uniform professional Standards.

⇒ Composition of ACI

The ACI includes a chairman who is either a judge of the Supreme Court, a judge of the High Court, or the Chief Justice of the High Court, or any eminent person with expertise in the field of arbitration proceedings.

⇒ Appointment of Arbitrators:

The Arbitration and Conciliation Act allows parties to choose their own arbitrators. If there is a disagreement between the parties about the appointment, they can seek the assistance of the Supreme Court, High Court, or any person or institution authorized by the Court to appoint an arbitrator.

⇒ Modes of settlement under ADR

- a) Arbitration
- b) Conciliation
- c) Mediation
- d) Lok Adalat

⇒ Arbitration

Section 2(1)(a) of the Act defines ADR. ADR offers an alternative to litigation in courts and brings benefits such as flexibility and confidentiality. According to the Black Law Dictionary,

ADR is a method of resolving disputes involving two parties and a neutral third party, whose decision is binding on both parties.

⇒ Conciliation

A neutral third person, referred to as a conciliator, mediates disputes and helps parties come to a mutually agreeable resolution as part of the conciliation process. The Conciliator, who has been appointed for this role, may offer their advice to help the disputing parties come to a compromise. To put it another way, the settlement represents a compromise between the parties.

⇒ Mediation

Within the realm of mediation, a neutral third party, referred to as a “mediator,” plays a pivotal role in assisting disputing parties to arrive at a mutually agreeable resolution. Rather than rendering a decision, the mediator facilitates communication between the involved parties, enabling them to navigate and resolve the conflict independently. Eligibility to serve as a mediator is contingent upon the completion of a requisite 40 hours of training, as stipulated by the Supreme Court’s Mediation and Conciliation Project Committee (SC). Additionally, to attain accreditation as a qualified mediator, an individual must have concluded a minimum of 20 mediations overall, with at least ten of these resulting in a successful settlement.

⇒ Lok Adalat

Lok Adalat, colloquially known as the ‘People’s Court,’ is presided over by a sitting or retired judicial officer, social activist, or member of the legal profession serving as the chairman. The National Legal Service Authority (NALSA), in collaboration with other Legal Services Institutions, orchestrates Lok Adalat periodically to exercise their jurisdiction. Cases currently under consideration in regular courts or disputes that have not yet been presented before any judicial forum can be referred to Lok Adalat. The procedural aspects are characterized by the absence of court fees and a streamlined process, contributing to expeditious proceedings. If a matter initially filed in a regular court is subsequently referred to Lok Adalat and successfully resolved, the original court fees paid upon filing the petition are refunded to the involved parties.

Advantages of ADR

- Less time consuming
- Cost-effective method
- Least complicated procedure, free from technicalities of courts

- People have the freedom to express themselves without fear of legal repercussions.
- It is an efficient way to potentially restore relationships, as parties can discuss their issues together on the same platform.
- It helps prevent further conflict and maintain a good relationship between the parties

CONCLUSION

In this article, the author highlights arbitration as an effective and efficient method for resolving disputes. After reviewing various opinions and comments, the author observes that arbitration is deeply rooted in the Indian mindset. With legal amendments, case law interpretations, government support, and a preference for arbitration as a dispute resolution method, it is evident that there is an increasing reliance on arbitration, especially in international business due to the globalized economy and heightened competition. People are choosing arbitration over lengthy and costly court proceedings. Consequently, alternative dispute resolution mechanisms, such as arbitration, play a critical role for businesses in India and those dealing with Indian firms. The analysis also emphasizes the supervisory role of courts in ensuring the legal validity of arbitration awards, even after decisions are made by arbitrators or neutrals.

MARITIME ARBITRATION – AN ENGINE FOR INTERNATIONAL MARITIME TRADE

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Abstract

This article analyzes how maritime arbitration facilitates international maritime trade. This analysis is done by first primarily tracing the origins of maritime arbitration and further how the maritime laws and laws related to arbitration have come into being and have developed over the years. It is vital to analyze the factors that make maritime arbitration as a facilitator of international maritime trade and also to look into the different types of maritime arbitration or arbitration in general. Finally, many jurisdictions around the world have set up their own maritime arbitration centers to facilitate quicker, reliable and flexible dispute settlement so that in return it will facilitate efficient international maritime trade.

Keywords: Arbitration, International Trade, Maritime Laws, ADR, Dispute Redressal

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INTRODUCTION

The maritime industry is a close-knit community. Hence, there is a need to maintain good relations with fellow industry participants. The world is very much dependent on the movement of goods by sea, and the major chunk of world trade is carried out by sea; it amounts to 90% of the world trade that is moved by sea¹. It is up to one's own comprehension as to the number of disputes that could possibly arise out of maritime trade with respect to a lot of things involved in the movement of goods and the functioning of the industry.

There are various dispute settlement mechanisms that cater to the needs of the maritime industry in terms of settling disputes. These are the roles of the judiciary in adjudicating disputes, maritime arbitration, and alternative dispute resolution methods, i.e., mediation, escalation clauses, and online dispute resolution. Of all of these various mechanisms to settle disputes, maritime arbitration is a more stable and dependable system to resolve disputes. It provides an efficient system that the parties to the issue themselves stipulate, and the involvement of the judiciary whenever there is a need and at times when it is mandatory for them to interfere brings validity to the arbitration process. Even though there is a fixed framework of procedure, the parties are given the liberty to fill in to make a working arbitral tribunal.

HISTORY OF MARITIME ARBITRATION

Maritime arbitration is one of the oldest methods used to settle maritime disputes that arise out of maritime contracts. Though styled as a modern mechanism for settling disputes in the field of the maritime industry post the advent of international commercial arbitration, the mariners of the ancient world have utilised the method of maritime arbitration to resolve their issues. It could be traced back to the Greek mythologies, but it is tough to trace a path that would lead us to the origins of maritime arbitration before the 18th century, as maritime arbitration is a private dispute resolution method, the documents wouldn't be available to trace the beginnings of it, and even if they might have been available, they weren't preserved properly².

Two prominent factors contributed to the beginnings of maritime arbitration in England, a place that could be considered the home of maritime arbitration. The development of commercial laws around the thirteenth century led the way to arbitrating disputes pertaining to the maritime

¹ Shipping and World Trade: World Seaborne Trade, Shipping Fact, Overview, <https://www.ics-shipping.org/shipping-fact/shipping-and-world-trade-world-seaborne-trade/>, (Last accessed April 15, 2024)

² Eva Litina Theory, Law and Practice of Maritime Arbitration: The Case of International Contracts for the Carriage of Goods by Sea, International Arbitration Law Library, Volume 60 (Kluwer Law International 2020), 'Chapter 1: Theoretical Background', pg. 18

industry, and consequently, it led to the swelling of maritime trade in the sixteenth century. The oldest evidence as to the beginnings of maritime arbitration could be found when traced back to the year 1320 in England³.

Other than England, the Roman Empire had utilised arbitration for settling disputes prominently; as the empire faded, so did arbitration. Later, it was revived by the medieval guilds in England, who utilised it to settle disputes that arose out of maritime transactions during the medieval period. The process of maritime arbitration was regulated by the rules stipulated by the mariner guilds. It became so dominant in England that it drew the attention of King Henry VII of England, and he passed legislation to curtail the supremacy of a guild's order that could override a suit in the King's court. For almost a century, maritime arbitration became dormant as an arbitration decree was now only considered as a private decree and couldn't be enforced by the courts. This came to an end in the year 1698 after legislation was passed to legally consider an award as a decree of the court; later, in 1889, the courts were given the power to enforce an award with full sanctions⁴.

The usage of maritime arbitration is very much dependent on the maritime laws; these laws are nothing but the customs and usages of mariners, traders, seamen and the guilds that have followed over time. The oldest codified law was dated back to 534 A.D. by the Romans in the Justinian Digest; some scholars believe that these laws were extracted from Rhodian maritime law, which is believed to have existed around 800 B.C. the maritime law is also known as "*Lex Maritima*" which is essentially developed as a part of "*Lex Mercatoria*". It is specifically developed in medieval England; they are the unwritten rules and usages of traders that were followed uniformly. These rules were enforced by the Consular Courts of England that were presided by the wayfaring consuls and were usually applicable to commercial transactions between mariners and merchants. These rules have withstood the time and are still applicable to this day.⁵.

Arbitration in settling maritime issues has come into being due to the contributions of *Lex Maritima* and the laxity of the Consular Courts in functioning regularly. There are obvious reasons for the drawbacks of the Consular Courts, as the consuls were always on the move it devoid of the courts of stability and also, the courts took a lot of time to resolve disputes. Hence, this led the merchants to opt for a stable, faster, economical mode that would enforce the trade usage without raising the scope for legal technicalities. By the end of the seventeenth century,

³ Gerard Watson, *Arbitration in Admiralty*, 24(4) Ohio State Law Journal 636-649, 636 (1963).

⁴ Lynden Macassey, *International Commercial Arbitration: Its Origin, Development and Importance*, 24 (7) American Bar Association Journal 518-524, 581-582, 520 (1938).

⁵ Supra 4

maritime arbitration became a prominent dispute settlement method as it catered to their needs efficiently, and the transactions out of which the disputes arose were kept discreet. The mariners had two basic reasons to opt for maritime arbitration: confidentiality and time efficiency. As time is a basic entity on which the whole maritime industry revolves, time is utterly important for the industry. Also, it provides a personalised dispute resolution method; hence, it was quite favoured⁶.

The Industrial Revolution, which spanned the eighteenth and nineteenth centuries, slowly led to the fall of imperialism and colonialism all over the world, and the emergence of nation-states could be observed. This led to states enacting their own domestic laws. In 1854, England enacted an arbitration legislation, which became a core legislation on which international commercial arbitration depended. It introduced designated courts with the authority to stay proceedings, appoint arbitrators and hear appeals. This facilitated London in becoming prominent in the field of arbitration globally.

As the USA was a former colony of the English Men, they acceded to the common law principles of arbitration that were developed in England. In 1647, "The Board of Nine Men", which is a court of arbitration, was set up in New York. Arbitration in the USA was further bolstered after establishing formally in 1768 the New York Chamber of Commerce. In 1914, after New York, in a charter party agreement, was chosen as a seat of arbitration as part of the Produce Exchange Charter Party, it became a prominent place for arbitration for the world⁷. Despite this, arbitration didn't become prominent in America until the Federal Arbitration Act. 1925 was enacted. After World War II, the imports and exports by sea were ramped up, which amplified the importance and usage of arbitration in America⁸.

LAWS AND CONVENTIONS

The *Lex Maritima* lost its prominence and as well as its universal application after the states started enacting their own domestic maritime laws; this phenomenon started taking place in the nineteenth century. One of the first jurisdictions to enact maritime legislation was France; it enacted the French Commercial Code, which had provisions related to maritime law.

⁶ Frank Emerson, *History of Arbitration Practice and Law*, 19 Cleveland State Law Review 156 (1970)

⁷ Robert Jarvis, *The Problem of Post-Hearing Delay in Maritime Arbitrations: When Did You Say We Would Receive the Arbitrators' Award?*, 9 Maryland Journal of International Law 19, 29 (1985).

⁸ Donald Zubrod, *The History of Maritime Arbitration in New York*, 32(2) *The Arbitrator* 3 (2001).

Subsequently, this code became a model code for a number of civil law jurisdictions such as Holland (now the Netherlands), Bolivia, Chile, Spain Portugal etc.⁹

Due to a lack of uniformity over the application of maritime laws, there arose a need for conventions promoting international uniformity. This began in the twentieth century with the introduction of universal regulations in the area of contracts for the carriage of goods by sea. A number of conventions in this area have been introduced and ratified. “The Hague Rules¹⁰ (1926), the Hague-Visby Rules¹¹ (1968/1979) and the Hamburg Rules¹² (1978)” After the ratification of the Hague Rules, the subsequent conventions are mere amendments and changes that have been brought to the former conventions.

While the discussions were going on with respect to these conventions, until the Hamburg Rules were ratified, the consensus on arbitration in the maritime sector was absent. The Hamburg Rules had brought with them provisions that facilitated maritime arbitration. Further development in the area of carriage of goods by sea was brought by the Rotterdam Rules¹³ (2009), the only convention that was signed in the twenty-first century, and it aimed to unify rules of the transportation of goods wholly or partly by sea¹⁴.

Despite the lack of uniformity of all these conventions in the maritime industry, the standard form of contracts that are usually used for chartering, bills of lading, etc., has dominated the sector and has brought uniformity in the sphere of the maritime industry. These contracts that are pre-drafted satisfied parties with respect to harmonising with international conventions without actually satisfying those regulations. The harmonisation and unification of national laws with respect to arbitration, in general, were only possible after the ratification of the UNCITRAL Model Law on International Commercial Arbitration¹⁵ (hereinafter “the Model Law”) and the

⁹ William Tetley, *Uniformity of International Private Maritime Law: The Pros, Cons, and Alternatives to International Conventions-How to Adopt an International Convention*, 24 Tul Mar LJ 775, 783 (1999-2000).

¹⁰ International Convention for the Unification of Certain Rules of Law relation to Bills of Lading and Protocol of Signature Signed at Brussels on 25th August, 1924

¹¹ Two Protocols were signed at Brussels on 23rd February, 1968 and 21st December, 1979 to further amend Hague Rules of 1924.

¹² United Nations Convention on the Carriage of Goods by Sea, 1978, Signed at Hamburg. These rules were passed in order to replace the earlier convention rules i.e., the Hague Rules and The Hague –Visby Rules.

¹³ The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, adopted in December, 2008. It adopted as a modern successor to the earlier rules in order to provide a modern framework for transportation of goods by seaways

¹⁴ Loukas Mistelis, Competition of Arbitral Seats in Attracting International Maritime Arbitration Disputes in Miriam Goldby & Loukas Mistelis(eds.), *The Role of Arbitration in Shipping Law* 135 (OUP 2016).

¹⁵ The UNCITRAL Model Law on International Commercial Arbitration, 21st June 1985, amended on 4th December, 2006.

enforcement of foreign awards were globally accepted due the New York Convention¹⁶ along with Geneva Convention¹⁷ and Protocol¹⁸.

MARITIME ARBITRATION

P. Ramanatha Aiyar gave a very simple definition of maritime arbitration it is, “it is the use of arbitration as a dispute resolution mechanism for the disputes that arise out of shipping industry¹⁹“. The disputes that can be dealt with the maritime arbitration are given in the Maritime Arbitration Rules of 2016²⁰.

Maritime arbitration was in the picture of dispute settlement from the time when commerce and trade came to light. It was separate from the jurisdiction of the courts and had also faced hostility from the courts occasionally. In contemporary times, one can say that the balance has been struck between party autonomy and judicial intervention. The parties have the right to seek assistance from the courts²¹. The following are the aspects that render maritime arbitration a facilitator of international maritime trade;

- *Supervision of Judiciary*

The degree of supervision by the judiciary differs from jurisdiction to jurisdiction. The two main players, arbitration, play a key role in the settlement of disputes pertaining to the maritime industry, along with the assistance and support that the courts provide. There are three basic grounds on which a court can review the arbitration agreement. These situations arise at different phases of an arbitration. When a party approaches the court to resolve a dispute that resulted from a contractual relationship and the parties had decided earlier to approach an arbitral tribunal to settle their disputes, the court will first carefully review the agreement pertaining to arbitration before making a reference to the matter to arbitration²².

The second scenario then occurs when a disagreement calls for temporary remedies; in this case, the court reviews the parties' agreement to arbitrate issues and will send them to arbitration as

¹⁶ United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York 10th June 1958.

¹⁷ The Geneva Convention on Execution of Foreign Arbitral Awards signed on September 26, 1927

¹⁸ The Geneva Protocol on Arbitration Clause signed on September 24, 1923

¹⁹ P Ramanatha Aiyar; The Major Law Lexicon; Maritime Arbitration.

²⁰ Indian Council of Arbitration's, The Maritime Arbitration Rules, 2016; Rule 7, Scope of Application., Available at: https://icaindia.co.in/pdf/Maritime%20Rules_with%20effect%20from%2017th%20January,%202022.pdf, (Last accessed April 18, 2024)

²¹ Nigel Blackaby, Constantine Partasides, Alan Redfern and Martin Hunter, Redfern and Hunter on International Arbitration, Redfern and Hunter on International Arbitration (Seventh Edition), 7th edition (Kluwer Law International; Oxford University Press 2023)

²² New York Convention, Art. II (3) and UNCITRAL Model Law, Art. 8(1).

well as during the enforcement of temporary awards²³. Lastly, the third and final situation occurs when a party seeking redressal approaches the court to have the arbitration judgment declared void. The court then looks into the arbitration award to find out whether the tribunal's settlement can be recognised and enforced²⁴.

According to the Model Law, “if a party where the dispute was resolved through arbitration has proved that they were under some incapacity to present their case or the agreement to arbitrate is not valid, in such cases an arbitral award can be set aside by the court.”²⁵ The domestic courts have the authority to declare an award void or annul it, provided it isn't enforceable. The foreign courts have to enforce the awards by adhering to the New York Convention and also other conventions agreed upon regionally that are related to enforcing arbitration awards that culminate out of international commercial arbitration. Hence, we can conclude that, at the stage of recognition and enforcement of awards, the court has the power of judicial review in two separate instances, which are totally different though having the same grounds for refusal of enforcement²⁶.

For setting aside a foreign award, very few grounds are only specified in the New York convention; since it doesn't have a standardised system to recognise grounds for doing so, the onus to decide the enforceability lies on the jurisdiction that would be enforcing the foreign award. Only limited jurisdictions under the convention are permitted to annul, and also, an annulment can be sought for, i.e., the jurisdiction which passed or made the award or the jurisdiction of whose law is followed to make the award²⁷. Though there are no specific grounds that could limit judicial review on foreign awards, it is expected that the foreign awards are mandated and encouraged to be enforced by the contracting parties of the convention under Article II of Convention²⁸.

“A very particular and minimal grounds for setting aside awards are available under the Model Law as well, but there remain certain variations as the grounds differ from jurisdiction to jurisdiction.”²⁹ For example, the Singaporean courts can set aside an award if the award has been

²³ Supra 15, Art. 9.

²⁴ Ibid, Art. 34 (2) (a) (i).

²⁵ New York Convention, Art. V (1) (a); UNCITRAL Model Law, Art. 36(1) (a) (i).

²⁶ Gary Born, International Commercial Arbitration 169 (2d ed. Kluwer Law International 2014, Pg. 3163

²⁷ Ibid. Pg. 3163-3165

²⁸ Ibid., Pg. 3168-3172

²⁹ Supra 15, Art. 34 (2)

proved to be passed as an outcome of corruption or fraud and if there happens or seems to be a breach of natural justice³⁰.

- **Advanced Technology and its impact**

Technological advancement has impacted arbitration in a very positive way, as it facilitates faster and more efficient dissemination of information. This has also entailed cutting the costs for arbitration and led to better and more secure arbitration proceedings. The usage of the internet to gain access to information and the technology to communicate swiftly has spread far and wide in the 21st century, and this led to a steep rise in online transactions related to international trade and trans-border contracts, and, as an outcome, the number of disputes also rose up drastically. This is also very applicable to the shipping industry as the avenue has provided an opportunity for relatively smaller and less developed countries in terms of economic importance. The access to the internet has limited the barriers for the entry of these countries into the industry³¹.

Thus the technological advancement was capable of creating awareness in the participants of commercial trade to take up arbitration and settle their issues amicably rather than approaching courts. The acceptance towards arbitration as a reliable dispute settlement method has, over the years, only increased. Enhancement in technology can be of very much help in the progress of maritime arbitration, as it helps in a faster and more efficient way of dissemination of information and knowledge, relatively increases cost-effectiveness, also improves security in the international arbitration and as well as efficiently assist in the working and managing of court procedures³². It also reduces international travelling as the proceedings could be taken up online, impacting the environment less as in-person proceedings are not mandatory in the digital era. With the help of technology, documents can be signed and sent from any corner of the world, and the usage of paper for the proceedings has also been reduced drastically³³.

The usage of technology isn't devoid of risks; there are obvious risks, such as the usage of artificial intelligence, which will definitely affect the resolution of a dispute. The legal outcomes or solutions generated by the usage of legal predictive analytics raise questions about the judgements by the courts; as far as arbitration is concerned, it becomes more tedious and

³⁰ The Singapore International Arbitration Act, 1994, Section 24

³¹ Constantina Sampani, *The Impact of Culture in Online Dispute Resolution for Maritime Disputes*, 44 CAMBRIAN L. REV. 6 (2013), Pg. 11

³² Peter Gross, *Shipping Law, Shipping Lawyers and Admiralty Courts: The Future—The Next 5-10 Years*, NUS Center for Maritime Law Working Paper 19/07, 5 (2019)

³³ Lucy Greenwood & Kabir Duggal, The Green Pledge: No Talk, More Action, Kluwer Arbitration Blog (March 20, 2020), Available at: <https://arbitrationblog.kluwerarbitration.com/2020/03/20/the-green-pledge-no-talk-more-action/>, (Last accessed April 19, 2024)

imagining the effect it might have is scary. The debate on the use of artificial intelligence in arbitration proceedings is going to continue for a long time. Though the shipping industry is considered to be traditional, it will certainly be affected by technological advancement and the usage of artificial intelligence³⁴.

- **Practical Implications of Seat Selection**

Courts have a vital role in the process of arbitration. During its many stages, court involvement in certain occasions seems inevitable. In the case of enforcement, the participation of courts is very significant. The national courts confer authority and validity on the New York Convention, as the courts are the ones that implement the provisions of the convention. The party against whom the award is passed has the onus to perform the award and if the party doesn't perform it voluntarily, then the party seeking to enforce the award, as there could not be an appeal of the award or the enforcement mechanism within arbitration, the enforcing of the awards is now the burden of the courts as they are the ones to decide their enforceability³⁵.

As the local courts with regard to maritime arbitration take up several crucial functions, the selection of an arbitral tribunal has some practical ramifications. As a matter of fact, the parties should also consider that the reliance on courts is not just during the enforcement stage, but they can also approach the courts during the process of arbitration³⁶. In fact, it is necessary for the parties to approach courts if the claimant considers that the adverse party is trying to circumvent the arbitration agreement and thereby enforce the agreement³⁷. There is also a lot of procedural involvement of courts in arbitration as they shall assist in appointing and removing arbitrators, enforcing interim measures, taking evidence and conducting annulment or recognition proceedings. It is very crucial in time-sensitive issues like maritime claims as it involves the arresting of ships, freezing injunctions or any other appropriate measures³⁸.

The success of arbitration maritime disputes is reliant on the local courts at least partially as they have a role in implementing the international conventions, and as they are interpreted differently in different jurisdictions, the aim is to interfere as little as possible. The least intervention shall encourage maritime arbitration. Competition between the arbitral seats was ignited due to the

³⁴ Maud Piers & Christian Aschauer (eds.), *Arbitration in the Digital Age: The Brave New World of Arbitration* (CUP 2018)

³⁵ Nicholas Healy and David Sharpe, *Cases and Materials on Admiralty* 139 (5th ed. West Academic Publishing 2011).

³⁶ Supra 21.

³⁷ John Thomas, *Commercial Dispute Resolution: Courts and Arbitration* 2 (April 6, 2017)

³⁸ Supra 14.

evolution and development of the maritime arbitral market as well as jurisdictions to attract cases. The states now perceive it as a separate industry in which the states are trying to make long-term investments. The states are trying to create arbitration-friendly jurisdictions in their territories by amending laws and policies and also creating favourable courts³⁹.

- **Party Autonomy**

Arbitration derives its being from the party autonomy, it is what makes it exist in the first place. As the parties, one who decides to take up arbitration in case a dispute arises. This principle has wide international acceptance and is a crucial principle that acts as a strong pillar on which the whole base for international commercial arbitration is built⁴⁰. The authority of the arbitrators stems from the contracts that parties make between them out of their will.

A private agreement confers authority on arbitrators as well as deprives them of liberty, as they can be inflated and deflated of their responsibility. Parties agree to arbitrate for specific reasons that are advantageous to them; they are, “parties are at liberty to choose a neutral forum to resolve their disputes, an award could be enforced even in a foreign country and the confidentiality of the dispute, cost and time saved and flexibility are part and parcel of arbitration.”⁴¹

The manifestation of party autonomy is quite visible throughout the process of arbitration; it begins with the standard form of contracts that are signed by the parties to come to a consensus for affreightment, bills of lading, etc., even before the process of dispute resolution begins, the parties have the autonomy in the constitution or forming the arbitral tribunal which would address the disputes and provide with an arbitral award post the issues are resolved, an opportunity to choose law regarding the procedure and the agreement to arbitrate, language, the form in which an arbitral award could be passed etc.⁴²

The party autonomy is significantly portrayed by the Model Law as it permits the parties to exercise their discretion with respect to the applicability of a specific substantive law⁴³, adherence to a specific arbitral procedure⁴⁴, constituting of the tribunal⁴⁵, the place at which arbitration

³⁹ Yves Dezalay & Bryant Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order*, 198 (University of Chicago Press 1996).

⁴⁰ Supra 21, Pg. 171

⁴¹ Supra 2, Pg. 34

⁴² Joshua Karton, *The Culture of International Arbitration and the Evolution of Contract Law*, 73 (OUP 2013), Pg. 79

⁴³ Supra 15, Art. 28

⁴⁴ Ibid, Art. 19

procedure can be commenced⁴⁶ and the language that has to be used in the process of the arbitration⁴⁷. The principles mentioned in the New York convention with respect to a foreign award's enforceability are very well reflected in the Model Law as well⁴⁸.

The most important of them is public policy, which is the most effective means of opposing party autonomy as a justification for obstructing, delaying, or rejecting the execution of an arbitral ruling as permitted by Article V (2) (b) of the New York Convention. The majority of domestic courts worldwide typically decline to invoke exceptions to prevent a foreign award from being enforced, and even in rare cases when this is requested, an award is set aside⁴⁹.

Party autonomy is subject to indirect regulation since it may set off a public policy clause that prevents the award from being effectuated in adherence to the New York Convention. Thus, it becomes very important to determine the rules and procedures that might be applicable, and it attaches a lot of importance to deciding the rules and regulations that are to be applicable for the parties, their counsels, and arbitrators while dealing with the disputes that arise out of carriage of goods by sea⁵⁰.

MARITIME ARBITRATION - AD HOC AND INSTITUTIONAL

International commercial arbitration can broadly divided into two types, they are: Ad hoc and Institutional Maritime Arbitration. “*Lex Arbitri*”, or the law of the place of arbitration, is applicable to whatever arbitration it might be and wherever it might be, is conducted and subjected to it. The laws are generally very broad in nature and are not typically very narrow. The parties have the liberty to choose laws that can be applicable, and usually, the ad hoc maritime arbitrations are performed based on Model Law⁵¹.

The operation of arbitration substantially differs between both forms of maritime arbitration. Maritime arbitration in the institutional set-up itself differs from one institution to another due to procedural differences. In an ad hoc way of conducting maritime arbitration, the rules that supplement the arbitration are found in the statutes of the state where the maritime arbitration is held, and contrarily, the parties expressly refer the supplementing rules of arbitration in an

⁴⁵ Ibid., Arts.10, 11 & 13

⁴⁶ Supra 15, Art. 20

⁴⁷ Ibid., Art. 22

⁴⁸ Supra 2, Pg. 35

⁴⁹ Reinmar Wolff, Article V (2) (b) in Reinmar Wolff (ed.), New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 Commentary 405 (CH Beck Hart Nomos 2012).

⁵⁰ Ignacio Arroyo, Concept, Sources, and International Organizations Relating to Shipping Law in David J Attard (ed.), The IMLI Manual on International Maritime Law, vol. 2, 5 (OUP 2016)

⁵¹ Supra 21, '1. Introduction', Pg. 20

institutional set up to an agreement, they are of private nature and drawn by the institution they have subscribed to. Rules in an agreement should be clearly specified that are necessary for conducting the arbitration proceedings if it is an ad hoc maritime arbitration; on the contrary, the rules are usually never mentioned and are supplemented by the state's statutory rules in which it is held⁵².

The difference that is most decipherable between ad hoc and Institutional maritime arbitration is that while the former is always linked to a country, the latter need not be linked to a country as it is, though always not international, it can be conducted by arbitrators of any nationality and the proceedings take place according to the rules which don't have a nationality and are only subjected to public policy compliances. This is specified evidently in "Article V of the New York Convention, if the party against whom a foreign award has to be invoked, the recognition and enforcement can be revoked if the party has proved beyond doubt that the procedure stipulated and agreed upon in the agreement has not been followed during the formation of the tribunal and procedure followed has also contravened the agreement and such failure to adhere to the agreement isn't in consonance with the state's domestic laws where the arbitration has taken place"⁵³.

Institutional maritime arbitration and ad hoc maritime arbitration can also be differentiated based on the institutional submission of disputes. Under the institutional arrangement, the parties submit their disagreement to an arbitral forum or centre that is permanently formed, will govern, and has its own set of procedural procedures. The centre will supervise and administer the conducting of any maritime arbitration that has been initiated before it. Generally, these institutions have their own framework set of rules for the entire proceedings. While the ad hoc method involves arbitration that is conducted outside an established centre and isn't governed, an arbitrator becomes part of the tribunal that shall be created, especially for the purpose of arbitrating disputes. A greater freedom is with the parties with respect to the conduction of proceedings and managing the affairs related to it. The parties have the highest degree of freedom to negotiate rules of arbitration, and it also helps in saving costs that are pre-determined in the institutions⁵⁴.

MARITIME ARBITRATION CENTERS

⁵² Francesco Berlingieri, *International Maritime Arbitration*, 10 J. MAR. L. & COM. 199 (1979), Pg. 200

⁵³ Supra 16, Art. V (1) (d)

⁵⁴ Lucas Leite Marques, Gabriela Júdice Paoliello and Rafaela Brandão Rocha, *Maritime arbitration – Ad hoc and institutional methods: A view from a Brazilian perspective*, R. Bras. Al. Dis. Res. – RBADR | Belo Horizonte, ano 03, n. 06, p. 163-175, jul./dez. 2021

There are many maritime arbitration councils around the world, but the most prominent are “London (London Maritime Arbitrators Association), New York (Society of Maritime Arbitrators in New York) in the western hemisphere and Singapore (Singapore Chamber of Maritime Arbitrators) and Hong Kong (Hong Kong Maritime Arbitration Group) in the eastern hemisphere”⁵⁵. The first two centres of them share a major caseload. Usually, the standard form contracts mention London or New York as the seat of arbitration in their dispute resolution clauses. Apart from the prominent centres mentioned above, states worldwide have established their own maritime arbitration centres. A few of these are in Tokyo, Hamburg, Greece, China, Paris and many more worldwide.

- **London**

The Maritime Arbitrators Association in London was established in the year 1960. It is not per se an institutionalised arbitration and hence doesn't supervise and administer arbitrations actively. The LMAA handles a major caseload of international maritime arbitration. The latest numbers reviewed in 2023 revealed that the association had received a whooping number of 1,845 new individual maritime references, and 3,268 arbitrators were appointed in those references⁵⁶. An institutional set-up in the form of the “London Court of International Arbitration” handles maritime arbitration along with LMAA, and they form a duo and share a large market of maritime arbitration. The LCIA handled around 37% of its cases related to transport and commodities in 2022, approximately 108 cases out of 293 cases it handled in the year 2022⁵⁷.

- **New York**

Globally, for arbitration, New York is one of the leading centers'. It has a group of institutions which administer a large number of cases. They include the “American Arbitration Association (AAA), the International Centre for Dispute Resolution (ICDR), which is an international division of the former, and the International Institute for Conflict Prevention and Resolution (IICPR)”. In the domain of maritime dispute settlement through maritime arbitration, they have the Society of Maritime Arbitrators (SMA) New York and the Maritime Arbitrators Association,

⁵⁵ Joy Thattil Ittoop, Maritime Arbitration: A Global Analysis in Pallab Das Through the Lens of Maritime Law: A World View, (1st Edn. EBC 2020)

⁵⁶ London Retains its Crown in International Maritime Arbitration, Published on 6th March, 2024, <https://lmaa.london/london-retains-its-crown-in-international-maritime-arbitration/>, (Last accessed April 18, 2024)

⁵⁷ Refer to LCIA Website: <https://www.lcia.org/LCIA/reports.aspx>, (Last accessed April 18, 2024)

an organisation at the national level for maritime arbitrators. New York, after London, is the most chosen seat for maritime arbitration in the charter party agreements.

New York, being the homeland of foreign award enforcement due to the signing of the New York Convention, had become a favourable location for arbitration, and awards that originate from New York are enforced in any country that signatories to the New York Convention. The parties are at liberty to apply rules of their choice, which could be applied to maritime arbitration, for example, the rules regarding appointing and removing arbitrators and the law that has to be applied to the contract, as well as the agreement of arbitration. The awards are final and not appealable unless there are procedural lacunas. The applicable rules must conform to the US Federal Arbitration Act, 1926⁵⁸.

- **Singapore**

Singapore enacted the International Arbitration Act in 1994 to facilitate international commercial arbitration and with a vision to become an arbitration centre for the world. The main markets for the Singapore centre are China, India and Indonesia⁵⁹. In 1991, the “Singapore International Arbitration Centre” was established in the country to deal with and promote international commercial arbitration, and it ratified the Model Law in 1994 through the International Arbitration Act of 1994. The Singapore Chamber of Maritime Arbitration officially began working in 2004 and had initially functioned under the SIAC as a subordinate body, but it reconstituted itself as an independent body and started functioning independently in 2009.

Singapore is the number one choice of seat for arbitration in Asia, according to the International Chamber of Commerce. The state has backed international commercial arbitration through its proactive policies and has developed the infrastructure to facilitate it. The features of the Singaporean arbitration centre are they provide a common law legal system that is well-developed and business-friendly, lawyers in Singapore are experienced in dealing with commercial disputes, judges who have sound knowledge of the aspects of the maritime industry and a sophisticated commercial jurisprudence that is synchronous with the business connectivity and its geographical connection⁶⁰. Owing to these developments, Singapore has been

⁵⁸ Supra 55, Pg. 102

⁵⁹ SCMA, Year in Review 2018, Available at: <https://scma.org.sg/SiteFolders/scma/387/YIR/2018YearInReview.pdf>, (Last accessed April 19, 2024)

⁶⁰ Singapore International Commercial Court Committee Report 8-11 (November 2013), https://www.mlaw.gov.sg/files/Annex_A-SICC_Committee_Report.pdf, (Last accessed on April 19, 2024)

incorporated in the BIMCO standard dispute resolution clauses. It has contributed to the significant increase in the caseload in Singapore.

- **Hong Kong**

The international arbitration scenario came up in 1985 with the establishment of the Hong Kong International Arbitration Centre. Due to increasing demands from the shipping industry, the “Hong Kong Maritime Arbitration Group” was set up in the year 2000 under the aegis of HKIAC. The government has taken active initiatives to promote maritime arbitration domestically and internationally as well as to enhance its position in global maritime arbitration. Due to its efforts, BIMCO in 2020 added Hong Kong as a seat for resolving disputes to its clauses. It is a Model Law jurisdiction and has, under the Hong Kong Arbitration Ordinance, a unified international and domestic legal regime. A right to appeal against an award for setting it aside was provided on the basis of the question of law⁶¹. The HKMAG has handled 111 maritime arbitrations in both 2021 and 2022, respectively. On the other hand, the HKIAC was only able to handle a meagre number of 32 cases in 2022 and 31 cases in 2021. In 2023, it handled a huge amount of cases, amounting to a total of 80 cases,⁶².

CONCLUSION

There are three main objectives of maritime arbitration: reliability, efficiency and flexibility. These three characteristics help in shaping maritime arbitration according to the needs of its users. Reliability is considered as achieved when the parties are able to predict the outcome of an arbitration. It can be determined by the extent of judicial review on the points of law which are to be applied to parties, consistency in the implementation of publishing of awards policy and adherence to the party's preferences on confidentiality. The efficiency of the arbitral seat can be seen in its capacity to conduct the proceedings smoothly. It can be determined by the policies on arbitrator challenges that encourage trust and the arbitration rules that include cost-effective features. Flexibility is the provision of various options to the parties which could suit their needs, the need of the parties to partake in proceedings or not. It could be determined by the range of options provided by the maritime arbitration to the parties.

Maritime arbitration is a comprehensive mechanism that has, over the years facilitated the redressal of issues that prop out of maritime transactions. It has become so integral to the

⁶¹ Hong Kong Arbitration Ordinance, 2011, Sec. 99 (e)

⁶² Refer to the HKIAC Statistics, available at: <https://www.hkiac.org/about-us/statistics>, (Last accessed on April 19, 2024)

industry that standard clauses for arbitration are provided as part of contracts that are standard-form in nature, which are provided by notable institutions like the Baltic and International Maritime Council. Countries around the world have started setting up their own maritime arbitration centres; they see it as a viable option for investment and as a faster dispute settlement mechanism. From the above, it can be understood how maritime arbitration facilitates international trade; it does so by providing a faster, more reliable and more flexible dispute resolution.