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# Impact of Fake News: An Indian Electoral Perspective

*Abhishek Dua*[1]

## Introduction

Fake news, misinformation, disinformation, is not a new phenomenon. It has co-existed with human civilization, to which history is evidence. However, with the advent and proliferation of the internet and social media coming of age, the extent of fake news in public sphere has magnified manifold. Considering India being a mobile first market, where majority of people identify smart phones as their main device for accessing online news and a considerable number using it only for accessing online news, more specifically through various kinds of social media,[2] the crisis of fake news in India becomes more rampant.

This paradigm shift in the way people in India have begun to access news, placing more credibility to news on social media platforms than on the traditional sources and the fact that public opinion is of utmost importance, to determine who rules the country, has inspired political parties, politicians and their supporters to resort to and optimally use social media platforms for election campaigning and communication. The 2019 General Elections are a testimony to the fact, where social media platforms were favourably used not only to disseminate political agendas, ideologies, manifestos, publicity campaigns, so as to garner a favourable public opinion, but also undermine the position of the opposition.

If British Broadcasting Corporation (BBC) reports hold any veracity, WhatsApp in India has become a vehicle for misinformation and propaganda. For the 2019 general elections, the Bharatiya Janata Party and the opposition, the Congress party, both took to spread false news or misinformation in an attempt to mislead the electorate and gain a favourable advantage.[3] For instance, there was a message in circulation on WhatsApp, about the suicide bombing against the Indian security forces in Kashmir in 2019, where it was claimed that the leader of the Congress party had promised a huge amount of money to the perpetrator/accused and his family and in addition promised to release him and other terrorists languishing in prison. The people of the state voted for the Congress in the approaching elections.[4] Another message doing rounds was how the Bharatiya Janata Party was "indulging in war mongering for electoral gains".[5] Yet another interesting piece of misinformation was regarding a purported circular from the Election Commission of India,(ECI) which stated that Non-Resident Indian (NRI)s who held an Indian Passport could vote online.[6] Innumerable such instances of fake news on social media, inciting national, religious, or any other sentiment, during elections, came to light, with the intent to gain traction and to undermine the image of the opposition, in order to gain a favourable advantage in elections.

## Impact, Perils & Definition of Fake News

The big question then is, how does fake news affect or make an impact on elections? The answer to the corollary lies in the basic concepts of motivated reasoning

[1] Research Scholar, Alliance School of Law, Alliance University, Bangalore

[2] The Reuters Institute, India Digital News Report, 2019.

[3] Kevin Ponniah, *WhatsApp: The 'Black Hole' of Fake News in India's Election*, BBC News (Apr. 6, 2019), https://perma.cc/5YJS-ZH2A

[4] SnigdhaPoonam & Samarth Bansal, *Misinformation Is Endangering India's Election*, The Atlantic (Apr. 1, 2019), https://perma.cc/Y39M-KGWU

[5] Anjana Pasricha, *Fake News Inundates India Social Media Ahead of Election*, Voice of America (Apr. 3,2019), https://perma.cc/798C-YMWE

[6] Bharat Kancharla, *During the 2019 Lok Sabha elections, only about 150 cases of Fake News reported to Social Media Platforms by ECI*, FACTLY, (August, 2019) https://factly.in/during-the-2019-lok-sabha-elections-onlyabout-150-cases-of-fake-news-reported-to-social-media-platforms-by-eci/

and confirmation bias, apart from the obvious facts, that social media has easy access and outreach, as it is inclusive, which abridges the gap between the political parties and the electorate and moreover bypasses the regulatory regime and critics, which otherwise traditional media is subjected too.[7]

The concept of motivated reasoning describes our affinity to believe in what we want to believe in more willingly, than what we don't want to believe in, while confirmation bias is an affinity to find, interpret and even remember information, that underpins our beliefs and then accept such information, in the exclusion of other information.[8] Therefore, any news in public domain, to which people have an affinity towards or which people want to believe in, shall be or is accepted easily, even if it is false/ fake. That is just how the menace of fake news spreads its fangs and influences the voting choices of people.

Even with the adulation and popularity that fake news has harvested, no Indian statute or regulatory guidelines have yet defined fake news or laid down the standards for defining it. Therefore, before any stance or legal action can be undertaken against occurrences of fake news, it would be expedient to first amend the existing legal and regulatory framework, by inserting an appropriate definition of the term.

Interestingly, it has been experienced in other countries that a plain definition of the term fake news, as consisting of falsehood, may lead to an ambiguous, overreaching and an inefficacious definition, if applied to India, as in the case of Malaysia's Anti-Fake News Act, 2018, which defines fake news as *"news, information, data, and reports, which is or are* wholly or partly false or in any other form capable of suggesting words or idea.[9]"

The preceding definition would be a failure and would fall on its face, if applied in a democracy like India, where citizens are guaranteed freedom of speech and expression[10] as a fundamental right, under the Indian Constitution, subject to reasonable restrictions,[11] viz, i) in the interest of the sovereignty and integrity of India, ii) the security of the State, iii) friendly relations with foreign States, iv) public order, v) decency or morality, vi) or in relation to contempt of court, and v) defamation or incitement to an offence.

Speech in India then, may not only be restricted owing to its consequences, but also because of its substance, as the state patently, has an overarching interest in restricting speech, the direct consequence of which is violence. Interestingly, in case of obscenity or defamation, though violence is not a consequence, speech is restricted because of the value system of the state, as it is believed that it would erode public morality. Therefore, any restriction on speech must have an immediate correlation with a specific head set out in Article 19(2). The government otherwise cannot restrict speech merely in the 'public interest', or because it is 'false', neither of which are heads under Article 19(2). Therefore, appropriately defining the term fake news becomes of paramount importance, in order to evaluate its repercussions/consequences and to take cognizance of it.

In the case of France, the law against information manipulation or fake news, puts down the following criteria's to evaluate if a piece of information is fake news, viz, it must be evident, it should have been deliberately disseminated on a substantial scale, the direct consequence of which should be, disturbance of the peace and tranquillity or a compromise of the outcome of an election.[12]

[7] Anuradha Rao, How did Social Media Impact India's 2019 General Election?, ENGAGE, (December, 2019) https://www.epw.in/engage/article/how-did-social-media-impact-india-2019-general-election

[8] Jonathan Maloney, *Confirmation Bias & Motivated Reasoning*, INTELLIGENT SPECULATION, (April, 2019) https://www.intelligentspeculation.com/blog/confirmation-bias-amp-motivated-reasoning

[9] Sohini Chaterjee, Akshat Agarwal, *Regulating fake news in India is tough*, MINT, (July, 2018) https://www.livemint.com/Opinion/ECLC6qtR9ij8nDz33xaCEN/Regulating-fake-news-in-India-is-tough.html

[10] INDIA CONST. art. 19 c. 1(a)

[11] INDIA CONST. art. 19 c. 2

[12] Government of France, *Against Information Manipulation*, (December 7, 2018) https://www.gouvernement.fr/en/against-information-manipulation.

Although the definition appears to be robust and encompassing in its criteria, if looked at from the Indian perspective, only the last two criteria would fit in the Indian scheme of things. The first criteria would still be ambiguous, as it does not differentiate between undisruptive misinformation and confirmable misinformation, which may cause social harm or malign the reputation of an individual.

The line is slippery and not easy to draw, as the term fake news in itself is unstructured and shapeless and includes, though not limited to, unconfirmed content, manipulated videos, hoaxes, and even morphed pictures in the veil of memes.

However, after travelling the contours of fake news, it is ascertained that the following criteria should fall within the ambit of the definition of fake news, so as to serve its purpose, in the Indian scenario, viz

1. Any confirmable misinformation or disinformation,
2. Intentionally disseminated to the public at large, purporting to be true
3. With the potency to threaten life, public peace and tranquillity or national security or an outcome of an election.

## Ramifications of Fake News

Since ours is a parliamentary democracy, the trite saying 'democracy is for the people, of the people and by the people' aptly applies. The will of the people is paramount which is expressed through their vote and becomes the basis of the authority of the government.[13] It then becomes of paramount importance that the people/voter should have access to true, correct, objective and unbiased information to be able to make a reasoned and rational choice, which is ultimately expressed through the ballot by means of a vote.

In context of Indian Democracy, fake news decimates all means to support the voters to make an informed and rational choice, by completely misinforming and misleading the voter with false, incorrect, biased and prejudiced information and in consequence retards and extinguishes the voter's ability to make an informed and rational choice, thereby infringing the voter's freedom of speech and expression and changing the complete complexion of the political landscape.

The hazards of fake news do not end there. Fake news further gives an undue advantage to the candidate disseminating fake news in political communication and propaganda, over the candidate not relying on it, hence vitiating an equal contesting ground, which is indeed a violation of the fundamental right to equality14.[14]

To add to its serious effects, dissemination of fake news comes for a price and considering its nature, the money spent on it, is not revealed as an election expense, which is mandated by the Conduct of Election Rules, hence violating it.

## Existing Legal Framework

There are no specific provisions under Indian law that specifically deal with fake news. However, there are provisions available, dealing with it, in a piecemeal manner, falling under the Indian Penal Code, 1860, Criminal procedure Code, 1974 and The Information Technology Act, 2000, The Indian Telegraph Act, 1885 which is applicable both offline as well as online. However specific provisions dealing with it, in relation to elections fall under 'The Representation of the People Act, 1951' and guidelines issued by The Election Commission of India, from time to time, which are as follows:

### 1. Silent Period:

The Representation of the People Act, 1951, which governs the conduct of elections in India, prohibits advertising and campaigning on TV and other electronic media by candidates and political parties during the "silent period," which is during the period of 48 hours ending with the hour fixed for conclusion of poll in a constituency.[15] However, individuals are not prohibited from expressing their private opinions during the

[13] People's Union of Civil Liberties vs. Union of India & Anr., (2003) AIR SC 2363
[14] INDIA CONST. art. 14
[15] Representation of the People Act, No. 43 of 1951, § 126, https://perma.cc/L7FX-SFMK
[16] Kanchan Chaudhari, *We Can't Stop Individuals from Using Social Media 48 Hours before Polls, ECI Tells Bombay HC,*

silent period as per The Election Commission of India (ECI).[16]

Considering the increasing cases of fake news during elections, a committee was established by the ECI to review and suggest changes to the provision of silent-period. The committee submitted its report in January 2019,[17] proposing an extension of the scope of the forty-eighthour ban to cover print media and "intermediaries" as defined in section 2(w) of the Information Technology Act.

**2. Model Code of Conduct (MCC):** The Model Code of Conduct (MCC)[18] is a compilation of guidelines, issued by the ECI prior to the conduct of elections, to political parties and contesting candidates, to regulate their conduct, in connection with elections and ensure the elections are conducted in a free and fair manner."[19] The MCC comes into force from the date the "election schedule is announced and remains in force till the election results are announced."[20]

However, even though the MCC are not enforceable by law, some of its provisions may be enforced through corresponding provisions in other statutes such as the Indian Penal Code, 1860, Code of Criminal Procedure, 1973, and Representation of the People Act, 1951. To back the non-enforceability nature of MCC, the ECI proposes that the non-enforceable nature of MCC should be preserved; failing which elections may never be completed with judicial proceedings typically take a long period to conclude. Concurrently, the Standing Committee on Personnel, Public Grievances, Law and Justice, recommends making the MCC legally binding by making it a part of the Representation of Peoples Act, 1951, as already most provisions of the MCC are enforceable through corresponding provisions in other statutes, mentioned above.[21]

Prior to the 2019 general elections, the ECI published and issued the Manual on the Model Code of Conduct[22] as guidance for political parties and candidates, including information on the Model Code, enabling law, instructions, and court decisions.[23] The Manual makes explicit mention of a Compendium of Instructions on Election Expenditure Monitoring (February, 2019)[24] and Instructions of the Commission with respect to use of Social Media in Election Campaigning.[25] Instructions on social media contain guidelines on "information to be given by candidates about their social media accounts," precertification of political advertisements, and "expenditure on campaigning through the internet including social media websites."[26]

### A. Social Media Account Information:

Rule 4A of the Conduct of Elections Rules, 1961, requires candidates or proposers of candidates to submit an affidavit (Form 26) at the time of filing their nomi-

HINDUSTAN TIMES (Jan. 12, 2019), https://perma.cc/GX7H-EL62

[17] Press Release, Election Commission, Report of the Committee on Section 126 of the Representation of the People Act, 1951 Submitted to the Commission (Jan. 10, 2019), https://perma.cc/9Q5E-ZMBG

[18] Election Commission of India, Model Code for the Guidance of Political Parties and Candidates, https://perma.cc/34BQ-WMTW.

[19] Roshni Sinha, *Model Code of Conduct and the 2019 General Elections*, PRS (Mar. 11, 2019), https://perma.cc/63XM-TWSS.

[20] Id.

[21] Id.

[22] Election Commission of India, Manual on Model Code of Conduct (Mar. 2019), https://perma.cc/55KXCW49.

[23] Manual on Model Code of Conduct: About This File, Election Commission of India, https://perma.cc/8E2R3NGM

[24] Election Commission of India, Compendium of Instructions on Election Expenditure Monitoring (Feb. 2019), https://perma.cc/Y54E-WNBA.

[25] Letter from ECI to Chief Electoral Officers et al., Instructions of the Commission with respect to Use of Social Media in Election Campaigning, Letter No. 491/SM/2013/Communication (Oct. 25,

[26] Amogh Dhar Sharma, *How Far Can Political Parties in India Be Made Accountable for Their Digital Propaganda?*, SCROLL.IN (May 10, 2019), *https://perma.cc/64VU-LDA5*

[27] Conduct of Elections Rules, 1961, Rule 4A, https://perma.cc/DA6U-J5T8

[28] Id., Form 26, para. 3, https://perma.cc/23XQ-QVZ4; Instructions of the Commission with respect to Use of Social

nation papers.[27] Paragraph 3 of this Form requires the candidate to provide the ECI with his/her "email ID" and a list of any social media accounts.[28]

### B. Social Media Content Pre-Certification:

The ECI requires pre-approval / pre-certification of political advertisements on social media and have directed for the establishment of a grievance cell and appointment of grievance officers."[29]

Pursuant to the order of the Supreme Court of India[30], requiring political parties, candidates, persons, to pre-certify the use of political advertisements on electronic media, including television channels and cable operators, the ECI issued detailed guidelines in this regard,[31] which are as under:

Every registered/national/state political party and every contesting candidate intending to issue advertisements on electronic media and/or television channels and/ or on cable network, will have to apply to the ECI for pre-certification of all political advertisements before their publication. Subsequently the ECI issued an order, dated 27.08.2012, subsequent to which Media Certification and Monitoring Committees at district and State levels were given the responsibilities of pre-certification of such advertisement along with other functions viz acting against Paid News etc.

The ECI issued another set of instructions in this regard according to which, as social media websites were also electronic media by definition, the Commission's instructions relating to pre-certification of advertisements would also apply mutatis mutandis to websites including social media websites and shall fall under the purview of pre-certification."[32]

### 3. Expenditure of Social Media Content to be Divulged

According to The Representation of the People Act, 1951, every candidate is "required to keep a separate and correct account of all expenditure relating to elections, incurred from the date of nomination, to the date of declaration of result, both dates inclusive."[33] Pursuant to the Supreme Court of India judgement,[34] the ECI required candidates and political parties to submit a statement of account of expenditure on elections to the ECI within a period of 75 days of assembly elections and 90 days of Lok Sabha elections. Interestingly in 2013 the ECI clarified all doubts by issuing another set of instructions,[35] which clarified that the expenditure on social media was a part of the expenditure in connection with elections and that, candidates and political parties shall have to include all expenditure on campaigning, including expenditure on advertisements on social media, for maintaining a correct account of expenditure and for submitting the statement of expenditure.

Recently, apart from self-regulation and the Voluntary Code of Ethics adopted by social media platforms to tackle the problem of fake news, a new bill[36] has been introduced in the Lok Sabha and awaits accent.

On the other hand, tech platforms need to ensure the use of sophisticated algorithms to provide the public with correct, accurate, and truthful information in public domain and remove/delete/abandon fake information/propaganda on social media platforms, as soon as they are detected.

Media in Election Campaigning.

[29] Sahana Udupa, Elonnai Hickok & Edward Anderson, *Can Extreme Speech Online Be Regulated Without Curbing Free Speech? This Series Finds Out*, SCROLL.IN (May 9, 2019), https://perma.cc/G6TS-8QLF.

[30] Ministry of Information & Broadcasting Vs M/s Gemini TV and Others (2004) 5 SCC 714

[31] Letter from Election Commission of India to Chief Secretaries et al., Supreme Court Order Dated 13th April, 2004 for Pre-certification of Political Advertisement on Electronic Media, –Letter No. 491/MCMC/2018/Communication (Sept. 13, 2018) (re: applicability of 2004 directions throughout territory of India at all times), https://perma.cc/U2MM-U862.

[32] Id

[33] Representation of the People Act, 1951, S.77(1)

[34] Common Cause v. Union of India, Writ Petition (Civ.) No. 13 of 2003.

[35] Instructions of the Commission with respect to Use of Social Media in Election campaigning.

[36] The Fake News (Prohibition) Bill, 2019.

Concurrently, lawmakers need to look at appropriate legislative measures, a new law dealing with fake news or amendment of existing laws to that effect, so that it is made an independent criminal offense. More significantly, the need of the hour is to device a strong and a proactive execution mechanism, where cases of fake news are identified and taken cognizance of at the earliest, within a given time frame.

# Right to Information (Amendment) Act, 2019- A Mockery on The Autonomy of Administration

*Ankit Anand*[1]

## Introduction

Baron Acton's thought: *"Power corrupts and absolute power corrupts absolutely"* is suitable in the context of the RTI Amendment Act, 2019 because of the absolute discretionary power conferred to the CG.

There are four basic tenets of good governance- "accountability, transparency, public participation, and predictability" associated with the government. We can imagine public participation only when information is easily available to the public concerning the affairs of the government. RTI Act encourages responsibility and transparency in the affairs of all organs of government which makes the government more answerable. Prior to the RTI Act, 2005 the administrative authorities had the discretionary authority under the "Official Secrets Act, 1923" not to provide adequate information to the public which ultimately resulted in maladministration, bribery, and misuse of power.

The RTI Act came into existence in the year 2005 and it is one of the most historical legislations which created a milestone in the legal history of India. The objective of the Act was to give a sense of empowerment to the citizens: bring "transparency and accountability" to the affairs of government. It was a major move to make the citizens well informed about the affairs of the government.

## Significance of The RTI Act, 2005

Before discussing the relevant attributes of the Amendment Act, 2019, it is important to summarise the pertinent provisions of the RTI Act, 2005 which are:

Firstly, the key objective of this Act was to bring transparency and empower the citizens of this country. The former president of the USA, Barak Hussain Obama, in his speech to the administration made a similar point on the importance of information:

> *"In our democracy, the Freedom of Information Act (FOIA), which encourages accountability through transparency is the most prominent expression of a profound national commitment to ensuring an open government. At the heart of that commitment is the idea that accountability is in the interest of the government."*

The RTI Act authorises citizens of India to seek information from the government and at the same time, the government has to furnish the relevant information to the applicant in a specified time-bound manner. The application can be filled in both online and offline mode. The Information comprises "any material in any form, including records, documents, memos, e-mails, opinions, advice, press releases, circulars, orders, logbooks, contracts, reports, papers, samples, models, data material as well as any kind of information such as tapes, cassettes, videos, diskettes, etc."[2] There are certain kinds of information that is not subject to disclosure at any cost.[3]

Secondly, as per the statutory provisions, to have any piece of information, an application should be filed before the "Public Information Officer (PIO)". In case, the PIO didn't provide the required information within the period of thirty days,[4] the applicant can raise the issue before the First Appellate Authority (FAA). The FAA is bound to furnish the same information within forty-five days.[5] Even if the FAA didn't provide the same information within that period, the applicant can

[1] Assistant Professor, School of Law, SRM Institute of Science & Technology, Chennai
[2] Right to Information Act, § 2(f), 2005 (India).
[3] Right to Information Act, § 8, 2005 (India).
[4] Right to Information Act, § 7(1), 2005 (India).
[5] Right to Information Act, § 19(6), 2005 (India).

go for the second appeal to the "Central Information Commission or the State Information Commission" which are the quasi-judicial body which has the power to conduct inquiries and impose penalties for the enforcement of the right of the applicant.

Thirdly, it is related to the fees. The applicant has to pay a minimal fee of Rs. 10 along with the application[6] and "Below Poverty Line" category is exempted to pay the requisite fee.[7] As far as the format of application is concerned, The Act does not prescribe any format of the RTI application, but the application should contain the full disclosure which includes name, address, signature, and questionnaire along with the name and position of the PIO.

## Key Highlights of The RTI Amendment Act, 2019

First and foremost, The Amendment Act, 2019 conferred discretionarily arbitrary authority to the Central Government to decide the "term of office of Chief Information Commissioner (CIC) and Information Commissioners (ICs) at the Centre and the State level". However, prior to the amendment, the tenure of the CIC and ICs at the Centre and the State level was of five years or sixty-five years whichever comes earlier.

Secondly, The RTI Amendment Act, 2019 gave authority to the Central Government to determine the "salaries, allowances, and the other terms & conditions of service of the CIC and ICs at the Centre and the State level." But prior to the Amendment Act, "salaries, allowances, and the other terms and conditions of service of the CIC and ICs at Centre level" was equivalent to those of the "Chief Election Commissioner and the Election Commissioners" respectively. However, "salaries, allowances and the other terms & conditions of service of the CIC and the ICs at the State level" was identical to the "salary of the Election Commissioner and the Chief Secretary of the state" respectively.

Thirdly, The Amendment Act, 2019 also abolished the provision of the other benefits including the "Pension or Retirement benefits conferred to the CIC and ICs at the Centre and the State level" from the previous government service. However, prior to the Amendment Act, at the time of the appointment, if the CIC and ICs at the Centre & the State level were already getting "Pension or Retirement benefits" for his/her prior government service, their salaries will be reduced by an amount equal to the "Pension or Retirement benefits".

## Comparative Analysis of The RTI Act, 2005 and RTI (Amendment) Act, 2019[8]

| SI. No | Statuory Provision | RTI Act, 2005 | RTI (Amendment) Act, 2019 |
|---|---|---|---|
| 1. | Term of Office (Section 13) | Section 13 stipulates the "term of the CIC and ICs" was of five years or sixty five years whichever comes earlier. | The Amendment Act abolished this particular provision and confers the absolute power in the hand of the CG to decide the term of the CIC and ICs. |
| 2. | Term of Office (Section 16) | Section 16 stipulates the "term of the State CIC and ICs" was of five years or sixty-five years whichever comes earlier | The Amendment Act abolished this provision and confers the absolute power in the hand of the CG to decide the term of State CIC and ICs. |

[6] Right to Information Act, § 6, 2005 (India).
[7] Right to Information Act, § 7, 2005 (India).
[8] Right to Information Act (2005); Right to Information (Amendment) Bill (2019); PRS

| | | | |
|---|---|---|---|
| 3. | Salary (Section 13) | Section 13 stipulates that the "salaries, allowances, and other terms &conditions of service" of the CIC will be equal to the "salaries, allowances and other terms & conditions of service" of the Chief Election Commissioner.<br><br>Section 13 further stipulates that the "salaries, allowances, and other terms &conditions of service" of the ICs will be equal to the "salaries, allowances, and other terms &conditions of service" of the Election Commissioner. | The Amendment Act abolished this particular provision and confers the absolute power in the hand of the CG to decide the "salaries, allowances, and other terms &conditions of service" of the Central CIC and ICs. |
| 4. | Salary (Section 16) | Section 16 stipulates that the "salaries, allowances, and other terms &conditions of service" of the State CIC will be similar to the "salaries, allowances, and other terms &conditions of service" the State Election Commissioner.<br><br>Section 16 further stipulates that the "salaries, allowances, and other terms &conditions of service" of the State ICs will be similar to that of the "salaries, allowances and other terms &conditions of service" of the Chief Secretary to the State Government. | The Amendment Act abolished this particular provision and confers the absolute power in the hand of the CG to decide the "salaries, allowances, and other terms &conditions of service" of the State CIC and ICs. |
| 5. | Deductions | Section 27 specifically stipulates about deduction. It stated if the CIC and the ICs at the Centre and the State level at the time of appointment are already getting the "Pension or Retirement benefits" for his/her prior government service, their salaries will be deduced by an amount equal to the "Pension or Retirement benefits". | The Amendment Act, 2019 abolished these statutory provisions. |

## The Justification of The Government

The justification of the government in introducing these amendments to the Act is the following:

1. Firstly, the Central Government claimed that there is a lacuna in the RTI Act itself for making the "Election Commission of India" and the "Central & State Information Commission" in the parlance with each other. The "Election Commission of India" derives its authority from the Constitution of India under Article 324 whereas "Central & State Information Commission" derives its authority from the RTI Act, 2005. The government further claimed that we can't equate a constitutional body and a statutory body; through this amendment, we would

rationalize their status. The government also claimed that it would bring accountability and transparency.

The government in their defence contended that the "Election Commission" being a constitutional body is totally different from the "Information Commission" which is a statutory body and due to which both the bodies can't be equated. But, we have the reference of Central Vigilance Commission Act, 2003 which is contrary to the excuse of the government. Under the Act the "salaries, allowances, and other terms & conditions of service" of the Central Vigilance Commissioner will be equal to the "salaries, allowances and other terms & conditions of service" of the Chairperson of Union Public Service Commission (UPSC) and the "salaries, allowances, and other terms & conditions of service" of the Vigilance Commissioner will be equal to the "salaries, allowances and other terms & conditions of service" of the member of UPSC.[9] If the Central Vigilance Commission, being a statutory body can be equated with a constitutional body like the UPSC, then, why will the Information Commission be the only exception?

Apart from that an interesting fact associated with the RTI Act, 2005 is that the original RTI bill recommended the salaries, and the allowances of the CIC and ICs were on parlance with the secretaries and the additional secretaries respectively. But the parliamentary committee consists of the then BJP MP Ram Nath Kovind (now the President), Balavant Apte, and other leaders recommended to change the same and increase it to the same level as the chief election commissioner and other election commissioners for the CIC and ICs respectively which is ironical in itself.[10]

2. Secondly, there is a contradictory provision in the RTI Act itself. Under the RTI Act, the decision of the CIC is in parlance with the decision of the Supreme Court's Judge. However, the decision of the CIC can be challenged before the High Court which is contradictory. The Central Government claimed that the Amendment Act would strengthen the whole structure of the RTI Act.

   However, there are other statutory bodies that are considered to be on par with the judges of the Supreme Court as the members of "National Green Tribunal (NGT) and the National Human Rights Commission (NHRC)" but the Central Government did not address this issue to have uniformity.

## Objection Against RTI Amendment Act, 2019

1. It is not in consonance with the pre-legislative consultation policy, 2014
2. Crumbling the federalism of the RTI Act.
3. Menace to the autonomy of Impartiality and the Independence of Information Commission.
4. Delegation of Excessive powers to the Central Government.

## Pre-Legislative Consultation Policy

The Central Government came up with the pre-legislative consultation policy in the year 2014, which stipulates that any ministry/department which is going to make new laws or amend the existing provision of any law, in that case, it is the duty on the part of the government to put such draft bill before the public domain for discussion. The point of view of a person who is going to be affected by such a law should be taken into consideration by the government.

It is not the first time the government tried to amend the RTI Act, 2005. They already tried in the year 2012 and 2017 and the draft proposal was put before the public domain for healthy discussion and recommendation. However, ironically the new Amendment Act was passed by the parliament without putting it before the public domain. The Government has not acted as

[9] The Central Vigilance Commission Act, § 5(7), 2003 (India).

[10] RTI Act amendment: Former information commissioners, activists criticise government move, (February 15,2020, 16:45 PM), https://www.apnlive.com/rti-act-amendment-former-information-commissioners-activistscriticise -government-move/

per the guidelines stated in the pre-legislative consultation policy, 2014 by not placing the amended draft proposals in the public domain. Apart from that, there was no consultation with the ICs before passing the RTI (Amendment) Bill, 2019. The government on the other hand put an excuse that the public is not at all involved in the process because the amendment is going to affect only the RTI officers and government.

## Crumbling The Federalism of The RTI Act, 2005

Prior to the Amendment Act, 2019, there was a crystal clear bifurcation of separation of power between the centre and the state legislature concerning the "term, salaries and allowances" of the ICs at the centre and state level which exemplify the "federal structure" of the RTI Act. The prominent reasons for providing federal structure are to give functional and financial independence from the government.

Under Amendment Act, 2019, the Central Government has the unreasonable discretionary authority to determine the "term, salaries and allowances of the CIC & ICs at the Central level as well as the State level". The Act stipulated that the salaries and allowances of the ICs of the centre shall be paid out of the "consolidated fund of India" and of state ICs shall be paid out of the "consolidated fund of state." As per the constitutional provision, neither the Central Government nor the Parliament has any authority over the "consolidated fund of state" except in case of "President's rule in the state under Article 356 of the Constitution of India." It is hard to digest as to under what authority parliament through its law-making power delegate the centre to decide the "salaries and allowances" of the State ICs.[11]

## Menace to The Autonomy of Impartiality & Independence of Information Commission

One of the prominent reasons why the Parliamentary Standing Committee equates the CIC with the Chief Election Commission rather than a civil servant because of the aspect of independence of the commission. The purpose of the RTI Act is to safeguard the interest of the public by providing the details without any distress of the Centre and State Government.

The Amendment Act curtailed the impartiality as well as independence of the ICs by lowering its rank and by authorizing the Central Government to decide the "salaries, allowances, and tenure" of these authorities. This directly makes the whole institution as a bureaucrat under the authority of the Central Government which won't allow the Commission to work in an impartial way.[12]

## Delegation of Excessive Powers to The Central Government

It was an absolute legislative function of the statutory authority under the RTI Act, 2005 to fix the "tenure, salaries, allowances and other conditions of services of the CIC and ICs at the Centre and State level". But conferring the absolute authority in the hand of the Central Government tends to excessive delegation.

In the *Re Delhi laws case*, The Hon'ble SC held that "The legislature does not have authority to delegate its essential law-making functions into the hands of the executive."[13] "The legislature should keep the work of essential legislative functions to itself such as determining the legislative policy and laying down standards which are enacted into a rule of law and it can leave the task of subordinate legislation which by its very nature is ancillary to the statue to the subordinate bodies."[14]

[11] *The Right to Information Is Dead. Here Is its Obituary,* (February 19, 2020, 13:32 PM), https://thewire.in/government/the-right-to-information-is-dead-here-is-its-obituary

[12] *Id.*

[13] AIR SC 332 (1951)

[14] Municipal Corporation of Delhi v. Birala Cotton, Spinning and Weaving Mills and others, AIR SC 1232 (1968)

In the case of *A. N. Parasuraman vs. Tamil Nadu,*[15] the Hon'ble Supreme Court held that "the provisions of the Tamil Nadu Private Educational Institutions (Regulation) Act 1966 is not in consonance, both on the ground of excessive delegation as well as the violation of the Article 14 of the Constitution of India as it did not contain adequate guidelines to the executive for the exercise of the delegated legislative power."

If we analytically examine the RTI Amendment Act, 2019, it is evident that the parliament gratuitously conferred excessive legislative authority to the Central Government for deciding the "tenure, salaries, allowances and other conditions of services of the CIC & ICs at the Centre and State level" and did not lay down any standard rule-making guidelines for the Central Government relating to "tenure, salaries, allowances and other conditions of services."

## The Drawbacks of The Amendment Act, 2019

According to the researcher, the loopholes associated with the Amendment Act, 2019 are as follows:

1. The Amendment Act empowered the Central Government absolutely which directly deteriorates the basic notion and structure of the RTI Act.
2. The Amendment Act gave arbitrary authority to the Central Government. Therefore, the aspect of neutrality of the ICs mutilated and it made the ICs more trustworthy to the government.
3. The Amendment Act made the Central and State Information Commissioner dependent on the Central Government. Therefore, the autonomy of the Independence of Information Commission becomes weak.
4. The Amendment Act moderates the status of the Information Commissioner at the Centre & State level from those of the Judges of the SC which resulted in lack of authority to issue directives to the officers.
5. One of the major drawbacks of the Amendment Act is that it was passed by the Parliament without taking into consideration the view of the general public.
6. The RTI Act brought accountability and transparency in the governance but the Amendment Act certainly took away the transparency because of the arbitrary power which is being conferred to the Central Government.

## Conclusion

The RTI Act was enacted by the government was to bring "transparency, culpability and accountability" to the administration in all the organs of the government. The act was enacted to empower the citizen of India to access all kinds of information and at the same time safeguard the independence of the ICs so that they could accomplish their duties freely without any undue influence.

The RTI Act had brought a revolutionary change in the whole administrative system and gradually transformed India where any citizen of this country has the statutory right to access every kind of information associated with any organ of the government. The RTI served as a weapon in the hands of citizens of India to deter the "misuse of power" and authorize them to ask genuine questions from the bureaucracy and the governments. As Justice A. P. Shah, (former Chief Justice, Delhi and Madras High Courts) described the importance of information as:

> *"Information is the currency that every citizen requires to participate in the life and governance of society"*

It is the basic right of every citizen of India to seek information because without information we cannot expect a vibrant democracy. We have witnessed that the citizens of this country utilized this statutory right and unearthed some of the famous scams like Adarsh Housing Society Scam, Commonwealth Games Scam, 2G spectrum scam etc.,[16] However, the RTI Act had a two-fold feature. On one hand, it provided the statutory rights to citizens of this country and on the other

[15] 4 SCC 683 (1989)

[16] *10 Years of RTI: 5 Stories Of Ordinary People Using The Act For Positive Change,* ( January 17, 2012, 15:50 PM), https://www.huffpost.com/archive/in/entry/2015/10/13/rti-10-years_n_8277290.html

hand, it uses to hold all organs of government accountable at the same time.

The Amendment Act abridges the autonomy, independence, and impartiality of the Information Commission by diminishing their status and lowering their rank. It conferred vital legislative functions to the Central Executive which is irrational and capricious and it tends to be excessive delegation. Therefore, the New Amendment Act altered the fundamental notion of the RTI Act. It is right to connote that the new amendment captivates the impartiality, autonomy, authority, and independence of ICs and makes them mere puppets in the hand of the Central Government. It conferred absolute authority to the Central Government which is a direct threat to the freedom of speech and expression of citizens and gradually it might lead to the dictatorship.

# Repressed Coastal Population - An Analysis of Rights of Coastal Communities and Ineffective Intricacies of Coastal Law Regime in India

*Asha.J*[1]

*"The earth has enough for everyone's need but not for everyone's greed."*

*-Mahatma Gandhi*

## Introduction

With a 138-crore population, India faces several fatalities as a consequence of natural disasters. Climate change, geo climatic conditions and high socio-economic vulnerability are the main reasons for coastal issues in India. Furthermore, catastrophic incidents and different types of complex environmental conundrums are increasing due to the industrial and economic activities in coastal zones, wherein half of the Indian population lives. Enormous economic renovations and urbanisation has ensued in deprivation as well as ecological damage to coastal zones in India. Even after three decades of Coastal law, India is still combating coastal issues; sustaining the livelihood security of fishing communities, preserving the health of coastal eco systems and bio diversities which are crucial to overall sustainability of coastal regions.[2] But while striving to accomplish the economic goals of our country, our coastal policies have failed to incorporate the powerful concept that survival of human beings depends on their harmonization with nature. There is a close collaboration between man and nature. But at the same time, development is as important as environmental protection. Coasts offer crucial components for social and economic development to the world. However, the unregulated development in coastal zones have resulted in livelihood challenges to coastal communities and this article mainly addresses the tripartite issue of development, environmental protection, and livelihood challenges of coastal communities in India. Therefore, the objective of this paper is to study the legal and environmental advancements for the sustainable development of our coasts as well as to analyse the issues faced by coastal inhabitants.

## Coastal Law Regime in India

Coastal Regulations in India tracked its concepts from UN Conference on Human Environment, held in Stockholm in 1972. Based on that 'The Environment Protection Act (EPA) 1986'[3] was enacted to execute India's commitments as a party to the conference. The Coastal Regulation Zone (CRZ) Notification of 1991 was made under the provisions of the Environmental Protection Act 1986, to protect coastal environments and also the social security and livelihood securities of fishing communities in India. For the last three decades, this subordinate legislation is the only trail in managing coastal zones of India. Coastal Regulation Zone Notification is applicable to the entire Indian Coast including the Andaman & Nicobar Islands and the Lakshadweep Islands. It generally covers the coastal stretches of seas, bays, estuaries, creeks, rivers, and backwaters influenced by tidal action up to the defined distance into the land from High Tide Line (HTL).

The CRZ Notification was introduced with the following three main purposes:

i) To arrive at a balance between development needs and protection of natural resource.

ii) To prohibit and/or regulate the activities which are harmful for both coastal communities and environment.

iii) To plan for a sustainable management, so that the livelihoods of millions of people are protected, and the coastal environment is preserved for the future generation.

[1] Ph.D. Scholar, Alliance School of Law, Alliance University, Bangalore.

[2] Hemant Kumar. A. Chouhan et al, *Coastal ecology and Fishing Community in Mumbai,* 51 EPW 39 (Sep.24, 2016)

[3] Environmental Protection Act, 1986, Act No.29, Acts of Parliament,1986 (India).

The Coastal Regulation Zone Notification (CRZ) in India was initially saluted as a progressive law by fish worker activists and environmental groups as they already recognised that coastal areas needed some reforms from unregulated development. CRZ Notifications were also intended to govern human and industrial activity close to the coastline, to protect the fragile ecosystems near the sea. CRZ Notification was enacted to restrict certain kinds of activities like large constructions, setting up of new industries, storage or disposal of hazardous material, mining, or reclamation and bunding, within a certain distance from the coastline. The real issue is that the delicate areas next to the sea are home to many marines and aquatic life forms and are also endangered by climate change. Therefore, they need to be protected against unregulated development. However, India's fiscal transformations had influence on the functioning of CRZ notification and it damagingly touched the objectives of CRZ. It is critiqued that considerations of economy overweighed ecology. The clauses of the notification prohibiting and restricting activities along the coast remained unimplemented, and the mandatory Coastal Zone Management Plans were also not implemented. Further, there was no proper institutional mechanism to ensure execution of CRZ Notification. So, The Honourable Supreme Court in **S. Jagannath v. Union of India**,[4] declared that sea beaches and sea coasts are gifts of nature and any activity which pollutes these natural resources, or the gift of nature cannot be permitted to function . In this case, a shrimp farming culture industry by modern method was harming the eco system, polluting potable ground water and exhausting plantations. All of these activities were held to be violative of constitutional provisions and non-implementation of Coastal Regulation Zone Notification was debated expansively by the Supreme Court of India. The court further held that before the induction of any such industry in a fragile coastal area should necessarily pass the strict ecological test. After this judgment, there have been several amendments to the CRZ Notification, 1991, based on the recommendations of various committees which are consistent with the basic objective of the notification. But there were continued difficulties posed by the CRZ Notification, to its effective implementation, from the beginning. In 2019 the CRZ was restructured to regulate the activities of coastal zones in India. However, its main criticism was the disregard for livelihood perspectives of coastal communities in the wake of continuous disasters which are happening in our country.

## Genesis of CRZ

In 1981, the then Prime Minister Mrs. Indira Gandhi, through a letter to Chief Ministers of all coastal states of India, insisted to start initial measures for protection of coastal areas to enhance their conditions. In 1982, The Ministry of Environment and Forests set up working groups to prepare environmental guidelines for the development of beaches and coastal areas and it resulted in the formation of Working Group on Beach Development Guidelines, 1983. It was the guidelines for the development of Beaches, Tourism, Industrial Development, Urban and Rural Development, special areas such as mangroves, scenic areas, corals, oceanic islands etc. In 1991, the CRZ Notification came into force based on Environment Protection Act of 1986. During these years various committees were appointed, and based on the recommendations of Dr. Swaminathan committee, MoEF revised the earlier notification and the CRZ Notification, 2011 revision came into existence. But both Notifications faced severe criticisms and later in 2019, CRZ Notification 2011 was revised and the CRZ 2019 came into force. However, the CRZ 2019 notification faced huge disagreements from its stakeholders for various reasons[5]

## Constitutional Mandate for Coastal Protection

Right to pollution free environment is a fundamental right under Art.21 of our constitution. Protection of natural resources and environment is encompassed in our fundamental duties also. India is known for enacting necessary environmental Acts from time to time in accordance with various international conventions including the Stockholm and Rio declarations.

[4] S. Jagannath v. Union of India, AIR 1997 SC 811.

[5] Amisha Aggarwal, *Climate Change and coastal Zone Regulation: Regulation of Coastal Protection, an analysis of CRZ Notification*, 2018, 13 IOSR-JESTFT 8,49-56(Aug. 2019).

More than this,our Constitution guarantees to its citizens certain fundamental rights such as Article 21[6] which guarantees to every person 'the right to life'. Consequent to judicial interpretation, now includes the right to a clean environment and access to natural resources.[7] It is relevant to note that India has given a constitutional status to environment protection by imposing a duty on the State to protect and improve the environment under Article 48A and Art. 51 A (g). It also imposes a fundamental duty on every citizen to protect and improve the environment. Art.47 puts a duty on the state to raise the standard of living and to improve public health which depends on the quality of the environment. In **Subash Kumar V. State of Bihar**,[8] it was held that the state is under a Constitutional Obligation to protect the right to environment and citizens have a right to the wholesome environment. In **M.C. Mehta v. Union of India**[9] also, the court held that Art. 39(e), 47 and 48A cast a duty on the state to secure public health and environmental protection. Art. 51 A(g)[10] places a fundamental duty on the state to protect public health and environment. Through many judicial decisions[11] it is reaffirmed that Coastal regions and water bodies are an integral part of our environment, and the states are obligated to protect the coasts of India.

## Coastal Community and Coastal Regulations in India

The coasts of India are generally facing environmental damage, displacement of coastal communities and causing hurt to the livelihoods of millions who depend on the sea for their survival. Coastal communities argue that traditionally the coastal land belongs to them and their rights in such coastal areas should be respected. But other than a brief mention in the preamble of the CRZ Notification as well as in the interpretation available in the 1996 judgment of the Supreme Court, there is very little in the CRZ Notification vis-à-vis fisher rights. **S. Jagannath v. Union of India**[12] , identified the adverse impacts of coastal pollution caused by non-traditional and unregulated prawn farming. It held that *the intention of the CRZ Notification is to guard the ecologically fragile coastal areas and to maintain the aesthetic qualities of the seacoast. The setting up of modern shrimp aquaculture farms near the seacoast is perilous and is degrading the marine ecology, coastal environment and the aesthetic uses of the sea coast.* The Court concluded that prawn farming industries should be banned in the coastal Regulation zones under the CRZ Notification 1991 because their functioning was in violation of numerous environmental laws. However, the Court allowed the traditional systems of aquaculture to continue by taking into consideration the traditional coastal communities in that area.

The objective of the CRZ Notification was to control ecological damage to coastal areas caused by pollution, maintain coastal livelihood security, uphold the traditional rights of fishermen and maintain the aesthetic value of the coast. However, there were no concrete provisions and measures that explicitly defined the rights of fishers. At present, coastal people are facing the issues of landlessness, unemployment, and homelessness. An evaluation of the CRZ Rules should link larger issues of livelihood and environmental sustainability of coastal regions. Insights to small scale fishery- based livelihoods and environmental sustainability should be taken into consideration while framing coastal policies. Coastal livelihood issues and the developmental activities in coasts and its repercussions on the lives and livelihood of fishing community is of serious debate. According to CRZ 2019, the country's coastline which is currently protected will be

[6] INDIA CONSTI. art.21.
[7] Abdul Jabbar Haque, *The Right to live in healthy and pollution free environment: An analysis in Constitutional Perspective,* 3 NJEL 1, 30-38(2020).
[8] Subash Kumar v. State of Bihar, AIR 1991 SC 420
[9] M.C. Mehta v. Union of India, 2002 (2)SCR 963
[10] INDIA CONSTI. art. 51 A § g
[11] Indian Council for Enviro Legal Action v. Union of India,(1996)5 SCC 281, Kinkeri Devi v. State Of HP (AIR 1988 HP 4) , S. Jagannath v. Union of India (1997 SC 811)
[12] *Id*

thrown up for development and this move will lead to the development of resorts, hotels, and mega housing projects, ultimately leading to the uprooting of fishermen. It does not define activities which are to be prohibited in the coastal zones. Instead, it allows state governments to identify economically significant areas and allow industries to grow. Also, the notification is silent on the management of these zones and suffers from so many loopholes as it fails to consider the biological diversity , demographic patterns, and distribution of natural resources in the coastal zones even if the area is ecologically fragile.[13] Furthermore, the Provision for the development of new ports which might be disastrous for India's ecological balance. In **M. Wilfred v. Ministry of Environment and Forests**[14] , the applicants have claimed that the site of the proposed port project, in its immediate vicinity, is inhabited by small scale fishermen who depend on Coastal and offshore water for fishing as a part of their livelihood. In the above case the applicants, seek to protect and safeguard coastal areas of outstanding natural beauty and areas likely to be inundated due to rise in sea level consequent upon global warming. The areas were declared by the Central Government or the concerned authorities at the State/ Union territory level from time as CRZ under CRZ Notification of 2011. In this case the court ordered Central Government to go for an Environment Impact Assessment (EIA) and CRZ clearances before implementing the projects. Recently in **Worly Koliwada Naksha Matsya Vyavasai Sahakari Society v. Municipal Corporation of Navi Mumbai**,[15] The Supreme Court stopped the coastal road project in Mumbai on the basis that it had not obtained environmental clearance from the authorities, and it had adverse impact on the coastal community. So, the judicial pronouncements arising out of coastal issues initiated by environmental activists are quite often enough to understand the law. But it is criticised that, through the new notification in 2019, the policy makers have regularised the violations. It will protect structures built on the seaward side of the existing roads and structures built contrary to CRZ in the name of development facilities for temporary tourism infrastructure. It will also have a negative impact on the fisheries as it will restrict the movement of fishermen in the inter habitation segments. Indian fishermen have been using the fishing waters and the land to process their catch, repair their nets, or sell their products as common property resources. If these areas are provided for tourism infrastructure development, the means of livelihood of local inhabitants will be in distress. Additionally, the new notification may lead to them being treated as encroachers and may lead to their displacement without any compensation. In **Ramdas Janardhan Kohli and others v. Secretary MOEFCC and others**,[16] the traditional fisherman sought compensation from City and Industrial Development Corporation (CIDCO) as well as the Oil and Natural Gas Corporation (ONGC). Fisherman residing in coastal areas around Mumbai had objected to infrastructure activities in the region, citing potential loss of their means of livelihood. They argued that urbanization has caused environmental damages to fishing areas and had a negative impact on more than 1600 families. They had been damaged by a project launched by CIDCO. The fisherman complained that they used to catch fish varieties near the shore but now that area had been destroyed by CIDCO. National Green Tribunal awarded compensation worth INR 950 million to be split between 1630 affected families and held them liable for damaging environment and affecting livelihood of fisherman community in that area. In **Alexio Arnolfo Perera v. State of Goa**,[17] The court ordered against Goa Government's temporary shack policy for tourism development as it was against CRZ Notification. Therefore, our judiciary has been proactively interfering in conservative as well as livelihood issues of coastal zones.

[13] Raghav Parthasarathy & Vikas Gahlot, *Coastal Regulation Zone: A Journey From 1991 Till 2019,* NLS ENV.LAW,( Jun.9, 2020) http://nlse.org/coastal-regulation-zone-a-journey-from 1991- till-2019/.

[14] M. Wilfred v. Ministry of Environment and Forests, 2016 SCC Online 426

[15] Worly Koliwada Naksha Matsya Vyavasai Sahakari Society v. Municipal Corporation of Navi Mumbai, WP(L) No. 560 of 2019 dated 16. 7.2019

[16] Ramdas Janardhan Kohli and others v. Secretary MOEFCC and others, MANU/GT/0056/2015 (India).

[17] Alexio Arnolfo Perera v. State of Goa (2014) SCC Online NGT 6655.

## Coastal Population Expecting Environmental Displacements in Future

The essential characteristic of coastal populations is that they are primitive traits and stay in peculiar geographical location. They are economically backward with unique cultural identity and are usually isolated from the mainstream community. This weaker section of society which got separated over several parameters was always retained out of the mainstream society and have thus become ignorant towards their rights and means to redress their problems. They are also prone to social, economic and environmental challenges. The main encounters confronted by the coastal community are as follows.

1. Vulnerability to natural calamities and climate change
2. Threats to coastal population and infrastructure
3. Livelihood securities of coastal people
4. Non-identification of the special needs of coastal people in the ecologically sensitive areas.
5. Rapidly increasing pollution and associated urbanisation and commercialisation resulting in detrimental fishing methods.
6. Legal uncertainty related to land rights and other rights.
7. Competition over limited coastal spaces and resources.
8. Environmental displacements in future.

The Coastal community fears that CRZ, 2019 will be a shaded period for coastal communities like fisherman, toddy tappers and farmers. It is complained that they will be displaced as the Non development Zone is reduced from 500 meters to 50 meters. National Fish Worker Forum (NFF) have expressed their fear that all Sagarmala packages, plans and projects will uproot the livelihoods of traditional fish workers. These projects will only benefit corporates and are against the interests of coastal community of India.

Lack of concern for disasters and climate change are also a concern for the community. Okhy, Gaja, Fani Cyclones and devastative floods have created huge losses to fishing communities and it is the need of hour to formulate policies to compensate their losses due to natural calamities. NFF says that CRZ, 2019 is a strategy which impacts the livelihood of small-scale fish workers and it is a move to privatise the coasts and hand it over to corporates.[18] While executing The Coastal law in 1991, the livelihood aspects of coastal community were given significance. Dr. Swaminathan committee set up as an aftermath of tsunami, went as far as suggesting a Land Right Recognition Law and suggested that specific protection should be provided to traditional communities who subsist on coastal areas only on the basis of their customary rights. But the recommendation was never executed, and the concept of customary ownership itself is grabbed by way of tourism and other developmental purposes. Over the last three decades, the regulation has been amended thrice and revised around 34 times. The coastal community views it as a lack of community and environmentoriented policy. National Fish Workers Forum says that the policy should include a well demarcated hazard line and should factor the effects of climate change. Further, they say that CRZ 2019 will pave a way to future disasters and the coastlines will be more exposed in the upcoming years. The CRZ, 2019 is merely giving more access to the corporate /tourism, land mafia for development, and the coastal community's livelihood as well as the environment are being ignored.[19]

Coastal communities are vulnerable to unforeseen events such as Tsunami, a regional flood/cyclones. They are not resilient to normally recurring hazards. The deprivation of coastal environment is primarily due to human induced actions which jeopardizes food security, livelihood, fiscal development, and existence

[18] National Fish workers Forum (NFF), Press Release Dated 26-5-2019.

[19] *Fishermen's body rejects CRZ 2019, Demands rollback,* TIMES OF INDIA,(Feb.25,2019 12.45PM) `www.times of india.com.`

[20] Sushama Guleria et al., *Coastal community resilience: Analysis of resilient elements in 3 districts of Tamil Nadu State, India,*16 JNL. OF COASTAL CONSERVATION 1,101-110(Mar. 2012).

of coastal communities. They are not naturally resilient to coastal hazards.[20] Many internal assessments of post-tsunami relief and rehabilitation, undertaken mostly by international non-governmental organisation and local NGOs, highlight the significant gaps that exist between goals and achievements as well as recognise that the felt needs of local people have been inadequately addressed. While many, including fishers, are arguing that initial relief was quite effective, though restricted to the villages near the main roads, rehabilitation has been haphazard with no clear goals both for the rehabilitator and the rehabilitated.[21] Many NGOs entered the rehabilitation arena completely ignorant about the socio-economic issues relevant to coastal communities, and consequently blamed the shortcomings of delivery on poor implementation and local political and social dynamics.[22] But such explanations are unfinished. To understand developments in fishing villages and issues of coastal community, it is necessary to delve into the uneven antiquity of coastal management in the context of shifting urgencies along the coast. This description will also highpoint the challenges gaining for integrated coastal zone management. Besides the physical damage, the tsunami left an indelible stamp on people's minds that a fear intensified by requirement of NGOs and the governmental intervention. Post-tsunami relief and rehabilitation exertions have not agonised from a lack of funds but due to lack of governance and legal uncertainty. The coastal areas which have been customarily inhabited by traditional fishing communities are also antagonized with largescale industrial growth and development. The coastal hazards are aggravated by rapid urbanization and unplanned human settlements, poorly engineered construction, lack of adequate infrastructure, poverty, and inadequate environmental practices such as deforestation, mangrove destruction, and land degradation etc. Thus, the coastal policies should corroborate the need for proper risk assessment as this would aid the coastal community in planning and responding to coastal hazards, making the coastal population safer from the risk of disasters. The 1992 Earth Summit in Rio de Janeiro, contributed to new perspectives about coastal management to include the role of education in engaging people to work towards a more sustainable future for the world's coastal areas. In response to these challenges and international trends, governments at all levels and non-governmental organizations should develop policies, strategies, and programs to support more integrated and effective coastal disaster reduction.

Since the inception of the CRZ notification, fishing communities of several states have been trying to negotiate with the MoEF for the protection of their customary rights and representation in the decision-making process. To maintain social stability and promote distributional justice, local coastal communities should be allotted clearly drafted, specific use and property rights about specific areas. Fishing collectives and environmental groups objected to the latest CRZ 2019 notification which opened India's coastline for enhanced commercial activities, primarily on the following grounds.

- No prior consultation was held with coastal communities, especially the fisher folks.
- The lifting of development restrictions would be disastrous for coastal environment and traditional communities living there.
- Interfering with ecologically sensitive coastal areas would leave them more vulnerable to natural hazards.

So, the coastal community has articulated their displeasure towards CRZ, 2019 and has demanded a comprehensive CRZ Act which ensures their rights. They also claim for an allinclusive study on assessment of vulnerability and inclusive community participation which can afford an important guide to coastal planning and resource allocation at various levels. It can benefit to raise public awareness about the risks, and such initiatives must envision prevention of catastrophic disasters and sustainable recovery in the aftermath of a disaster. It can also reduce the coastal community's vulnerability to natural disasters.

[21] Ajith Menon et al, *Reconfiguring the Coast,* 43 EPW 16 ,35-38 (Apr. 19-25,2008).
[22] Senthil Babu, *Coastal accumulation in Tamilnadu,*46 EPW 48, 12-13(Nov. 26,2011)

The CRZ notification is critical to the lives and livelihood of communities comprising of 170 million people or 14% of Indian population living across 70 coastal districts, 66 main lands and four island territories.[23] Their future especially that of the marginalised communities, is directly linked to the health and disaster preparedness of coasts.

The 2019 CRZ notification violates the balance between ecosystem and development.[24] The property rights and economic development in coastal zones are severely hampered with several unrealistic and unachievable restrictions when applied with a common yardstick throughout the country. The mandatory 50-meters buffer zone for mangrove forest in private land with an expanse of more than 1,000 sq. m has been taken by the present notification. This will affect the coastal ecosystem. The notification has given relaxation in Coastal Regulatory Zone and this will be helpful for people with small land holdings but the disastrous impact of it on ecology will be against the coastal community.

Environment Scientists and green activists have expressed their concerns regarding unbridled construction activities on the coastal areas and its negative impact which are to be addressed. They have also warned the government against gifting coastal areas to the tourism sector in the name of fishermen. As huge populations live in the coastal areas, their need for economic development and subsistence activities infringe on the quality of the environment in that region.[25]

According to National Disaster Management Authority, up to 36 million Indians are likely to encounter coastal floods due to rising sea levels by 2050.[26] So, ensuring protection to coastal populations and structures from risk of inundation from extreme weather and geological events is the need of the hour. It should guarantee that the livelihoods of coastal populations are not unduly hampered by these frequent amendments.

To maintain social stability and promote distributional justice, local coastal communities should be assigned with clearly drafted, specific use property rights about specific coastal areas. The coastal communities often have established experienced and practices to manage local ecosystems sustainably. It is proved in many cases that assigning exclusive rights to local communities can also help to protect coastal eco-systems. Accordingly, the rights and obligations laid down in CRZ notification should have a clear and increasingly comprehensive content which will be enforceable in the Courts.[27]

## Rights of Coastal Population- Unidentified and Repressed?

**Right to Life and Livelihood:** Strengthening the livelihoods of fishing communities and maintaining coastal ecologies and biodiversity are vital for the sustainability of coastal regions of India. The rising environmental vulnerabilities expand deprivation of coastal ecosystems and livelihood security of coastal communities. Traditional and customary rights in relation to fisheries and living space, as well as historic rights of coastal fishing communities are not recognised in the Coastal Regulation Zone Notifications. Ensuring traditional coastal community rights is of great significance and possibly to ensure social justice for traditional fishing communities is to designate a zone to protect their right through which only we can sustain their fundamental right to life and livelihood.

[23] Meenakshi Kapoor, *Ignoring objections ,India finalises New Coastal Laws,* INDIA SPEND(Mar.21,2020) www.indiaspend.org, art.14.com/post/ignoring-own-experts-fisherfolks-experts-india-finalises-new-coastal-law-investigation.

[24] Vinod. K. Dhargalkar et al., *CRZ Notifications 2018- Disastrous to eco system functioning,* 6 INT.JNL. OF ECOLOGY AND ECO. SOLUTION 1, 10-15(Mar.2019).

[25] A. Ramachandran et al. *Coastal Regulation Zone Rules in Coastal Panchayats (Villages) of Kerala, India vis-à-vis socio economic impacts from recently introduced people's participatory programme for local selfgovernance and sustainable development,* 48 OCEAN AND COASTAL MGMT. 632- 635(2005), www.Elsevier.com/locate/ocecoman.

[26] Study by Climate Center, National Disaster Management Authority, October 2018.

[27] Abhishek Das, *Coastal Regulation Zone: Governance and Conservation,* LAWYERS CLUB INDIA (OCT 9,2019.12.18PM) http://www.lawyersclunindia.com/articles

**Right to Pollution Free Environment**: This right is included indirectly as a part of Art.21 by various judicial interpretations. Environment deterioration can eventually endanger life of present and future generations. It includes right to survive as species, quality of life, the right to live with dignity, right to good environment and right to livelihood. All these rights are implicitly recognised as Constitutional rights. In **Subash Kumar V. State of Bihar**,[28] it was held that the right to life includes right to enjoyment of pollution free environment and if anything endangers or impairs that quality of life in derogation of laws a citizen has recourse to Art.32 for removing the pollution which is detrimental to his life. Further in a series of cases like **M.C. Mehta v. Kamal Nath**,[29] **Enviro-Legal Action V. Union of India,**[30] reiterated the same opinion that the right to pollution free environment is a part of Art.21.

The poor and the under privileged classes of coastal people and other indigenous classes of people are usually suffering the burden of environmental glitches. Ironically, the crisis is due to unsustainable and destructive models of development. Anyway, right to pollution free environment as a part of Art.21 through the decisions of Supreme Court have become the bed rock of environmental jurisprudence. So, the destruction and depletion of coastal ecosystem and its people depending on the natural/ coastal resources of their own locality to meet their basic needs will be violative of their fundamental right. They also have the right to enjoy life, livelihood, cultural sustenance, aesthetics of natural surroundings. The violations of these rights may lead to other violations such as displacement and sustainable common property management, loss of access to productive land, destruction to life support system etc. So, a better understanding of diverse coastal system should be there to assure the coastal communities right to pollution free environment as their fundamental as well as a human right.

**Right to Development:** Prof. Upendra Baxi said that, development is a participatory process of implementing all rights for all people. Right to development is a holistic concept and development vis-a -vis environment has been a placard of all concerned stakeholders. In Coastal issues also, the most discussed area is whether we should give priority to environment or to development. But, in **Vellore citizens Forum v. Union of India,**[31] the court already settled that development and ecology are no longer opposed to each other and sustainable development has to be accepted as a viable concept to eradicate poverty and improve quality of human life while supporting the surrounding ecosystems. So coastal community also have the right to development along with sustainable development of Coasts. It should be kept in mind that development encompasses much more than economic wellbeing and includes the whole spectrum of civil, cultural, economic, political, and social process for the improvement of people's wellbeing and realisation of their full potential.[32] Therefore, while implementing new policies for coastal development, the above-mentioned concepts should be considered for the protection of coastal community. Present coastal law regime in India mainly focuses on development of coastal areas only and unfortunately does not include the development of coastal population. So, experts argue that both should go hand in hand to achieve the expected sustainable development in coastal regions of India. Further in **Nature Lovers Movement v. State of Kerala**,[33] case it was held that there should be an adjustment and reconciliation in between preservation of environment and development of economy. Therefore, while implementing guidelines of an appropriate developmental policy to coasts it should also analyse the obstacles and implementation deficits in sustainable coastal management.

**Right to Participation in Coastal Management:** Public participation is recognised as crucial in

[28] Subash Kumar V. State of Bihar, (1991) 1 SCC 598
[29] M.C. Mehta v. Kamal Nath, (1997) 1 SCC 388
[30] Enviro- Legal Action V. Union of India, (1996) 3 SCC 212
[31] Vellore citizens Forum v. Union of India, (1996) 5 SCC 647
[32] N.D. Jayal v. Union of India, (2004) 9 SCC 362.
[33] Nature Lovers Movement v. State of Kerala, AIR 2000 Ker.31.

making environmental governance more robust. 'Participatory' mechanisms in environmental governance are advocated for a variety of reasons, including an implied emphasis on participation as furthering justice and equity, ambitions to make participative or deliberative measures as supplements or alternatives to representative democracy and enhancement of legitimacy of controversial environmental decisions.[34] In connection with the notion of sustainable development, the Rio Declaration stated that environmental concerns are to be solved with the participation of all concerned people at the relevant level. Despite of the agreement on the importance of public participation in environmental decision-making there is a clear lack of consensus on what public participation is supposed to mean and more importantly on what it is supposed to accomplish.[35] The Preamble of Aarhus convention[36] says that involvement of stakeholders and public at large will improve the substantive quality and outcomes of Environmental decisions. It is said that consultation with public and interest groups may unquestionably increase the knowledge and help to make more technical and holistic environmental decisions.

The marginalised coastal community in India is discriminated and always kept away from coastal policy making and it is also evident in the latest CRZ Notification, 2019. The coastal community remained silent spectators of development, but the obligation of environmental degradation usually affects them. These marginalised sections of people are away from material benefits and from environmental decision making. Even the coastal zone management plans were not available to them and were against the basic concept of environmental democracy in coastal planning. In **Kaloor Joseph v. State of Kerala**,[37] The court observed that the state cannot refuse the right of citizen's access to Coastal Management Plan. Right to information of Citizen is the right protected by our Constitution of India under Art.21. State or Local authorities cannot refuse it and they have a duty to publish CZMP. The court also directed the government to give sufficient publicity to management Plan prepared by the State so as to enable the public to know whether there is any deficiency in that plan and to ensure that CZMP was properly implemented and not violated by anyone and also to ensure that it's not violative of rights of coastal people. It is said that economic activities in the ecological sensitive areas should be able to assure social justice in distributing environmental resources also.[38] So, implementation of the concepts of environmental justice and environmental democracy is the need of the hour otherwise the environmental/ coastal resources will unequally be distributed between the capitalist and fishermen. The fishermen will become the scape goats of the hazards of coastal degradation. Hence, the right to participate in coastal policy making and awareness and informed consent for coastal development should be made available to the coastal community and all other stakeholders.

## Securing and Enforcing Property Rights/Land Rights

The Coastal community is oblivious of their land rights. The individual and collective rights of fishing communities over coastal lands became highly debated in recent years after the frequent amendments of CRZ Notifications in India, as communities do not even have titles and deeds for their houses and settlements even after 60 years of Independence. In the past few decades, fisher folk have prepared and planned to request land rights from the State because of the rapid development in these areas. There have been tourism/development projects, and interest groups who have been waiting to take over the coastal

[34] Naveen Thayyil, *Public Participation in Environmental Clearances in India: Prospects for democratic decision making,* 56 JILI 4, 463-492(Oct- Dec. 2014)

[35] Nichola Tilche, *In what ways is the emphasis on public participation a positive development in Environmental law? An analysis of Aarhus Convention and its impact on EU Environmental law and policy,* 1 EPLR 1- 23(2011).

[36] UNECE Convention on Access to Information ,Public Participation in Decision making and Access to Justice in Environment matters. Signed on 25 June 1998.

[37] OP NO. 20278 of 1997, dated 2nd June1998(unreported)

[38] Pavan Vinayak et al. *The role of Principles of environmental justice in securing equality in distribution of environmental resources- A critique,* 6 IN LAW MAGAZINE NLSIU(Nov.2020)

land and its abundant resources. However, the coastal community's traditional claims over coastal lands have precluded the scope of privatisation in the coastal areas to some extent. When CRZ 2019 came into force the land mafia threatened the coastal community and purchased the coastal properties by saying that their properties will be displaced by the provisions of recent notification.[39] So, proper alertness should be given to them by unambiguously defining property rights and assurance should be given to them that the policy changes will not adversely affect them. Then only they can be capably safeguarded against meddlers. The land ownership issues in coastal areas are gaining eminence with use-based entitlements. Construction of Special Economic Zones, land mafias/land acquisitions, non - recognition of coastal rights have changed the concept of land ownership in coastal zones.[40] They tend to provide more handler-based rights in coastal Zones, where right is delegated over land for a demarcated commercial or development activity. Furthermore, under the Coastal Regulation Zone Notification,2019 the coastal dweller's right to use coastal lands and concept of coastal commons etc. are not recognized.

The fishing communities and coastal lands rapport is very intricate in nature. Most of the studies on fishing communities mention the absence of official legal ownership rights for fishers over coastal lands.[41] One of the dominant rationales for non-identification of their right is due to the poor condition of life and the inadequate conditions of the marine fishing populations in India. The gathering of the unabridged community on a narrow strip of land along the length of coastline also increase their exposures and it is a consequence of the highly spread nature of the fishery resource and the dangerous of fishing operations by them. Every fisherman chooses to live on the seafront to spot the sea and to land his craft safely. This also have implications on whether their lands were considered 'authorised constructions' under the CRZ Notification or not. In general, the traditional occupation of fishing seems to need a closer association with the sea than with the land and it is decisive for signifying the interests of fishing communities. The fishing community people have been the traditional inhabitants of the coast. Their livelihood adjoining the sea is deep-rooted in their connotation with the sea. They never identified the need to prove their right over coastal lands through land titles. The triviality is that fishing community is also conferred to land-based regulations, but it is not recognised by them due to their social, economic, educational backwardness. The recognition of land rights of local inhabitants of coastal area is a necessity and it is claimed that the local inhabitants should be avoided from the strict application of CRZ notification. So, while considering the social preferences and beliefs regarding the land rights of coastal people, a liberal approach to eco system people and their traditional land accessibility is highly required as it has become a sensitive issue now a day.

## Right to Coastal Commons

Coastal common means the coastal resources that come under the realm of common property from which various communities and stakeholders derive economical, and ecological benefits.[42] Indian coastal regulations are quiet on fisherfolk's traditional rights to coastal and ocean spaces. High courts and Supreme Court of India upheld the right to commons in case of fishing communities and other inland communities. Indian courts established that foreshore between the high tideline and low tideline belong to the government and fisherfolks can work their trade without unsettled to the land. In **Abas v. Andi Chettiyar**,[43] a single judge in Madras High Court denied the plea of a property owner to possess and fence certain forelands

[39] Kerala Coastal Zone Management v. Maradu Municipality, 2019 (2) KLJ 944.

[40] Sudarshan.S. Rodreguez, *Coastal land rights of Fishing communities- Claims for survival,* Dakshin Foundations, Bangalore 42(2010)

[41] Sebastian Mathew, *Coastal Management Zone- Implications of Fishing Communities,* 43 EPW 25, 17-21 (Jun.21-27,2008)

[42] Niskula Jamir et al., *Coastal Commons and Conservation Cascades: Indian saga at Protection attempts under CRZ Notifications, 1* ENV.LAW AND SOCIETY JNL,NUALS,45-66 (2013).

[43] Abas v. Andi Chettiyar AIR 1963 Mad.74.

and upheld the customary rights of fisherfolks to dry fish and park boats on the land . Thus, public access to the commons has been ferociously guarded by Indian Courts. In **Jagpal Singh v. State of Punjab**,[44] The Supreme Court held that enclosure of a village pond by real estate developers is illegal, and the court ordered to evict all illegal /unauthorised occupants of village and restored it for common use of villagers. This is a watershed judgment of The Supreme Court which ensures the rights of coastal commons[45]

The CRZ 1991, although is a delegated legislation, cited the traditional rights and customary uses of coastal areas. But it was restricted to the housing purposes and other built-up spaces for their works. It did not admit the customary livelihood, culture, and other uses of the common fisherfolks. CRZ 2011offered certain concessions to the fisherfolks and instructed maritime states to prepare detailed Coastal Zone Management Plans, land -use plans and other long- term plans for CRZ area. However, the important clauses in CRZ 2011 remain unimplemented and CRZ 2019 is silent about all these issues. The frequent amendments weakened the law and because of its poor enforcement leads to the spread of privatisation, encroachments, urbanisation, and as a result withdrawal of coastal people from coastal spaces have increased in an unprecedented manner. For example, Kohli community in Mumbai are losing their traditional space. It is connected to real estate booming in coastal areas for the purpose of tourism and other developmental and business activities. So, the need of protecting the right to coastal commons is a necessary evil to promote the community values, aesthetics, culture, and tradition of coastal people and thereby to promote their rights and needs in a significant method.

## Suggestions

The traditional coastal communities are integral to the coastal areas of India. The State must recognise the rights of the fishing community's livelihood issues as well as the access and use of beach space. The CRZ Notification initially contained certain provisions that protected the interests of fisher communities whose livelihood depended on a healthy coast. If coastal communities are involved in the implementation of the notification and its monitoring, it could ensure the protection of coastal habitats as well as relieve the state government from the responsibility of being involved in the day-to-day implementation of the notification. Therefore, it is important for the notification to emphasise the necessity of capacity building and active participation of local governments and citizens in rural and urban coastal areas. In its contemporary form, the above concepts are absent in the notification. Several traditional fisherfolk and coastal community institutions bargain themselves against jointing in CRZ 2019 because the notification does not recognise their presence or their potential role in coastal conservation. It would be useful to study how these community institutions can play a role in the implementation and monitoring of coastal zone management laws.

Further state should regulate the entry of external actors in eco-sensitive areas and to clear the demands to strengthen the CRZ Notification while recognising and guaranteeing rights of fisher communities to resources and its management which must be obligatory in present day scenario. There has been a consistent demand to recognise the rights of fishing communities to access and use the coastal space. There was also a very clear mandate for the unambiguous role and responsibility of fishing communities in the management and protection of the coasts. Serious flaws and omissions in the enforcement and implementation design should be avoided. Vagueness and arbitrariness of the new categorisation, deficiency of clear procedure, definitions, objectives, lack of transparency, non-involvement of stakeholders are reasons for the failure of present CRZ Notification.[46] To avoid all these issues, it can suggest the following recommendations.

[44] Jagpal Singh v. State of Punjab AIR 2011 SC 396

[45] Mukul Kumar et al, *Mapping the coastal commons : Fisher Folks and the politics of Coastal Urbanisation in Chennai,* 29 EPW 48, 46-53(Nov.29,2014)

[46] Ayush Verma, *A Sail through the management of coastal zones in India,* BLOGIPLEADERS (JUL. 16, 2020) Blog ipleaders.in/Sail-Management-Coastal-Zone -India.

## Recommendations

1. Use of the coastal area only for direct resource-based livelihoods and infrastructure needs of the country.
2. Sustainable development of the coast and its resources in future.
3. Participation of stakeholders in the decisions related to the use and management of the coast and its resources.
4. Evolve and strengthen government policies along with community-based governance structures.
5. Special provisions for the control, rights and access of coastal resources and coastal lands to ensure the life and livelihood of coastal people and for coastal protection.
6. Ensure coastal land rights of fishing communities as defined by socio-cultural traditional boundaries to make a balance between development planning, coastal management, and fisher livelihood security.
7. Inclusion of a list of livelihood activities which are permissible in CRZ region and it should be specially designed for the protection of coastal community.
8. Relaxing the No Development Zone (NDZ) should not be detrimental to the interests of traditional coastal communities.
9. Allowing dwelling units for fisherfolk
10. Permitting economic activities like tourism under the ownership of fisher folk.

The above suggestions cannot guarantee the livelihood security of fishing communities absolutely. While the government has established policies and legislations for conserving marine resources, the state governments and respective forest and marine departments are facing issues in implementing these regulations. But we can understand that the present patchwork Notification does not solve the issue of conflicts and issue of access and rights over the coastal space which is inherently allied to the livelihood security of fisherfolk. It is crucial that rights of traditional fisher communities to coastal spaces be legally recognised and expanded in prevalence over infrastructural development in such places. Merely permitting a set of fishing activities and facilities within the CRZ or any coastal law falls short of the fisherfolk's demand for control over coastal governance. Ignoring this element will only lead to further conflict between fisherfolk and non-fisher interest groups like large tourism/ industrial mafia and government authorities, as being witnessed in the State of Goa and Kerala where large developmental activities by corporates are causing problems to the coastal community. Hence it is vehemently recommended that the conservation methods should strike a balance between the economy and ecology at the same time.[47] Most importantly, the model of community-based conservation that found success in other countries should be adopted in Indian context also.

Further, enunciating human rights with the environment generates a rights-based approach to environmental protection as it will be obligated to develop new approaches and policies to safeguard the rights of individuals and communities reliant on natural resources. It will also help in providing remedies to people harmed by environmental degradation. Taking a human rights approach to coastal protection is beneficial that it reinforces the concept of mutual goals and the serious outcome each may have on the others. The understanding in terms of an incompatible burden between development perquisites, environmental protection and human rights of local inhabitants must be abridged in coastal zones, both at international and national levels.

## Conclusion

The coastal law regime in India faces a lot of turbulence in the present scenario and the CRZ notification leaves so many issues unaddressed and unclear. It is high time to identify the paths for improvement in Indian environmental law especially the coastal regulations because the present CRZ is incompatible with

[47] Radha Krishan, *Environmental Protection: Legal and Human Right Perspective,* 2 NJEL 1,30-34(2019) www.stmjournals.com

its own objectives due to its deceptive mechanism, deficient procedures and lack of transparency. The issues of coastal encroachments throughout the country are continuing and it is witnessing the lacunae in existing legislation. The concept of development has historically taken precedence over coastal protection, and it is not in conjunction with stakeholders as well. The Grant of coastal clearances is a key step in the statutory framework to balance ecological concerns of the coastal environment, and concerns of coastal communities about the quality of their immediate surroundings, including issues of sustainable access of poor and marginal communities to common property resource for their everyday subsistence. There is a need for having public consultation and participation in coastal management, and a provision for such participation and consultation should be included in the Indian CRZ Regime. The paper describes and analyses the extremely limited space for public participation in the existing CRZ regime. It argues for a broad-based coastal law that has public consultation at multiple stages, right from screening, scoping, and appraisal during EIAs, to post-clearance monitoring as well as compliance of clearance conditions. It is possible that a comprehensive, dedicated national legislation for coastal zones which even while adopting uniform approach to multifarious issues faced by Indian coastal areas will give States enough room to address the local issues of coastal community. In the current pace of economic growth, a battle for coastal land grab to fuel development projects, tourism and so on is the truth of coastal spaces. This suggests that a sense of urgency must accompany for a new legislation. Until then, each individual fishing settlement will have to fight its own encounter against each local developmental menace and bear in an unjust political space. The present CRZ Framework is neither comprehensive nor exhaustive, so a Pan National Law is necessary to ensure environmental sustainability as well as livelihood security of the coastal community. The Shailesh Nayak committee in 2014 described the threat of displacement of fisher communities as coasts were being opened up for development. CRZ 2019 expands such issues for those who live in various informal settlements along the coast. Therefore, while drafting coastal policies we should focus on a central theme of *equitable, sustainable, pro-poor, pro-fisher housing and development models for our coasts.*

# Domain Name Disputes and the Rising Threat of Cybersquatters

*Jalaj Agarwal*[1] *and Gracy Bindra*[2]

## Introduction

In recent decades, the world has been taken over by the internet, giving rise to digital age menaces. The Internet is now being used for commercial purposes in recent years; this has led to the transformation in the businesses. With the changing trends of marketing and a paradigm shift of physical marketplace to e-commerce, many companies have been successful in their business and commerce positioning services online.[3]

As cyberspace takes over the businesses, the importance of domain names and trademark law increases. A domain name refers to a computer address by which a company or an individual can be located by any other internet users.[4] The main aim to pose domain names is to distinguish and locate the different computers, users, files, and resources accessible over the Internet.[5] In usual practice, the companies are inclined to choose domain names which are easy to memorize, everyday words and well- known trademarks by their consumers. The problem arises when two or more people claim the same name, which is forbidden under trademark law. Trademark law has often been referred to as it restricts the use of already registered trademarks because it tends to confuse a potential customer about the profile and true seller of the product or service involved. The same has been invoked to resolve disputes between computer users that obtain Internet domain names and the owners of the registered trademarks.[6] There are various negative consequences of the transition to cyberspace in the form of trademark issues such as cyber-squatting, typo- squatting, mega tagging, renewal snatching etc.

## Domain Name System and Trademark

Every web page has a unique address which not only represents the branding of the company but also distinguishes it from the other companies in the market. The domain names aid internet users to remember, locate and access the sites instead of writing the long IP address in binary computer language.

A domain name refers to a unique name which recognizes the website[7] and contains three parts to it. The first part known as third level domain which contains- "www". which represents that the website is connected to the world wide web and discoverable on the internet search engines. The second part is the most essential part which includes the unique name of the company, for eg. - "Facebook", and better known as second level domain name. The last part is known as top level domain name and could be of various types -generic code, country code, special top- level domain names or restricted use domain names. If it is a country code, such as- ".in" for India or ".jp" for Japan; it represents a particular country. In case, a company chooses generic codes, such as- ".com", ".org", ".edu"; it represents deployment to no particular class of organization and is regulated by the Internet Corporation for Assigned Names and Numbers popularly known as ICANN. Some of the special top-level domain names are- ". legal", ". app" etc. Restricted top-level domain names are not allowed to be used by everyone as the name suggests, such as ". arpa", ".biz" etc.

[1] BA LLB (Hons.) 5th Year, Symbiosis Law School, Pune
[2] BA LLB (Hons.) 5th Year, Symbiosis Law School, Pune

[3] Michael D. Scott, *Advertising in Cyberspace: Business and Legal Considerations,* COMPUTER LAW., 1 (1995).
[4] Sally M. Abel, *Trademark Issues in Cyberspace: The Brave New Frontier,* MICH. TELECOMM. & TECH. L. REV., (1999).
[5] Bonifaz, Monica. *Domain names, Internet and Trademarks, infringements in cyberspace,* PAPER REVIEW, (2015).
[6] Froomkin, A., *The collision of trademarks, domain names, and due process in cyberspace,* COMMUN. ACM., (2001).
[7] Pope, Michael & Warkentin, Merrill & Mutchler, Leigh & Luo, Robert, *The Domain Name System: Past, Present, and Future,* COMMUNICATIONS OF THE ASSOCIATION FOR INFORMATION SYSTEMS, (2012).

The process of allotment of such domain names differs on case to case basis. It could either be a first come first serve basis or if a company with legitimate business claims a domain name of that company name, would be given preference over others.

In this changing world of e-commerce, the domain name systems have a great significance and disputes arising out of it have no bounds. This calls for a need for a specific regulating authority. Since recognising the source of product is an important role played by the domain name, there is a need to treat them as equivalently important to trademark as far as the legal protection and recognition is concerned, as this could lead to trademark infringement.[8]

Trademarks not only give unique identification to the product but have also become a way of digital branding for various companies. Businesses use fancy, unique and distinct domain names by often combining two languages, different font and color schemes in order to attract more users to their websites, thus it is an important tool for communication in business transactions.

In the real world, two people belonging from different countries can have one trademark for goods and services unlike the domain name which belongs to only one person in the virtual world and need not be for one good/service but could be for the whole company dealing in a range of different goods and services.

## Understanding Cybersquatting

Domain name abuse and misuse in the form of cybersquatting has increased in great numbers with the growth in commercial activities and use of cyberspace. In the 1990s, the internet had become a growing sensation and grew the menace of cyber-squatting, also known as brand-jacking.[9] The Delhi High Court interpreted the term Cyber-squatting as "an act of obtaining fraudulent registration of a domain name with the intent to sell it to the lawful owner of the name at a premium."[10]

The ultimate motive of maximum profit maximization drives the menace of cyber-squatting. Another reason for indulging in cyber-squatting could be to defame and bring bad name to the company by using fake identities. Registration of a domain name is a cheap and economical process; however, once a domain name is registered, it allows the party to earn profit through various means such as by publishing advertisements on the web page or by pay-per-click advertisements.[11] It can also be used to divert user's traffic from the original trademark holder's business by creating confusion in the minds of the consumers, and thereby causing losses to them.[12] Moreover, such individuals often sell a registered domain name at significantly high prices to the legitimate owner of a trademark whose identity is reflected in the domain name by creating a similar one, creating confusion and deception and using unfair trade practices such as blackmailing and harassing the original owners to gain revenue.[13]

There are various types of cyber-squatting like[14]-

1. Typo squatting- This type includes 'URL hijacking', 'a sting site', and 'a fake URL' wherein typo squatters take advantage of the mistakes internet users make while searching the browser and typing web addresses. Due to the similarities in the visuals, fonts and hardware, the users are often confused. Typo squatters might go to the extent of creating fake websites using

[8] Richard L. Baum and Robert C. Combow, *First Use Test in Internet Domain Name Disputes,* NATL. LJ 30, (1996).
[9] Jonathan Anschell & John J Lucas, *What's in a Name: Dealing with Cybersquatting,* ENT. & SPORTS LAW 3rd edn., (2003).
[10] Manish Vij v Indra Chugh, [2002] AIR Del 243.
[11] Jordan A. Arnot, *Navigating Cybersquatting Enforcement in the Expanding Internet,* J. MARSHALL REV. INTELL. PROP. L., 13th edn., (2014).
[12] Dara B. Gilwit, *The Latest Cybersquatting Trend: Typosquatters, Their Changing Tactics, and How to Prevent Public Deception and Trademark Infringement,* WASH. U. J. L. & POL'Y 11th edn., (2003).
[13] RASTOGI ANIRUDH, CYBER LAW, LAW OF INFORMATION TECHNOLOGY AND INTERNET (Lexis Nexis 2014).
[14] Sankalp Jain, *Cyber Squatting: Concept, Types and Legal Regimes in India & USA,* SSRN ELECTRONIC JOURNAL, (2015)

similar logos and colors to divert and confuse the traffic and create malware.

2. Identity Theft – In case an owner forgets or fails to renew their domain, the cyber squatter takes undue advantage of the situation by misleading the internet users by posing to be the legitimate owners. They do so by monitoring and targeting such domain names and purchase them as soon as renewal gets delayed or fails.

3. Name Jacking - Cyber squatters use celebrities or famous personalities posing to be related to them and illicitly attracting traffic to their website.

4. Reverse Cyber-squatting - Reverse cyber-squatting refers to a scenario wherein the cyber squatters attempt to secure legitimate domain names to indicate authenticity and create confusion and undue benefits.

There is a need to curtail such practices and therefore countermeasures have been devised by various organizations', which will be discussed in the next segment of the paper.

## Countermeasures to Cybersquatting

In order to prevent the growing threat of Cybersquatting it is important to have proper regulation, policies and authorities to counter and seize any such malicious acts. Globally, Internet Corporation for Assigned Names and Numbers (ICANN) is the organization that administers the domain name system. It was established in 1998[15] as an American not for profit private organization which undertakes the task of overseeing and supervising the distribution of IP addresses and domain names thereby managing and coordinating the domain name system. However, it is pertinent to note that the actual domain name registration is done by particular domain name registries located in different countries across the globe.

In order to resolve and facilitate the disputes arising in relation to domain names, the Uniform Domain Name Dispute Resolution Policy (UDRP) was established in the year 1999 by the ICANN.[16] Since its establishment UDRP has been successfully implemented in resolving a large number of domain name disputes over the years.[17] Currently there are six approved dispute resolution providers to which complaints can be filed as per procedure laid down under the UDRP; they are: World Intellectual Property Organization (WIPO), Asian Domain Name Dispute Resolution Centre (ADNCRC), National Arbitration Forum (NAF), Canadian International Internet Dispute Resolution Centre (CIIDRC), Arab Center for Dispute Resolution (ACDR) and Czech Arbitration Court (CAC).[18] Among them WIPO has been the most popular domain name dispute resolution platform.

Paragraph 4(a) of the UDRP provides the necessary elements when a trademark holder can apply to any ICANN dispute resolution service provider. According to this, the UDRP is capable of resolving disputes which arise when:[19]

- The domain name is alike or confusingly similar to the trademark to which the complainant has rights.
- The opposite party has no legitimate right or interest in the domain name.
- The opposite party has registered the domain name with mala fide intentions.

Furthermore, Paragraph 4(b) enumerates the factors for determining if there's a case of registering or using

[15] THE HISTORY OF ICANN, https://www.icann.org/history#: :text=ICANN%20was%20founded%20in%20 1998,the%20U.S.%20with%20global%20participation (last visited on 14 September 2020).

[16] UNIFORM DOMAIN-NAME DISPUTE-RESOLUTION POLICY, https://www.icann.org/resources/pages/help/dndr/udrp-en (last visited on 14 September 2020)

[17] Zohaib Hasan Khan, *Cybersquatting and its Effectual Position in India,* Vol. 6 Issue 2, IJ SCIENTIFIC & ENGINEERING RESEARCH, (2015).

[18] ICANN, LIST OF APPROVED DISPUTE RESOLUTION SERVICE PROVIDERS, https://www.icann.org/resources/pages/providers-6d-2012-02-25-en (last visited on 14 September 2020).

[19] UNIFORM DOMAIN DISPUTE RESOLUTION POLICY, https://www.icann.org/resources/pages/policy-2012-02-25-en (last visited on 14 September 2020).

the domain name in bad faith by the concerned party. Various factors which are taken into consideration for this purpose are:

- The domain name was registered with the main objective of selling it at a higher price afterwards
- The domain name was registered with the primary purpose of causing loss to the business and brand value of the competitor
- The domain name was registered so as to prevent the rightful owner of the trademark from acquiring the domain name for its mark
- The domain name was registered in order to take undue advantage of the brand value of the complainant's trademark and attract users to its website by creating confusion between the two parties.

Once the domain name dispute is resolved, the concerned authorities can either transfer the domain name to the complainant or cancel the domain name altogether. On the other hand, if the complaint is found without merit it can be rejected by the service providers. UDRP does not provide for any remedy in the form of monetary damages or any kind of injunctive relief. In case the losing party is not satisfied with the decision of the authority it can file a lawsuit against the opposite party in a court of competent jurisdiction within 10 days of the said decision.[20]

*World Wrestling Federation Entertainment, Inc. v Michael Bosman*[21] was the first case decided by WIPO through the UDRP. In this case the respondent had first registered the domain name "worldwrestlingfederation.com" and thereafter offered to sell the domain name to WWF at a higher price. WWF filed a complaint alleging that the domain name was registered with mala fide intention by the respondent and was in violation of WWF's trademark. The WIPO panel ascertained that the domain name was identical or confusingly similar to the WWF's trademark. It further held that the respondent had no bona fide interest or right in the said domain name and ordered the transfer of the registration of the said domain name to the complainant.

Similarly in Philip Morris Incorporated v r9.net,[22] the complainant was the owner of the wellknown brand and trademark 'Marlboro'. However, the respondents registered the domain name "Marlboro.com" against which a complaint was registered alleging that the said domain name was confusingly similar to the complainant's trademark and was registered in bad faith. The allegations were held to be valid by the WIPO panel and the registered name was transferred to the complainants.

Overall, the UDRP as operated by the approved service providers under ICANN is very efficient and popular in resolving domain name disputes. The UDRP process is much quicker and cheaper than the court litigation, it has an international jurisdiction and the cases are resolved by individuals who are experts in trademark law which is not always possible in normal litigation.

Over the years some countries such as Canada (Canada's Domain Name Dispute Resolution Policy) and the United Kingdom (UK's Domain Dispute Resolution Service) have even adopted their own dispute resolution mechanism being unrelated to the UDRP.[23] Although India has formulated its own dispute resolution policy, INDRP 2005, which is in line with the UDRP and the provisions of the Indian Information Technology Act, 2000 it has not been put to use much on account of it being a mere guiding policy.[24]

[20] THE UNIFORM DOMAIN DISPUTE RESOLUTION POLICY, `https://www.icann.org/resources/pages/policy-2012-02-25-en` (last visited on 14 September 2020).

[21] World Wrestling Federation Entertainment, Inc. v Michael Bosman, [2000] WIPO, Case no. D99-0001.

[22] Philip Morris Incorporated v. r9.net, [2003] WIPO Case no. D2003-0004.

[23] Doug Isenberg, *These Countries have adopted the* UDRP, GIGALAW, (2017) `https://giga.law/blog/2017/5/23/these-countries-have-adopted-the-udrp` (last visited on 13 September 2020).

[24] Jayakar, Krishna & Patricia, *India's Domain Name Dispute Resolution Process: An Empirical Investigation,* SSRN E-J, (2012).

## Situation in India

Over the years there have been numerous cases of cyber-squatting in India, but with the unprecedented growth in digital media and internet, there has been a surge in such cases in recent years. However, currently, there is no specific legislation in India for resolving domain name disputes such as cyber-squatting. The Indian Trademarks Act, 1999 does not provide for any specific provision protecting domain names in pursuance of trademark infringement. Furthermore, the jurisdiction of the act is not extra-territorial; therefore, it does not provide for adequate protection in case of infringement happening outside the Indian territory. Similarly, the provisions of the Information Technology Act, 2000 are not sufficient to resolve the domain name disputes in relation to trademark infringement and to curtail the acts of cyber-squatting.

However, the Indian courts have been active in resolving cases relating to cyber-squatting under the laws relating to passing off. Passing off is a common law tort and has been further developed by the Hon'ble courts to be applied in such cases of domain name disputes. This can be inferred from the judgment in *Satyam Info way Ltd. v Sifynet Solutions (P) Ltd.,*[25] wherein the Supreme Court stated that although there is no specific legislation in India with respect to resolving disputes pertaining to domain names and the Trademarks Act, 1999 also do not provide adequate protection as its operation is not extraterritorial, however domain names in India were protected under the laws relating to passing off to the maximum extent possible.

A passing off action inter alia restrains the defendant from using the name or trademark of the complainant so as to cease the respondent from passing off the goods or services to the general public as that of the complainant. It is used to safeguard the goodwill of the complainant and protect the general public from such deceitful activities. The applicability of this principle can be further understood through various landmark cases adjudicated by the Indian courts in this matter:

The first case in India pertaining to Cyber-squatting was *Yahoo! Inc. v Akash Arora & Anr.*[26] in the year 1999. The plaintiff was the owner of the well-known mark "Yahoo!" and also of the domain name "Yahoo.com." The defendants however registered a confusingly similar or identical domain name "YahooIndia.com" that too with similar format and colour scheme and provided similar services like that of the plaintiff. The Delhi High Court applying the law of passing restrained the defendant from using the said domain name. Ruling in favour of the plaintiff the court reasoned that the defendant's domain name was deceptively similar to confuse the general public and more of an effort to take undue advantage of the reputation of Yahoo Inc.

*Rediff Communication v Cyberbooth & Anr.*[27] was another early case relating to cybersquatting decided by the Bombay High Court. The respondents had registered a domain name "radiff.com" being similar to the plaintiff's domain name "rediff.com". The court decided in favour of the plaintiff as the defendant's domain name could create confusion between the distinctiveness of the two parties. In this case the court further held that domain names are an important and highly valued asset of the company and need to be adequately protected.

Similarly, in the case of *Acqua Minerals Ltd. v Mr. Pramod Borse & Anr.,*[28] the plaintiff was the owner of the trademark "Bisleri" in India. The defendant subsequently registered the domain name "bisleri.com" which was found to be an infringement of the trademark of the plaintiff as it was deceptively similar to the plaintiff's brand. The Court ordered the defendant to transfer the domain name to the plaintiff.

*Satyam Infoway Ltd. v Sifynet Solutions*[29] was the first case relating to cyber-squatting decided by the

[25] Satyam Infoway Ltd. v. Sifynet Solutions (P) Ltd., [2004] (3) AWC 2366 SC
[26] Yahoo! Inc. v. Akash Arora & Anr., [1999] IIAD Delhi 229
[27] Rediff Communication v Cyberbooth & Anr., [2000] AIR Bombay 27
[28] Acqua Minerals Ltd. v Mr. Pramod Borse & Anr., [2001] AIR Delhi 463
[29] Trademark Act, 1999, § 103.

Supreme Court. The plaintiff was the registered owner of the word "Sifynet" which was developed using the initials of its corporate name Satyam Infoway and had goodwill and reputation in the public. The respondent had registered domain names "Siffynet.com" and "Siffynet.net" which were deceptively similar with plaintiff's domain name "Sifynet.com". The Apex Court set aside the judgment of the High Court and gave its decision in favour of Satyam Infoway. It stated that the respondent had adopted the said domain name with a dishonest intention as the marks were found to be deceptively similar. The Supreme Court in this case held that domain names were regulated under the Trademarks Act, 1999 as they inculcated all the features of a trademark.

Even though the Indian Courts have been fairly active in dispensing cases relating to cybersquatting and providing adequate reliefs, it has been observed that with the increasing number of domain name disputes parties have started using alternate dispute resolution mechanisms such as arbitration and mediation for resolving cases relating to cyber-squatting. Parties generally prefer resorting to the UDRP process offered by WIPO and other ICANN approved service providers rather than formal litigation mechanism offered by the Indian courts for various reasons.

## Recent Developments

The world has recently been struck by a pandemic and as businesses are facing huge losses, the only sector that has boomed is e-commerce. Every company is shifting to the virtual world and claiming domain names and devising new ways to approach their clientele and attract more consumers. This has however increased cybersquatting disputes by manifold numbers.

In recent times, in countries like China, various cybersquatting suits have been filed wherein giant companies such as "Pinterest" have been targeted and revenues were made using the advertisements.[30] The main reason attributed to such a large number of suits have been recognized to be the absence of stringent laws against cyber-squatting, unlike in countries like Philippines[31] and United States[32] which have specific laws for cyber-squatting. The United States passed a legislation to govern such a serious and recurring offence, back in 1999, called the Anti-cybersquatting Consumer Protection Act (ACPA).[33] The law allows the perpetrators to be booked for a civil suit and thereby damages.

Statistics from the World Intellectual Property Organization (WIPO) demonstrate that in 2017, the number of domain name disputes have shown a growth of 1.3 percent since the preceding year.[34] In 2018, the maximum disputes were from the United States amounting to a total of 920.[35]

In India, the Hon'ble Bombay High Court gave an important decision recently in June 2020, in the case of Hindustan Unilever v Endurance Domain and Ors[36] regarding the responsibilities of domain name registrars (Intermediaries) and their technical capabilities in such cases of Cyber-squatting. The plaintiff was the registered owner of websites www.hul.co.in and www.unilever.com. However, the plaintiff observed that some parties had registered domain names such as "info@hulcare.co.in", "unilevercare.co.in", "unilevercare.org.in" and "unlevercare.co.in" which were deceptively similar to its own website. The Court ruled in favour of the plaintiff ordering an immediate injunction on the use of these domain names by the infringing parties.

[30] Dana Kerr, *Pinterest wins $7.2M in legal battle with cybersquatter,* (CNET, 30 Sept 2013) `https://www.cnet.com/news/pinterest-wins-7-2m-in-legal-battle-with-cybersquatter/` ( last visited on 05 September 2020)

[31] *Philippines: Analysis of the Cybercrime Prevention Act of 2012,* CENTRE FOR LAW AND DEMOCRACY, (Nov. 2012).

[32] Anti-cybersquatting Consumer Protection Act (ACPA), 15 U.S.C. § 1125(d).

[33] Anti-cybersquatting Consumer Protection Act (ACPA), 15 U.S.C. § 1125(d) (1)

[34] WIPO, *Cybersquatting Cases Reach New Record in 2017,* Geneva, (Mar. 14, 2018), `http://www.wipo.int/pressroom/en/articles/2018/article_0001.html` (last visited on11 September 2020)

[35] *Id.*

[36] Commercial IP Suit [2019] (L) NO.577.

HUL in this case has also impeded National Internet Exchange of India (NIXI), Endurance Domains, Go-Daddy and other domain name registrars praying the court for blocking of these websites and continued suspension of registration of such domain names by these registries. Justice Gautam Patel discussed at length the role of these intermediaries and relief that can be granted against them. The court held that such intermediaries cannot be asked to permanently block domain names and suspend the registration of domain names until they are found to be infringing the rights of another party and are fraudulent in nature. The court observed that any such decision of blocking or suspending a domain name cannot be taken by the parties alone without any judicial finding. It is a significant decision for the future of cyber-squatting cases in India as it clarified the role and liabilities of the intermediaries in such cases. The said judgment also puts an end on the growing trend of injunction orders being passed by the courts against these domain name registrars without considering the technical and legal liabilities of the intermediaries in providing such relief. The world faced a huge number of cyber -criminal activities during the unprecedented times of COVID-19 pandemic wherein the global marketplace shifted online. About 48,000 new cases were seen around the globe by one service provider, WIPO during the lockdown.[37] Attackers targeted some very famous and major brands such as Facebook, Apple, Netflix and Amazon wherein the customers were scammed with the help of cyber-squatting techniques and deceived with reward and re bill scams.[38]

With the growing intersection between trademark and domain name systems in this digital age, negative consequences have increased drastically and need to be curtailed. In this segment, authors have attempted to list down some grey areas as well as issues that must be addressed at the earliest.

- In India, currently there is no specific legislation for resolving disputes pertaining to cybersquatting. The Trademark Act, 1999 does not include a chapter about "cybersquatting" with stringent damages in case of contravention of the law.
- One of the main issues that cyberspace faces is domain name grabbing wherein people buy domain names with the intention to later monetize and sell it at high prices instead for personal usage. This results in the unauthentic and fraudulent use of the domain names.
- Due to the increasing online presence of various establishments, mere registration of domain names with the Registry is not enough for safeguarding the legitimate rights of parties, there is a dire need for specific statutory provisions regulating and penalizing acts like cyber-squatting. A proper procedure of registration would help in safeguarding as well as tracking the ownership of the domain names which are already registered as trademarks by another party. These records would also be beneficial in cases where any domain name is used to commit any cybercrime such as phishing or identity theft etc. which is punishable under IT Act, 2000.
- The main issue that arises is about the jurisdiction since the internet has no boundaries and the trademark laws of every country are territorial in nature. Cyber-squatting can be committed from distant places which are outside the purview of the national courts and it poses the questions as to whether to file the case or where the complainant resides or the defendant. Secondly, the binding value of the decision of the registration authority is questionable. This often leads to non-reporting of cases of defaulters getting away after the crime due to the lack of proper regime of punishing.
- ICANN is a private organization and the involvement of all the countries is voluntary making it difficult to regulate such a growing and serious issue. In spite of WIPO being the service provider agency, there is a need to have a treaty/convention establishing a holistic interna-

[37] WIPO, *Cybersquatting Case Filing Surges During COVID-19 Crisis,* [June 2020], https://www.wipo.int/amc/en/news/2020/cybersquatting_covid19.html ( last visited on 10 September 2020).

[38] Janos Szurdi, Cybersquatting, [September, 2020] https://unit42.paloaltonetworks.com/cybersquatting/

tional organization making it mandatory to all the UN members to ratify the same.

## Conclusion and Suggestions

In today's digital environment, domain names are seen as vital business assets. They play an important part in building brand value, consumer loyalty and popularity. With the growing business and commerce activities online, the threat of cyber-attacks has also grown exponentially. Cyber squatters target and attack the identity of well-known businesses so as to garner undue rewards by use or sell of these fraudulent websites. Considering the rise in Cyber-squatting cases in the recent years it is pertinent that strong measures are taken to counter this global menace as this misrepresentation not only infringes the rights of the legitimate trademark holders but also creates confusion in the general public.

In a country like India, where there is a lack of digital literacy there is an urgent need to have strong and specific Cyber and Intellectual Property laws as the current Trademark Act, 1999 and the Information Technology Act, 2000 are not adequate to prevent the cyber squatters from causing fraud to the general public and targeted businesses. There are certain recommendations that the authors would like to suggest in order to curb the situation, which are as follows:

- In India, Trademark Act, 1999 must include a chapter about "cyber-squatting" with stringent damages in case of contravention of the law. This would require amendment in the explanation of Section 2(m) to expressly include "domain name" in the definition of "mark".
- Under Trademark Act, 1999, ambit of penalty in case of infringement of copyright/trademark law must be widened to include online access to goods and services as well as public information through a website.[39]
- It is recommended for India to impose a strict liability with severe penalties in case of cyber-squatting. This is a great learning from the USA which has established legislations such as Anti-squatting Consumer Protection Act.[40]
- It is advised to resolve jurisdictional issues for better execution of laws and the binding nature of the decision.
- To avoid frivolous and wrong claims of domain names, registration must be cancelled, and such acts done in bad faith must be dealt with utmost strictness.
- Online mediation and expedited arbitration are a great way to resolve conflicts over the domain name disputes. This would be governed by rules of the WIPO Arbitration and Mediation Centre which will have a binding nature on the decision. The same would be reiterated as part of the application process when the companies/individuals buy their second level domain name
- Administrative panels should be set up to regulate the domain name challenges and administer the allotment of second level domain names which tend to be identical or closely similar to names which could violate the existing intellectual property rights and put the legitimate owners at huge losses.[41]
- All the second level domain names must be published on its registration, much like a trademark application process. This would ensure transparency and avoid deceit and disputes.
- In case of instances of "identity theft" wherein misuse of famous celebrities and personalities is done, it is advisable to amend Section 66 of the Information Technology Act, 2000 and Section 469 of the Indian Penal Code, to execute the criminal liability created by the act of cyber-squatting. This would facilitate the filing of FIR against the perpetrators and penalize them for hacking of computer systems or for unauthorized extraction of data from computer systems

[39] Trademark Act, 1999, § 103.

[40] Anti-cyber squatting Consumer Protection Act (ACPA), 1999

[41] WIPO, *Cybersquatting Case Filing Surges During COVID-19 Crisis,* [June 2020], `https://www.wipo.int/amc/en/news/2020/cybersquatting_covid19.html` (last visited on 10 September 2020).

as they had forged the electronic records to harm the reputation of others with a mala fide intent. Thus, eliminating the menace of cyber-squatting is the need of the hour not only for preventing fraudulent acts, but also to promote and protect businesses in this growing age of digitisation and globalisation.

# An Analysis of the Essentiality of Constitutional Morality in Contemporary India

*Ishika B Prabhakar*[1]

## Introduction

Constitutional Morality has not been defined in the Constitution but inferences to its meaning have been made through judgements. One such judgement would be the Sabarimala case,[2] wherein the Court stated the definition of constitutional morality in the verdict. It stated that,

*"We must remember that when there is a violation of the fundamental rights, the term 'morality' naturally implies constitutional morality and any view that is ultimately taken by the Constitutional Courts must be in conformity with the principles and basic tenets of the concept of this constitutional morality. . . ."*[3] . The aforementioned statement was made with reference to Article 25(1) of the Indian Constitution. The doctrine of constitutional morality was exercised as opposed to the doctrine of essentiality, the latter doctrine that was espoused in the ***Shirur Mutt*** case[4] by a seven-judge Bench of the Supreme Court wherein the Court took upon the task of deciding and bifurcating between the essential and non-essential practices of religion. The Judiciary went against the autonomy of customary religious practices and hence, the judgement was highly criticized due to the deemed usage of constitutional morality as judicial overreach. Instances of constitutional morality is imperative despite the popular opinions of society as the Judiciary is the only body capable of ensuring an individual's Fundamental Rights when the State fails to do so through the laws it enacts.

## (I) An Analysis of Several Cases and Legislations in Relation to the Juxtaposition of Judicial Activism, Judicial Restraint and Constitutional Morality

Fundamental Rights have been conceived in a liberal spirit and seek to draw reasonable balance between individual freedom and social control.[5] The essence of the Constitution lies in the spirit with which the Constituent Assembly conceived Fundamental Rights. Judicial Activism in itself is a constant battle between granting that individual freedom or withholding it for the purpose of social control.

Judicial activism can do the society a great service and disservice, the same can be analysed below.

In the case of ***AK Gopalan v. State of Madras***,[6] a very narrow view was taken by the Majority of the Bench. The case that had an opportunity to change the course of how the system viewed a person's Fundamental Rights and liberty, fell short to an insurmountable degree at the time. The pressure of the current Indira Gandhi's Government influenced and weighed heavily on this decision. Justice Chandrachud and Justice Bhagwati have stated and addressed their regrets over the decision of the case.[7] What would have been viewed as Judicial restraint being exercised by the Judges that made the decision to maintain and keep the law at status quo at that time, can now be understood to be a false notion. Judicial activism is when

[1] BA LLB (3rd year), Christ (Deemed to be University), Bangalore.
[2] Indian Young Lawyers Association v. State of Kerala, 2018 (8) SCJ 609
[3] Ananya Chakravarti, *Constitutional Morality in the context of the Indian Legal System,* 3 INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES 64, 66-67 (2020)
[4] The Commissioner, Hindu Religious Endowments, Madras v. Shri Lakshmindar Thirtha Swamiyar of Shirur Mutt, 1954 SCR 1005
[5] M. P Jain, *Indian Constitutional Law,* 878 (8th ed. 2018)
[6] AK Gopalan v. State of Madras, AIR 1950 SC 27
[7] Maneesh Chhibber, *35 years later, the former Chief Justice of India pleads guilty,* THE INDIAN EXPRESS, (Sep 16th, 2011), http://archive.indianexpress.com/news/35-yrs-later-a-former-chief-justice-of-india-pleadsguilty/847392/

a Judge uses his/her knowledge to prevent foreboding circumstances that negatively affect the society as a whole. In the aforementioned case, however, considering the political pressure on the Judiciary, the decision can be said to have been made through the exercise of Judicial activism that did not effectively help India progress as a society, it only helped the Judiciary maintain a harmonious relationship with the incumbent's Government at the time. This case is an example of the disservice that Judicial activism does to the essence of our Constitution.

In ***Maneka Gandhi v. Union of India***,[8] Justice Chandrachud and Justice P.N Bhagwati made amends for their decision in the A K Gopalan case that adversely affected the plight of the people. Article 21 which was in its dormant state at this point in time for nearly three decades sprung back to life by the decision made in this case. Justice Iyer J stated how formative and seminal the drafting of Article 21 is by comparing it to the magna carta of protecting the life and liberty of people.

Justice Bhagwati also stated and regarded Article 21 of the Constitution in a similar way as he evaluated it to be an important part of a democratic society. This case was a key factor that galvanized the transformative Judicial stance on the importance of the core Constitutional principles, slowly refurbishing the existing laws on freedom, liberty and equality. The emphasis on constitutional values that led the judges to make this historic and progressive decision can be argued to be constitutional morality. Judicial activism can go either way, that is, it can adversely affect the society or bode well for the society as a whole. Constitutional Morality on the other hand, is akin to having a premonition about foreboding circumstances that serve as an indication to the dangers of a current norm or law and its adverse effect on future societal predicaments. The Judges of the Courts are revered and put on a pedestal to make decisions with foresight and wisdom. Viewing Constitutional Morality as arbitrary is akin to viewing the whole Judicial System as inadequate and arbitrary as Constitutional Morality is nothing more than the Constitution's looming presence over the sensibilities of the Judges at all times. Judges are humans after all, subjectivity does somehow seep through their ironclad objective dealings with Judicial matters but that is known as Judicial Activism. A decision fuelled by a Judge's views cannot invalidate a decision or deem it to be arbitrary if the decision is made with the Constitution acting as the conductor of the same. The purpose of the doctrine of Constitutional Morality is the sole adherence to the principles of the Constitution and the goal of the same is to uphold and preserve those said democratic principles for the welfare of the society.

In ***Balaji v. State of Mysore***,[9] the Court espoused that Caste cannot be the only determinant of what constitutes as backwardness and that the right to equality and equal protection of law must still be maintained whilst addressing protective discrimination. This is an example of how Judicial activism developed in India to have a positive effect on society.

Judicial Review in itself is a form of Judicial activism as its priorities always lies with the betterment of society and the correction of current laws to strengthen that agenda. Public Interest Litigations is also a form of Judicial activism as it purports the aforementioned ideals of what constitutes as Judicial activism.

In ***Common Cause v. Union of India***,[10] the Apex Court took cognizance of passive euthanasia through living wills which can be communicated by the patients in case of terminally ill diseases. It recognized the personal autonomy of people with chronic diseases and their right to a dignified death and autonomy, which is an augmentation of the right to life as given under Article 21, which is also inclusive of personal liberty. This is what entails Constitutional Morality, the ability to understand and show empathy for the people of this country.

[8] Maneka Gandhi v. Union of India, (1978) 1 SCC 248
[9] Balaji v. State of Mysore, 1963 AIR 649
[10] Common Cause v. Union of India, (2018) 5 SCC)

Constitutional Morality on the other hand, is usually in a latent state. It has been mentioned in the judgement of ***Kesavananda Bharati***,[11] wherein the Judges laid down that the Preamble is a part of the Constitution. Constitutional Morality from a broad perspective is essentially what the Preamble constitutes. The aforementioned decision accentuates the importance of the doctrine of Constitutional Morality as the act of using the same to discern the issues of a dispute in order to deliver verdicts that ensures Judicial justice, is nothing but delivering verdicts that are in consonance with the sacred pledge of the Constitution, that is, the Preamble. Constitutional morality can be stated as a way in which the Court enacts laws that is applicable beyond it's time, in the interest of the public.

In the case of ***Justice K. S. Puttuswamy v. Union of India and others***,[12] the Apex Court affirmed the Right to Privacy of individuals to be protected as a Fundamental Right as under Articles 14, 19, and 21 of the Constitution.

This is still considered to be Judicial overreach by several people of the society. The aim of Constitutional morality is to ensure social justice and Constitutional evolvement. In most cases, the social morality of a particular society will not be in consonance with that of the need of Constitutional morality, however, Constitutional morality takes precedence over the majority opinions at the time as it is the duty of the Court to be forthcoming and prospective in nature.

## (II) Jurisprudential Analysis of Constitutional Morality

Constitutional Morality can be understood to be closely related to Jeremy Bentham's concept of Utilitarianism and John Stuart Mill's concept of the harm principle. Constitutional Morality is built and derived from public morality. The prevailing public morality of a society largely influences the Court's decisions whilst they exercise Constitutional morality. The concept of Utilitarianism determines the ethical nature of an action on the basis of the same producing the greatest good for the greatest number. Homosexuality was decriminalised in India because the majority of society thought it to be necessary, that is, the greatest number of people considered it to be overdue, hence, decriminalising the same was considered to be the greatest good. The harm principle is determined on the basis that a person's liberty can only be restrained if the exercise of the same causes harm to another person. According to the harm principle, an individual's freedom and liberty cannot be curtailed based on moralistic and paternalistic principles. In the case of Constitutional morality and the exercise of the same to decriminalize homosexuality, it was decided so by the Court because homosexuality does not cause harm to another human being. Questions of moralistic principles does not factor in whilst determining what actions are harmful, hence, the hurting of people's sentiments cannot be a contributor in the consideration of homosexuality being an offence punishable under law.

## (III) The Need of Constitutional Morality and the Application of the Same

Constitutional Morality has to understood to be more than a utopian ideal. The inalienable rights given under the Constitution to the citizens of India is proof of the agenda that Constitutional Morality is an attainable goal, and the exercise of the same will bring about Judicial justice and the same has been espoused in detail in Part III, IV and V of the Constitution.

The ***Sabrimala*** case is an apt example of the exercise of Constitutional morality in opposition to the views of society's majority. The society as a whole considered this to be Judicial overreach as they went beyond their authority to decide something that infringed upon people's customs and beliefs. The Court is anything but an ecclesiastical authority type figure and hence, this did seem out of touch from their jurisdiction. However, in pursuance of Constitutional Morality that seeks to be progressive even in the face of opposition, the decision did not fall short of the aforementioned ideals.

[11] Kesavananda Bharati v. UOI, AIR 1997 SC 1461

[12] Justice K S Puttuswamy v. Union of India and Ors, (2017) 10 SCC 1

[13] Apurva Vishwanath, *Sabarimala majority ruling: Review pending, scope widened,* THE INDIAN EXPRESS, (Nov 15th, 2019, 9:55AM), `https://indianexpress.com/article/explained/simply-put-review-pending-`

This decision has opened doors to decriminalize and amend other discriminative religious customs in the future.[13] Constitutional Morality has to be understood to be more than a utopian ideal.[14] Any inalienable right given under the Constitution to the citizens of India is proof of the agenda that Constitutional Morality is an attainable goal. The tussle between social morality and that of Constitutional morality makes for productive and good governance.

In the case of ***Navtej Singh Johar***,[15] the verdict of this case is the embodiment of Constitutional principles, the Court analysed why this law was discriminatory and fell back on the core principles of the Constitution to right a wrong law, this is essentially what constitutes as the use of Constitutional Morality to make a decision.

In the case of ***Joseph Shine v. Union of India***,[16] the old-fashioned and obtuse law under Section 497 of the Indian Penal Code, which espoused that it is an offence for a man to have sexual relations or intercourse with the wife of another man without the consent of the same, was held to be unconstitutional on the ground that this law only existed to recognize and consider the wants and needs of the husband at the cost of disallowing the wife to be in control of her own sexuality, and by making it a norm to have women ask their husbands for agency rather than recognising that women give themselves sexual agency and don't require permission from their husbands for the same. The norm of women being the property of their husbands was debunked and held to be against the constitutional ideals of dignity and equality. The basic tenets of Constitutional Morality are exercised to deliver that verdict.

In the case of ***Shreya Singhal v. Union of India,*** the Judges stated that dedication and adherence to the Constitution is very much a tenet of Constitutional morality[17] as they struck down Section 66 A of the Information Technology Act, 2000,[18] deeming it to be unconstitutional.

In the case of ***Shayara Bano v. Union of India***,[19] the Apex Court took cognizance of the predicament that the practice of giving a divorce through talaq-e-biddat cannot be considered as an essential religious practice as under Article 25 of the Constitution. The Court rightfully criminalised this draconian religious practice, this decision is the testament to the fact that the application of Constitutional Morality has shown great promise in reaffirming the Fundamental Rights of citizens.

In the current scenario, **the Transgender protective legislation**[20] passed by the Government has several discriminatory provisions. This legislation is extremely regressive, for example, it demands proof of a gender reassignment surgery for a person to be considered as transgender. It ironically provides barely any protective measures for trans genders and intersex citizens in spheres such as education, employment and healthcare. Several provisions of the Act have been contended to be discriminatory and the legislation has been challenged before the Supreme Court. This decision can be anticipated to yield two kinds of results: to either surge with the current, prevailing social morality of the public or it can and will do justice to this minority through the exercise of Constitutional morality.

**The Unlawful Activities (Prevention) Amendment Act, 2019,** Section 35 of the Act was amended to and give the Central Government the power to label an individual as a 'terrorist' under Schedule IV of the Act. Prior to the Amendment, only organizations could have been designated in this manner. This is the result of an extremely despotic incumbent Government grappling at all means necessary to wield its power to make arbitrary decisions so as to alter the

scopewidened-in-sabarimala-verdict-6120277/

[14] Chakravarti, *Supra note* 4, at 5.

[15] Navtaj Singh Johar & Ors v. Union of India, (2016) 7 SCC 485

[16] Joseph Shine v. UOI, 2018 SC 1676

[17] Shreya Singhal v. UOI, AIR 2015 SC 1523

[18] Information Technology Act, 2000, § 66 A

[19] Shayara Bano v. UOI, 2017 (9) SCC 1

[20] The Transgender Persons (Protection of Rights) Act, 2019, § 2(k), § 18

society and silence the dissenters into submission. In this amendment, there is no provision for the accused to be heard before a Court of law, it criminalizes a person without due process. Should these provisions be challenged in a Court of Law, the Court must view this matter in the purview of Constitutional Morality so as to impugn its validity.

Another instance of the Courts exercising Constitutional Morality over the years are in the matters related to marriage dissolution and live-in relationships according to the **Hindu Marriage Act, 1955**,[21] in predicaments where a cooling period of six months, being Judicial Separation, is usually granted for spouses who could use some time apart in order to rethink ending their marriage. This period, however, in cases when the spouses are beyond a reparable relationship, the Court forgoes the same and grants a divorce. This action goes against the social morality as India is extremely conservative in terms of the sacredness of marriage, and how spouses must make every effort to stay together.[22] The Judiciary has also endorsed the view that not all relationships need to come out of holy matrimony and are becoming more agreeable to live-in relations through the several decisions made over the past few years.[23] In the pursuit of Constitutional Morality, however, these archaic norms are undone in order to free the people shackled by those very ideals.

In light of recent turbulent times that India has faced with the Citizenship Amendment Act, 2019 and the farm bills recently passed in the Parliamentary sessions of 2020, it is apparent that this country is in desperate need of an objective, impartial, and strong voice to reassure the people of the Country that the Constitution and rule of law still remain the sovereign voice and influence over all matters. Every issue in this country is stemming from a deeprooted polarisation on the lines of religion and caste. The CAA is already a law that is published in the Gazette of India, the Court needs to adjudicate on challenges against the same with the ideals of the Constitution in mind. Several petitions will be filed to challenge the said bills if it becomes a law without taking into consideration the grievances of the farmers. If the matter does reach that level, it is up to the Judiciary to right the wrongs of the Government. A strong, unwavering voice that silences despotism and adjudicates matters within the purview of Constitutional Morality is the need of the moment.

## (IV) The Naysayers of Constitutional Morality : Their Point of View

The opposing view of the essentiality of Constitutional Morality is that too much of the same will lead to arbitrary and unlimited power bestowed upon one organ of the Government, that is, the Judiciary. The Attorney General of India, K.K Venugopal, has stated that if the use of Constitutional Morality continues, the destination will be hard to ascertain. He also stated that it's a dangerous weapon that can be wielded by the Judiciary.[24] The use of Constitutional Morality can only lead to one destination and that is a more tolerant society. There can never be too much of Constitutional Morality as the exercise of the same is done under circumstances wherein the Judiciary is trying to reinstate the essential character and principles of the Constitution into current norms and laws that have been led astray from those essential ideals.

## Conclusion

After an analysis of what constitutes as Constitutional morality and what constitutes Judicial overreach, several times, they are synonymous in nature. In order to get ahead with the times of new age, several old customs and practices have to be forgone, and that in itself will be considered as Judicial Overreach. It should not be considered as assimilation or the loss of the Indian character, tradition and identity, it should,

[21] Hindu Marriage Act, 1955, § 10, § 13, § 13 B (2)

[22] Dr. Ashutosh Hajela, *Legal Realism Via Constitutional Morality in India: A Critical Analysis,* SOCIAL SCIENCE RESEARCH NETWORK 39, 49-52 (2019)

[23] Indra Sarma v. V. K. V Sarma 15 SCC 755 (SCC:2013); D Velusamy v. D. Patchaiammal, 10 SCC 469 (SC:2010)

[24] Apoorva Mandhani, *"Constitutional Morality: A Dangerous Weapon, It Will Die with Its Birth: K. K Venugopal",* LIVE LAW, (9th Dec, 2018, 7:14PM), https://www.livelaw.in/constitutional-morality-a-dangerousweapon-it-will-die-with-its-birth-kk-venugopal/?infinitescroll=1

instead, be considered as a revision to the Indian character and essence. In a world wherein artificial intelligence taking over humans in the near future has become a known and accepted reality, it is a crime for the Courts to deny the efficacy of the doctrine of Constitutional Morality. Keeping that in mind, the ill-defined doctrine of Constitutional morality and the lack of Jurisprudential backing deems it to be difficult to defend against naysayers. India is in dire need of a jurisprudential backing of Constitutional morality so as to solidify the basis for the same without the smokescreens and ambiguity. However, when decisions are made and judgements are given through the prism of Constitutional Morality, the current archaic norms and practices are revamped through a new lens, which then helps reduce over criminalization and betters policy-making. Constitutional morality is largely based on public morality, but when the prevailing public morality is against Constitutional principles, the Courts exercise Constitutional morality to protect the minorities from the prevailing, vast majority opinion. Sedition in India is wielded as a powerful weapon against anyone with a difference of opinion from that of the Government in power. The over criminalization of sedition offences can only be rectified by the Courts through the adjudication of the same through the prism of Constitutional morality. The only change that can be brought about to laws that are largely misused and that advertently leave the people without any power and protection, is through the Courts that remain impartial and change the dialogue and unfair use of legislations through the exercise of Constitutional morality by the highest authority, that is, the Apex Court. If the Courts, however, are biased, no real change can be brought about. Former Chief Justice, Ranjan Gogoi, appointing Judges himself for an in-house inquiry into the allegations of sexual harassment against him and then disregarding the complainant using his platform is an example of how bias can permeate even through the Apex Court. Nothing about the whole ordeal was fair and impartial. Instances as such, ruin the sanctity and significance of the Supreme Court and it makes people lose faith in the Judicial system and its power to deliver justice. Hence, the Government in power can influence and sway the Courts to feed their agenda, but the Courts must remain impartial. The people deserve more than the Courts providing old solutions to new problems. The precedents aforementioned have guided India into becoming more open and accepting and a lot less obtuse and despotic, but the battle has not been won yet. India is considered to be partly free and an electoral autocracy as of 2021 by the released USA and Swedish reports respectively. Even if the relevance and authenticity of the same is questioned by various naysayers, the important aspect is that the world is taking notice of the grievances of people that our own Government is tone deaf and blind to. We as a country have a long and perpetual trudge ahead of us. The transparency and insightfulness of the Judiciary will be the focal point in affirming and assuring us that the necessary change required for India to blossom into what our forefathers envisioned for us as a tolerant society, will and can be achieved. The transformative effect of the Maneka Gandhi case in the 20$^{th}$ century set the tone for the way in which matters were adjudicated in a Court of Law after the same, a revamping of that effect is gravely essential by the polarized and divided India of the 21$^{st}$ century.

# Bio-Terrorism – A Brief Legislative Scrutiny

*Smt. Jayamol P.S[1] and Dr. Rangaswamy.D[2]*

*"Wars can no longer contain the population, so biological terrorism will become the weapon of choice." – David Icke*

## Introduction

Terrorism, by all means, challenges the stability of societies and the peace of mind of the people living in those societies. It is an age-old phenomenon that has evolved into an international network and threatens international peace, democracy, and development. In the modern era, the impact of terrorism is not limited to a particular region. With the advent of technology, access to resources and information, the beginning of the 21st century can be treated as an era of globalized terrorism.[3] The new terrorism of today is characterized by the threat of weapons of mass destruction. That is evident in the causalities and destruction that happened in the terrorist attacks all across the globe in the past few years. The advent of technology, biotechnology, microbiology, molecular chemistry, and genetic engineering has opened new vistas for mankind. But, on the other side, it has some adverse effects in the form of manufacture and proliferation of biological and chemical weapons. Modern technology, innovative sources of funding, and world network connections have given terrorists extraordinary capabilities that were demonstrated in different ways.[4] Consequently, countries are forced to spend the kind of intellectual, physical, and other resources in monitoring and assessing the activities of the various terrorist organizations around the world. The harm caused by the international terrorist movement has been described as 'transnational harm' that poses a serious challenge to national and international security.[5] Terrorist groups have generally sought to achieve their objectives with small arms and conventional explosives. This tendency may be changing, however, with the emergence of more deadly forms of terrorist activities.

Biological terrorism is rampant than before and more threatening than any other explosives or chemicals. Preventing or countering bio-terrorism will be extremely difficult. The process for creating biological weapons is now available on the internet and anyone with modest finances and basic training in biology and engineering could develop an effective weapon at little cost.[6] The terrorist groups vowed to destruct, might deliberately produce and disseminate disease agents that are contagious in humans, such as pneumonic plague bacteria or various types of haemorrhagic fever viruses, to trigger widespread epidemics that would undermine social structures.[7] The outbreak of corona virus in 2020 has caused unprecedented consequences all across the globe. Still, discussions and deliberations are going on relating to the source and nature of viruses leading to the suspicion that it is a bio weapon developed by China.

## Meaning and Definition of Bio-Terrorism

The term 'terrorism' doesn't have a widely accepted definition. However, what is commonly accepted is its efficacy to penetrate terror and thus to pressurize the people. Bio weapons and chemical weapons are often used together. But the Chemical warfare agents are

[1] Assistant Professor, Vaikunta Baliga College of Law, Udupi
[2] Assistant Professor, Karnataka State Law University, Hubballi
[3] Gus Martin, Terrorism and Homeland Security3 (2011).
[4] Shashi Shukla, Emerging New Trends of Terrorism: Challenges Before the United Nations The Indian Journal of Political Science September 1,2020,9.30PM. http://www.jstor.com/stable/41856202
[5] *Id.*
[6] L.R.Reddy, Bio-Terrorism As A Public Health Threat,23,( 2002).
[7] Jonathan B.Tucker, Chemical/Biological Terrorism: Coping with a New Threat, Politics and the Life Sciences, Sep.1,2020, 9.30 PM http://www.jstor.com/stable/4236227.

manmade poisons, whereas biological warfare agents are microorganisms and naturally occurring toxins that cause illness or death in people, livestock, and crops.[8] Biological weapons are so deadly that it can destruct all living organisms.[9] Biological warfare agents are the type of organism or toxin used in a weapons system, which is dangerous to humans, plants and animals. Normally, there are five different categories of biological agents that could be used in warfare or terrorism. These bio-agents include[10] bacteria, rickets, viruses, fungi, toxins etc.

Bioterrorism is the dissemination of biological agents[11] into the population by an individual or group intended to cause severe illness injury or death. As mentioned above, the diseasecausing organisms like bacteria, viruses, fungi, or rickettsia or poisons or toxins can be used in biological weapons. These bio agents can be modified from their original form to make them more adaptable for using as weapons.[12] The United States, Biological Weapons AntiTerrorism Act of 1989, defines biological agents. These microorganisms are varied in nature and number. It includes bacteria, viruses, fungi, rickettsia or protozoa or infectious substance, or any naturally occurring, bioengineered, or synthesized component of any such microorganism or infectious substance. It is capable of causing death, disease, or other biological malfunction in a human, an animal, a plant, or another living organism.[13] It is evident, that the agents can be used as bio-weapon by the extremists and terrorists. India's Public Health (Prevention, Control, and Management of Epidemics, Bioterrorism, and Disasters) Bill, 2017 defines bio-terrorism.[14] According to which, bio-terrorism is the purposeful adaption of biological agents to cause disease or death of human beings or any animal or plant through the dissemination of microorganisms or toxins through any medium. The slow and steady destructive capacity of bio-weapons have got wider acceptance and it is acknowledged by the world community. That is the main threat involved with bio-weapons.

## Background of Bio-Weapons

The long and un chequered history of bio-weapons show that throughout the ages, all across the globe, there have always been efforts to use germs and disease as weapons. The indigenous South Americans deliberately used plant-derived arrow poisons such as curare and also toxin from poison. This is used mainly for hunting.[15] The first bio-weapon ever used in the history was small pox which was adopted by the British army during the French and Indian War. The British gave to the Native Americans clothes that are used by the British people who had infected with small poxes.[16] The result was that the widespread outbreak of small pox and British army's victory in the battle. The development and applying of bioweapons were common during the world wars where it was indiscriminately used by all nations. During World War I, Germany used horses succumbed with anthrax disease. Later, this method was adopted by other nations also. There were instances of using arthropods and

[8] *Id.*

[9] https://www.unog.ch/80256EE600585943/(httpPages)/29B727532FECBE96C12571860035A6DB?OpenDocu ment

[10] Bacteria-single-cell organisms that cause diseases such as anthrax, brucellosis, tularemia, and plague.

[11] In 1969, the U.N. General Assembly

[12] https://www.unog.ch/80256EE600585943/(httpPages)/29B727532FECBE96C12571860035A6DB?Open Document.

[13] Durward Johnson and James Kraska, Some synthetic Biology may not be covered by the Biological Weapons Convention,(July24..2020, 9.00 AM).

[14] Sec. 2(1)(b) Public Health (Prevention, Control, and Management of Epidemics, Bioterrorism, and Disasters)Bill, 2017.

[15] *Supra n.5.*

[16] Weapons of mass destruction, https://www.globalsecurity.org/wmd/intro/bio_smallpox.htm#: :text=The%20outbreak%20of%20 smallpox %20 in%

[17] Manas Sarkar, Bio-terrorism On Six Legs: Insect Vectors Are The Major Threat To Global Health Security, 2 Public Health (September3,2020,9.45PM) http://www.webmedcentral.com/article_view/1282

vector-borne pathogens as weapons in wars.[17] Likewise, many instances of the manufacture, use, and proliferation of bio-weapons were present in history. As a result, to prevent the indiscriminate use of bio-weapons the Biological Weapon Convention (BWC) has been adopted. The present outbreak of the Corona virus points the finger towards the Chinese labs. It can be expected that the coming years will reveal the exact fact behind the present pandemic.

## Impact of Bio-Weapons

The intentional use of pathogens or other biological agents for terrorism has proved highly effective and cause damage on a larger scale than "traditional" terrorist attacks. Keeping the societies under severe threat, it could accelerate fear and showcase distrust far beyond those communities immediately affected. Ongoing biological research programs for both defensive and offensive purposes have attained highly advanced stages in many countries like Russia, United States, China, Britain, Iran, Iraq, Canada, etc.[18] The impact of bioterrorism would be more when compared with the traditional forms of terrorism.[19] It affects the psychology of people in large numbers. The source cannot be identified and the impact cannot be assessed easily which puts the laymen to great trauma and mental stress. Another important obstacle is the manufacture, storage, sale, and use of these bio-weapons. It is not so easy to locate who all are engaged in the manufacture or uses this weapon.

It is a general notion that a chemical release or a major explosion is far more manageable than the biological challenges posed by smallpox or anthrax. In a biological attack, the consequences could be more devastating. For eg., an anthrax attack might produce casualties numbering hundreds or thousands because of their stability and infectious nature.[20] After an explosion or a chemical attack, the worst effects of the incident can be easily overcome. The dimensions of the catastrophe can be defined, the toll of injuries and deaths can be ascertained. But in bio-weapons each day new cases can be expected and in new areas which highlights the destructive capacity of the bio-weapons.[21] The ascertainment of catastrophe is the most difficult part of the bio-weapon. The impact would be slow and steady, but it contaminates wider areas and a large number of people across the country and later across the globe. The bio-agents are difficult to find out as they are virtually undetectable and can be handled with relative ease by properly trained persons. They are highly contagious with a short and predictable incubation period and infective in low doses. The well-planned perpetrators have all means to protect or treat their forces and population against these infectious agents or the toxins.[22]

## Bio-weapons and public health

Almost all of the materials and items of equipment used to cultivate Bio agents have commercial applications and are easily available in the market. It is being used in the manufacturing of food products, animal feed supplements, drinks, bio pesticides, vaccines, and pharmaceuticals. Seed cultures of pathogenic bacteria such as anthrax can be purchased from commercial vendors by sending a request letter on the letterhead of a university or research institute.[23] This easy availability makes it the main reason behind public health issues. One of the main features of the bio-agents is that it is invisible, tasteless, and carries no smell of its own. Therefore, no reliable biological detection and warning systems are currently available. Apart from that, the incubation period for the bio-agents to attack the body after infection may extend depend-

[18] Randall D.Kats, Friendly Fire: The Mandatory Military Anthrax Vaccination Program,1836,50 Duke Law Journal(2000).

[19] Because of the ability of pathogenic microorganisms to multiply rapidly within the host, small quantities of a biological agent if widely disseminated through the air as a respirable aerosol can inflict casualties over a large area

[20] Leonard A.Cole,Countering Chem-Bio Terrorism: Limited Possibilities,15politics and the Life Sciences, (September 2,2020,8.00PM) https://www.jstor.org/stable/4236233.

[21] Supra n at.4.

[22] Piyali Sengupta & Ayushi Agrawal, Emerging Threat of Bio-Terrorism: An International Perspective,3 Journal of Politics & Governance,82( 2014).

[23] Jonathan B.Tucker, Chemical/Biological Terrorism: Coping with a New Threat,15 Politics and the Life Sciences,183(August 12, 2020,(.00 PM) http://www.jstor.com/stable/4236227.

ing on the bio-agent. Slowly the number of infected persons may increase from hundreds to thousands.[24] The release of these agents could go undetected and unnoticed for many days and weeks. The release of bio-agents would then be followed by mass illnesses, necessitating the first line of response by the public health community.[25] The application and use of these bio-weapons are manifold. It has been widely applied by the military forces and other non-state entities for political assassinations, it can cause economic imbalance through the adverse effect in livestock, environmental degradation, and can also be a reason for the different kinds of diseases, fear, and friction among the masses.[26] In a nutshell, this invisible, undetected agent can be the root cause behind the widespread hardships and sufferings of the infected people. Biological warfare agents would likely to cause significant impacts on the medical care system. Special medications or vaccines not generally available in standard pharmaceutical stocks would be required.[27]

## Legal Framework against Bio-Terrorism

The terrorists try to attain legitimacy through the threat or act of large-scale violence, and thereby achieve the ability to impose their values upon other countries.[28] Biological weapons and bio-agents are prevalent in societies worldwide. International Organisations have successfully identified and addressed the problems well in advance and tried to restrict the use of bio-agents.

## International Conventions

International Conventions reflect the general notions of the state parties. Since long way back itself bio-terrorism which was prevalent worldwide since time immemorial had been taken note of by the world community. It was culminated in the form of Geneva Protocol

## Geneva Protocol 1925

Geneva Protocol[29] declares that Bio-weapons are prevalent throughout history among nations and there was a dire need to control it. It prohibits the use of biological weapons. But it has not restricted the possession and development of biological or chemical weapons which was the main drawback of the protocol.

## Biological Weapons Convention (BWC), 1972

The 'Convention on the prohibition of the development, production, and stockpiling of bacteriological (biological) and toxin weapons and on their destruction 1972', (BWC)[30] is the first and the only convention prevailing against the prohibition of biological weapons. The main objective as enshrined in the preamble of the BWC is to achieve progress towards complete disarmament by prohibiting all types of weapons of mass destruction.[31] The convention intends to achieve the following objectives: -

*Complete prohibition of bio-weapons:* The convention is very specific that it intends to eradicate biological weapons or such type of bacteriological weapons being used against people. The parties to the convention affirmed that development and production of bio agents only for the prevention of diseases, protective or other peaceful purposes. They undertake not to develop, produce or stockpile microbial or other biological agents for other objectives. It explicitly prohibits

[24] *Id.*

[25] Ronald M. Atlas, Combating the Threat of Biowarfare and Bioterrorism: Defending against biological weapons is critical to global security, Bio Science, Volume 49, Issue 6, June 1999, Pages 465–477,(available at https://academic.oup.com/bioscience/article/49/6/465/229529#94371792 (last accessed on 1.8.2020).

[26] https://www.unog.ch/80256EE600585943/(httpPages)/29B727532FECBE96C12571860035A6DB?OpenDoc ument )last accessed on 1.8.2020.)

[27] *Supra n* at.18

[28] Scott Carry, The Tipping Point: Biological Terrorism, 3 journal of Strategic Security,13 (September 3, 2020, 9.00 PM) http://scholarcommons.usf.edu/jss/vol2/iss3/2.

[29] It was registered in *League of Nations Treaty Series* on 7 September 1929. https://www.un.org/disarmament/wmd/bio/1925-geneva.

[30] Signed at London, Moscow, and Washington on 10 April 1972. Entered into force on 26 March 1975.

[31] *See the preamble of the BWC.*

the use of weapons, equipment using such bio agents or toxins for commercial or armed purposes.[32]

*Destruction of Biological agents* - The parties to the Convention undertake to destroy or to use all biological agents in their custody, jurisdiction, or control immediately or within 9 months of entry into force of the convention, for peaceful purposes.[33]

*Non-transfer of biological weapons* - The parties to the convention are prohibited from transferring biological agents, toxins, weapons, or equipment[34] It also prohibits the development, production and stockpiling, acquisition or retention of the biological agents.[35]

*Cooperation among the Members* - It also prescribes cooperation and consultation in solving the problems about the application of the convention. It has to be undertaken within the framework of the United Nations.[36] Breach of obligations of the convention can complain before the Security Council and for that matter; cooperation has to be extended by the state parties. The results of the investigation have to be informed to the state parties by the Security Council.[37] It also encourages the development and application of scientific discoveries for peaceful purposes. For this, the members can cooperate alone or in connection with other organizations. While implementing the Convention it shall not hamper the economic or technological development of state parties to the convention.[38]

*Amendment procedure and review :* Amendments can be done with the acceptance of majority of state parties.[39] For the review of the procedures of the convention, after five years of the entry into force of this convention, a meeting of state parties is recommended in the convention in Geneva to see that the preamble and other provisions of the conventions are realized.[40] Since the Convention shall be of unlimited duration, the state parties to the convention can go out of the convention, if it jeopardized the supreme interests of its country.[41]

A review conference was held in Geneva for complying with the provisions enshrined in the BWC. Moreover, the state parties recognized that, parties to the Convention should ensure mutual co-operation for peaceful use of bio-weapons which would help to reduce the complications. Such an objective made them to agree on the annual submission of confidence-building measures regarding the areas of research centres and laboratories, and national biological defence research and development programmers, outbreaks of infectious diseases and similar occurrences caused by toxins; encouragement of publication of results, and promotion of the use of knowledge; active promotion of contacts, legislation, regulations and other measures.[42]

## Loopholes in BWC

Even though the BWC had some novel ideas for the proliferation of bio-weapons and total disarmament, there are some areas to be pointed out. The BWC does not contain any provision for monitoring the members about the compliance of the provisions. Still, in many parts of the world, among the member countries themselves, experimentations in bio-agents are going on with experts in these areas. As declared by former President of Russia, Boris Yeltsin, even after a signa-

[32] Article 1.of *BWC.*
[33] *Id.*. Article II.
[34] *Id.*. Article III.
[35] *Id.*. Article IV.
[36] *Id.* Article V.
[37] *Id.* Article VI (1).
[38] *Id.* Article X (1)
[39] *Id.* Article XI.
[40] *Id.* Article XII.
[41] *Id.* Article XIII (1).
[42] *Id.*.
[43] Barry R. Schneider, Biological Weapons Convention –International agreement, (Septtember2,2020,9.30PM) https://www.britannica.com/event/Biological-Weapons-Convention.

tory of BWC, the Soviet Union engaged in a secret biological weapons program.[43] A biological weapons program doesn't require huge plants or a large number of personnel. That makes it difficult to find out the violators of the BWC among state parties even after closed monitoring. The state parties are still ignorant or less concerned with the modus operandi of bio terrorists. The outbreak of corona virus has given a renaissance to the BWC provisions and its impact among world countries.

## Legislative history in India

India, being a democratic country, is most vulnerable to terrorism. There are internal and external forces playing behind to attack our democracy. In the backdrop of an increased number of terrorist attacks, India is armed with much legislation to combat terrorism in any form. The National Investigation Act, 2008[44] is the pioneer law in this regard and the Act has also prescribed for the establishment of a National Investigation Agency for bringing more efficiency in the investigation process in terrorist activities. The amendments were brought out in the Unlawful Activities (Prevention) Act,1967,[45] a Code of Criminal Procedure,1973 to strengthen the fight against terrorism. The changes in the Criminal Procedure Code, bound to have a bearing on not only the accused of terrorist acts but also on the victims thereof. The new laws have doubled the length of time as the suspected militants are allowed to be detained without charge. The tougher portion of UAPA, 2008 will be executed by the National Investigation Agency. Still, all these enactments lack a specific attention towards the proliferation of bio agents or threat of bio weapons.

## Public Health (Prevention, Control, and Management of Epidemics, Bioterrorism, and Disasters) Bill, 2017

In India, the first legislative attempt to address the epidemic and bio terrorism commences with this Bill. The Bill as its objective says that it aims to prevent and manage epidemics, public health consequences of disasters, acts of bioterrorism, or likelihood of threats.[46] It has prescribed provisions for the powers of central government, state and union territories, and district or local authorities in case of public emergencies. It has also prescribed provisions for observation, quarantine, and for isolating a person or class of persons if the situation warrants.[47] The provisions included in the Bill are a dire need of the time to combat bioterrorism in Indian soil.

## Findings and Conclusion

Terrorism, in any form, is a threat to mankind and it has to be eliminated from the world. The states have to pool their resources to counter international terrorism including bioterrorism. New ventures like bio defence systems and strict public health monitoring are the need of the time to prevent bio-terror attacks. The measures to prevent it at any time is the primary requirement to respond to its outbreak. Early detection of outbreak and capability to assess the impact is an essential tool in the case of biological weapons. The time taken to detect a bio-terror attack is very crucial, as faster the health department can respond to prevent its exposure and to begin treatment of those who have been exposed. Additional vaccines and new therapies are needed, and some countries have already developed vaccines. Active immunization will probably be the best way to protect military forces against a wide variety of biological threats. Apart from that, the proper and timely identification of the infectious agent is very important for the protection of the common man and even to the health workers. The medical team and the health workers have to be equipped with proper Personal Protective Equipment, masks, gloves, and other protective measures to guard themselves against contamination, and the antidotes and antibiotics should be available against the bioagents.

On a close perusal of global and national legal framework it is evident that, the studies and research conducted to assess the actual efficiency of counter bioter-

[44] The Preamble of the Act is to constitute an investigation agency.
[45] *See* the Preamble of the Act which is to prevent certain unlawful activities of individuals and associations.
[46] *See* the Preamble of the Bill.
[47] Section 3 of the Bill.

rorism measures are insufficient. International attempts and regional laws to combat bioterrorism are inadequate as technology is developing day by day. Both at the national and international level, bio agents and bio-weapons education and awareness should be given to health professionals and even to voluntary groups. However, the presence of a convention like BWC will serve the purpose of a watchdog even among non-signatory members from dispensing with biological weapon programs. But it is too insufficient because it doesn't have any strict compliance mechanism which has to be rectified. It is necessary to strengthen preventive bioterrorism measures using competent institutions that can better cooperate with the international community in their fight against terrorism and especially bioterrorism. Moreover, global community has to awaken from sleep and a global moral consensus among the states condemning bio terrorism is required.

# Tussle between the US and Iran in the High Seas: Is it a Sign of an Upcoming War?

*Manu Sharma*[1]

## Introduction

Since 1980's, there has been a constant strain in the diplomatic relations between the two powerful nations of the world, the USA and the Islamic state of Iran. Whether we look at the Iran- Iraq war of 1980's or the recent killing of Iran's superior military commander General Qasem Soleimani, the constant tussle between the two nations have gathered the worldwide attention of the experts who are analyzing the possibility of an "armed conflict" or a "war" in the coming time. This is the recent event which took place in the International water of the Persian Gulf where the Iranian Coast Guard gunboats traversed the American naval ships from an enclosed range. The US claims such perusal as an act of harassment and danger within the limits of high seas.

The legal dimensions of this particular event on one hand includes the legality of perusal by the Iranian coast guards and on other hand the use of armed force in the pretext of selfdefense by the US Navy ships. Under the international legal system and principles, the right to defend self has always been a topic of controversy and debate due to its vagueness and overbroadness. However, The US used its mechanisms in consonance to both international as well as its municipal laws. This paper attempts to critically analyze the legal aspect of this Iranian gunboat harassment with special focus on the engagement rules of the US Military laws, humanitarian principles and loopholes in the current settings.

The issue came into headlines on April 15, 2020 when eleven Iranian gunboats repeatedly traversed six US navy vessels, from an extremely close range during its joint integration operation with US army Apache helicopters in the international water of the Persian Gulf. The US Navy claimed this approach of IRCG's gunboats 'intentional, dangerous and harassing.' The matter escalated pretty quickly when the US president Donald Trump instructed the Navy to use an aggressive approach including shoot down and destroy the gunboats harassing them if required. This seems to be the most covert threat of using an armed action against Iran since authorizing the targeted attack at the Baghdad International airport killing the former IRCG's commander General Soleimani earlier this year. The author of this paper intends to examine whether the actions of both the nations stand on the justifiable grounds under the international legal system. Furthermore, particular reference has been given to the standing rules of US military engagement as they are the result of the national enactment of the principles of international law pertaining to armed conflicts, providing an operational and structural framework for any defensive action by US forces.

## Research Questions

*a*) What are the legal dimensions involved in this tussle between the US and the Republic of Iran in the High seas?

*b*) What were the justifications provided by both the countries pertaining to this incident?

*c*) What limitations does this incident highlight in pretext to the principles of international law and its customary legal provisions?

## Research Methodology and Objectives

The objective of the research is firstly to analyze, the horizons of international law related to armed conflict at high seas with this particular incident of Iranian gunboat harassment with special emphasis to US's domestic legal and national policy framework to better understand as to how international law is actually practiced in its real application. Secondly, to analyze the consequences of this incident on the relation between both the nations which were already

[1] Student, Symbiosis Law School, Pune.

heavily tensed especially after the killing of General Soleimani. Thirdly, to understand the horizons of compliance and limitations of the international law with the help of this incident. Lastly, the challenge that comes in upholding international law with a country like Iran which works against the directives of the US in the region of Middle East and has openly threatened the Americans.

The research methodology is 'doctrinal research'. The author focuses on determining the position of existing international legal order law, its limitations and possible scope of improvement with the help of an incident that happened between two powerful nations of the world, the US and Iran in Persian High seas recently, for which various research papers, reports, articles, policy have been used as a source. The limitations of the research are that it is highly theoretical and formalistic.

## Critical Analysis

### *A. Legality of Iranian gunboats perusal of US naval ships*

As the facts of the matter objectively represent that the Iranian gunboats repeatedly crossed the US warships, some from the distance as close as 10 yards, the author believes that the preliminary question which needs to be taken up for consideration is whether this intentional and repeated crossover is violative of the provisions of the international law of sea. The United Nations Convention on the Law of Sea (UNCLOS), talks about the concept of 'hot pursuit'[2] which provides that a coastal state can pursues a foreign ship if they have a genuine reason to believe that the ship is violating or has violated the laws and regulations of that particular state within the limits of their territorial waters. Moreover, it also provides this right to the states if any foreign ship is within the range of a contiguous zone and there has been an infringement of certain established exceptional rights for that zone like immigration, fiscal, customs, sanitary laws, and piracy. In the present case there is no denying to the fact that the US ships were in the contiguous zone but only performing their military operations and there is no instance of them violating any law pertaining to the contiguous zone. Hence the legitimacy of the actions of the IRGC's gunboats pursuing them in this context seems questionable.

### *Use of armed forces in the pretext of self-defense: International Perspective*

Any instance of use of force between two or more states in the pretext of defending self needs to fulfill the standards of the law on the use of force i.e. jus ad bellum to be lawful. The United Nations (UN) Charter under its chapter VII[3] enshrines Article 51 that authorizes a state to initiate an armed action against the belligerent state as a matter of its inherent right to defend itself individually as well as collectively, until the Security Council (UNSC) takes requisite measures to maintain international peace and security. Hence, self-defense is a 'circumstance precluding wrongfulness' of a state's use of force that would otherwise be violative of the prohibition stated in Article 2 (4) of the Charter[4] and its customary international law counterpart. Now in this case, there has been no resolution passed by the UNSC and hence US government must base its future actions of engaging IRCG's gunboats on Article 51.

### *B. Interpretation of the Event: USA's viewpoint*

Pertaining to this particular incident, the US government has put forward two contentions in expounding the application of Article 51 and other customary laws. The authorities in their first contention rejected the current prevailing and accepted view propounded by the International Court of Justice (ICJ) in its Nicaragua judgment where it opined that an armed attack must only be resorted exclusively in situations

[2] Stanly Johny, *Analysis: What is next in Iran- US Conflict?,* The Hindu, (January 8, 2020). https://www.thehindu.com/news/international/analysis-what-is-next-in-iran-us-conflict/article30510865.ece

[3] UN General Assembly, *Convention on the Law of the Sea,* 10 December 1982, 1833 U.N.T.S. 397', art.111. Available at: https://www.refworld.org/docid/3dd8fd1b4.html [accessed October 14, 2020].

[4] United Nations, *Charter of the United Nations,* 24 October 1945, 1 UNTS XVI, art.51. Available at: https://www.refworld.org/docid/3ae6b3930.html [accessed October 14, 2020

[5] International Court of Justice (ICJ) in its Nicaragua judgment.

of the gravest form of use of force.[5] Rather, the US backs for the automatic implication of the right of self-defense against any illegal use of force, for which it relied on the ICJ's judgment in Oil Platforms case11 wherein the court upheld that the mining of a military vessel sufficiently enough to bring into play the inherent right of self-defense. This indicates that the US views it lawfully justifiable to use armed force if the actions of Iranian gunboats subjectively satisfy their parameters of the use of force. However, the author disagrees with this contention and believes that the right to use self-defense must be used in exceptional circumstances where all other possible measures are exhausted. Secondly, the US has Islamic Republic of Iran v. USA, ICGJ 74 (ICJ 2003), contended the anticipatory application of Article 51 in the response to an imminent attack, an accepted viewpoint under international setting also leaves a grey area as to what exactly counts as 'imminent'. The latest articulated interpretation of 'imminent' has been provided in the White House's 2016 and Policy Frameworks report.[6]

There are a variety of factors that the US military authorities take into consideration on a national level in determining the imminency of an armed attack including nature, immediacy, probability of an attack, injury damage/loss likely to be caused, whether the anticipated attack is part of a concerted pattern of an ongoing armed attack, alternative measures of selfdefense etc. However, the author believes that it is important to look into it from the perspective of a military commander who is actually executing it at the unit level when time is of the essence, and hence a more manageable test should be whether the defensive measure is opted during the last possible window of opportunity in the fact of an attack that was almost certainly going to occur. Furthermore, finding out that whether an armed attack is ongoing or imminent is just not sufficient enough to deem the justifiable use of force in self-defense.[7]

### *Operationalizing Law of Self- Defense: US's Standing Rules of Engagement*

The Standing Rules of Engagement (SROE) promulgated in 2005, are the most recent version of directives providing an operational framework to use the right of self-defense by the US armed forces. They are issued by a competent military authority that outlines the circumstances as well as the limitations which the US forces will initiate or proceed with combat engagement with other encountered forces. These standing rules remain in force and must be abided by the armed personnel during both territorial and extra- territorial military operations and eventualities unless directed otherwise. The terms used under SROE for describing an ongoing and imminent attack are 'hostile act[8] ' and 'hostile intent'.[9] "A hostile act" refers to 'an attack (direct/ indirect) or use of force' against the state of the USA, its armed forces, subjects or its property. On other hand 'hostile intent' signifies the SROE's operational version of anticipatory self- defense. It can be defined as a situation carrying an impression of 'threat of imminent use of force' against the US, its citizens, property or forces. To define what actually constitutes imminent for a state is a difficult question and hence it is always contextual which means based on a subjective assessment of all circumstantial facts known at that particular point of time, even for the US forces. Importantly, the SROE in an attempt to bring some clarity in this regard added that 'imminent' does not necessarily mean immediate or on- the spot'. This was done to counter the so called 'Bush doctrine' set forth under the National Security Strategy, 2002,[10] which is a general description of an aspect of the US foreign policy post 9/11 attack dealing exclusively with

[6] *Report on the Legal and Policy Frameworks Guiding the United States' Use Of Military Force and Related National Security Operations,* https://obamawhitehouse.archives.gov/sites/whitehouse.gov/files/documents/Legal_Policy_Report.pdf

[7] *Chairman o f the Joint Chiefs of Staff Instr. 3121.01b, 'Standing Rules of Engagement (Sroe)/Standing Rules For The Use Of Force (Sruf) For U.S. Forces,* https://www.loc.gov/rr/frd/Military_Law/pdf/OLH_2015_Ch5.pdf

[8] *Id.,* Part E, rule 2, cl. (c).

[9] *Id.,* rule 2, cl. (d).

[10] *The National Security Strategy of the United States of America,* (September 2002). https://2009- 2017state.gov/documents/organization/63562.pdf.

the strategic horizons of preemptive attack as a means of self-defense. By addition, it now simply acknowledges that the commanding officer need not to wait for an actual attack to happen, though in no way it suggests the authorization of so called preventive self-defense.

The principle of proportionality and necessity are also incorporated in SROE. The military personnel are trained 'to not take the first hit' before defending. The author believes that if we read this statement in a broader sense that, the SROE caution the use of self-defense only while the belligerent state exhibits hostile intent or continue to commit hostile acts. Moreover the 'Law of War Manual',[11] alternative than using force if there is a demonstration of hostile intent. This is a pure reflection of the classic understanding of principle of necessity. With respect to proportionality, SROE contains precise description of what proportionate response shall be;[12] which is use of force that is sufficient enough to conclusively counter to hostile acts or demonstrations of hostile intent. It acknowledges within its justiciable domain the excessive use of means and intensity but not the nature, duration and scope of the force from what is actually needed. Even the Law Manual takes a very similar approach where it says that a response to an armed attack is proportionate to an extent of repealing the belligerent forces and restoring the peace and security of the disturbed area. Looking at both these principles the U.S's national policies with regards to armed attacks fulfills the obligations of International humanitarian law as it disallows the use of force when other alternatives are available, attack is non- imminent and non- continuous.

The current mission specific rules in SROE must be formulated in a more tailored fashion to facilitate the accomplishment of a particular operation including during actual hostilities,[13] which currently are largely classified because they might reveal US's forced tactics, techniques etc. to the belligerent state, giving an example declaring a particular organization as 'hostile' will permit the forces to engage with its members on the basis of their status of being the member of that designated group. But, since this is only allowed during an armed conflict, an action to this effect by US forces on IRCG Navy gunboat in high seas or any other Iranian forces would be unlawful unless there starts an armed conflict.

## SROE's *Categories of Self- Defense*

There are three categories of self-defense recognized by SROE which are- individual, unit and national.[14] The very difference in this hierarchy lies in the level of authority and responsibilities in which the right to self-defense is exercised. As already mentioned above the defending of the US, its forces and under certain circumstances its persons and property constitutes the requirements of national self-defense. It has to be noted here that the commanders of the unit are also authorized to exercise national self-defense. The category of Unit self-defense by contrast provides an inherent right to self-defense and also put certain obligations in return upon the commanding officers of the unit based on any warship or aircraft or any other place of their operation.

Though, the SROE specifically creates a legal distinction between the category of national and unit self-defense, there is no real or qualitative difference between a unit responding or the entire military structure because the legal basis is the same for both under the international law i.e. self-defense in face of an armed attack. Apart from responding in group, the SROE also authorizes the members to exercise self-defense in their individual capacity if required. When acting as part of the unit, such individual self-defense is treated as sub- set of unit defense and hence stands valid on the legal basis of international principles. In the present case the author is going to specifically deal

[11] https://dod.defense.gov/Portals/1/Documents/pubs/DoD%20Law%20of%20War%20Manual%20-

[12] Supra note 13, Enclosure A, Part 4, cl. (3).

[13] Department of Peacekeeping Operations Military Division, *Guidelines for the Development of Rules of Engagement (ROE) for United Nations Peacekeeping Operations,* MD/FGS/0220.0001 (May 2002). https://www.aaptc.asia/images/resourcess/9_Rules_of_Engagements/120_Roe_Guidelines.pdf

[14] Supra note 13, Part E, rule 2.

with the unit selfdefense because only a unit of the US's air force was operating in the Persian high seas at the time they were pursued by the IRCG's gunboats.

### *Unit Self Defense*

At the unit level, the SROE's de- escalation principle is designed in a way to satisfy the principles of necessity[15] and proportionality.[16] It states that the belligerent actor must be warned and provided with an opportunity to withdraw and cease its threatening actions. Here the author believes that it is a classic situation of 'easier said than done', which seems to be a challenging decision for a commander to determine whether there is a demonstration of hostile intent and whether de- escalation should be attempted or not. For example, during the Iran- Iraq War, 1987, Iraq Air Force attacked the US's Stark ship in high seas causing the death of 37 US Navy personnel. The Iraqi jets were identified from a distance and warnings were given to it, however it still launched an armed attack on US ships. Afterwards, an investigation led by the House of Representatives Armed Services Committee[17] found out that the pre required condition of de- escalation principles prior to self- defense in factored into the commander's inaction to defend the ship.

While on the other hand, in 1988, a US cruiser was shot down by an Iranian passenger aircraft Air Flight 655, killing off around 297 on board, that took off from Bandar Abbas International Airport which was mistakenly identified as combat aircraft operating in an attacking zone.[18] In present year, Iran also mistakenly took down a Ukrainian International Airlines killing approximately 176 people[19] during a tussle between the US and Iran after the targeted killing of General Soleimani earlier this year. The aim of the author in giving these two contrasting examples is just to underscore the complex nature of these decisions, especially in the presence of little moments of deliberation.

### *Margin of Appreciation*

Doctrine of Margin of appreciation is an invention of the European Court of Human rights[20] wherein, they defer to the will of member states, in specific circumstances. For ex- in case of disturbance to public tranquility or a threat to national security, the courts may justify State's restriction on freedom of speech or assembly etc. If such restrictions are in accordance with the law and necessary considering the facts and circumstances of that particular situation. The author aims to analyze whether this doctrine can be applicable in such scenario, particularly in this case. As stated already that under its requirement of proportionality principle, SROE allows a fair margin of appreciation in the use of means and intensity of force but not with respect to its nature, duration and scope. There is no debate to the fact how peculiar is to measure the precise degree of force necessary to do so and therefore the author believes that a fair margin appreciation must be given to the states in this regard. With respect to this particular case, considering the facts of the situation that the distance between the IRCG's navy boats repeatedly traversed the US warships from as close to a distance of 10 yards, if the US warships have had attacked IRCG's gunboats, then, the author feels it could have been defended under the doctrine of margin of appreciation if it was under a recognized doctrine under the principles of international law. On the other

[15] Supra note 13, Enclosure A, Part 4, cl. (2)

[16] Supra note 20.

[17] *Report of The Staff Investigation into the Iraqi Attack on the USS Stark of the Committee on Armed Services House of Representatives,* One- Hundredth Congress, 1st Session (June 1987). https://babel.hathitrust.org/cgi/pt?id=uc1.31210014708372&view=1up&seq=8

[18] Brad Lendon, In 1988, A US *Navy warship shot down an Iranian passenger plane in the heat of battle,'* CNN World, (January 20, 2020) https://edition.cnn.com/2020/01/10/middleeast/iran-air-flight-655-us-militaryintl- hnk/index.html

[19] Matthew S. Schwartz. *Iranian Report Details Chain of Mistakes In Shooting Down Ukrainian Passenger Plane,* NPR, (July 20, 2020). https://www.npr.org/2020/07/12/890194877/iranian-report-details-chain-ofmistakes-in- shooting-down-ukrainian-passenger-pl

[20] Council of Europe, *The Margin of Appreciation,* https://www.coe.int/t/dghl/cooperation/lisbonnetwork/themis/echr/paper2_en.asp

side, under no circumstances the states indulging in armed attack should use excessive means and intensity of force from what is actually required. Hence a balanced approach is what a State must strive for in such situations.

### *The Actual Response*

The US warships did not use any kind of force on the IRCG's gunboats even after their repeated crossing, which shows that their actions were in complete consonance with the provisions of Standing Rules of Engagement and as well as international legal norms. On the other side, the gunboats were neither attacking the US warship nor the helicopters which shows that they were not demonstrating any kind of 'hostile intent'. However the author feels that their actions are questionable under 'Hot pursuit'[21] mentioned under UNCLOS. To appreciate the calculated and sound decision taken by the US unit commander and to characterize the demonstration of hostile intent by Iranian gunboats, it is to be considered that the navy boats were armed and the relations between both the countries are highly strained and tensed.

Turning to what the US's president directed to US warships to shoot and destroy the IRCG's navy boats,[22] the author believes that if this happens, the justifiability will totally depend upon the circumstances of that time. It must be concluded on the precise facts that firstly a hostile act has occurred, or demonstration of hostile intent has been done. Secondly, there is no other alternative left than to employ force against the gun boats to defeat or disable the imminent attack and lastly the quantum of force used is within the limits of what was actually needed. Short of any reasons mentioned in SROE for a unit self- defense, the only reason left for the US to engage them would be national self-defense which can only be brought into play when there is an armed attack by from Iran's side. Even in that, it has to be determined that though the Iranian gunboats were not participating momentarily but there is a possibility that they would be used in future ongoing armed attack against the US and that it is not the situation in the Persian Gulf today.

Lastly, talking about the claims of the U.S. Navy, and the approach that the Iranian gunboats were dangerous and harassing[23] could become the sole reason for using armed force. Here the author would like to remind that the provisions of SROE are contextual in application, but the author believes that in most situations practically such activities would not rise to the level of an imminent armed attack and would not qualify as demonstration of hostile intent without an indication that gunboats were about to actually use of their weapon.

## Conclusion and Suggestions

From the above discussion it can be concluded that sabre - rattling is acceptable to an extent where it is not leading to an unlawful threat of use of force because of their unlawful nature under the provisions of U.N Charter. It is clear from looking at the domestic legal order of the US for dealing with the dimensions of armed attack that they are clearly defined in the Standing rules of engagement with other instruments like the War Manual which is in consonance with the norms of international law. The President's comment on the whole issue can be considered a warning to the Iranian government that the US navy units will avail their right to self-defense which can be considered lawful. The author is of the opinion that such comments are not appreciable as they might constitute a threat of armed attack and hence unlawful. Moreover, harassment which does not give an impression of imminent risk to life or property does not open the gateways to right of self-defense. The actions of IRCG's gunboats of repeatedly traversing the US warship in

[21] supra note 7

[22] *Trump says US will destroy Iranian gunboats harassing US ships,* Alja Zeera, (April 22, 2020). 'https://www.aljazeera.com/news/2020/4/22/trump-says-us-will-destroy-iranian-gunboats-harassing-us-ships

[23] Tucker Higgins & Amanda Macias, *'Trump says US will 'destroy' Iranian gunboats that harass American ships,* CNBC, (April 22, 2020) https://www.cnbc.com/2020/04/22/trump-says-us-will-destroy-iraniangunboats-that- harass-american-ships.html

the high seas can be questioned under the provision of United Nations Convention on Law of Seas. Lastly, looking at the history of relations between the US and Iran it can be said that lack of sound and reasoned decisions in situations of harassment can lead to an armed conflict and hence it is important that these countries should engage in peace talks or mediation can be initiated by other international organizations as it is historically evident that small events of prolonged tussle can turn into full-fledged situation of armed conflict, the recent example of which is Armenia- Azerbaijan conflict. The author is of the opinion that the present norms of international laws are outdated and seem to fail in achieving their object as the provisions are very vague and overbroad which gives opportunity to the powerful states to abuse these loopholes. For example, the definition of self- defense which is too overbroad that even an unlawful use of force can be justified under it in the pretext of anticipatory self-defense. Even the principle of necessity and proportionality are too outdated and undefined thus prone to be misused. There is an urgent need to change the present structure and form more precise definitions. Secondly, every member nation must formulate a domestic law which enshrines a more accurate scope and definition of international principles for e.g. - like the US have their own. Thirdly, the role of the international organizations like the U.N, which has now turned completely redundant, must be brought to an urgent institutional change to ensure the effective implementation of the Charter. Fourthly, some real powers to impose strict penal provisions against individuals as well as the States violating the provisions of international law must be there. Lastly, the most important of all is to mend the relations between the nations who are at tussle with each other, as friendly and co-operative relation between the States is the key to a peaceful world.

# Judicial Review and Fundamental Rights : Key Features of Constitutionalism

*Priyanka Choudhary*[1] *and Kush Kalra*[2]

## Introduction

While being perceived as a composed record[3] that recommends the plan of government, the Constitution is considered less as a sanction of the relations among social entertainers. The legitimate Constitution subordinates legislative issues to law. Likewise, political arrangements are to be found and defended inside legitimate edges, and arrangements are reached through lawful cycles (for example in protected mediation). Yet, the lawful Constitution doesnot end the private connection among Constitution and constitutionalism: from a material perspective, a constitution is a constitution decisively on the grounds that it fulfils the rudimentary assumptions for constitutionalism. The custom that constitutes formal authoritative records and constitutionalist assumptions are interrelated.

The lawful idea of the Constitution implies that it turns out to be essential for the overall set of laws and needs to fulfil the proper states of present-day law[4]. As a composed authoritative report, it is fit to legal legitimate application. In law-focused present-day states, constitutions accept commonness in the legitimate circle.

Constitutions are legitimately restricting, yet they are more adaptable than a standard rule with restricted ability to figure out what will occur in its name. In numerous regards, they are just casings. Furthermore, it isn't just that the casing is regularly loaded up with sudden substance, yet additionally that the very edge may change its shape. The Constitution is just to give a chance through which a framework may create.

## Concept of Constitution and Constitutionalism

The term 'constitution,' or its equivalent in other languages, existed long before modern constitutions emerged. But it designated a different object. Originally, it used to describe the state of the human body, it was soon applied to the body politic, yet not in a normative sense but as a description of the situation of a country as determined by a number of factors such as its geography, its climate, its population, its laws etc. In the eighteenth century, the meaning was often narrowed to the state of a country as determined by its basic legal structure. But still the notion 'constitution' was not identified with those laws. Rather, the term continued to describe the state of a country insofar as it was shaped by its basic laws. However, the basic laws themselves were not the 'constitution' of the country. 'Constitution' remained a descriptive, not a prescriptive, term.[5]

A constitution is a "charter of government deriving its whole authority from the governed.[6] The constitution sets out the form of the government. It specifies the purpose of the government, the power of each depart-

[1] Assistant Professor, School of Law, University of Petroleum and Energy Studies, Dehradun
[2] Research Scholar, Sharda University, Greater Noida
[3] The U.K. continues to operate without a written constitution. Similarly, the Hungarian Kingdom of the AustroHungarian Monarchy (and until 1945) was without a written constitution, and yet it qualified as a constitutional state in its time, with a number of important statutory documents, charters, and treaties. Today Israel and New Zealand have written bits and pieces of ordinary laws which deal with constitutional issues but without entrenchment.
[4] According to the advocates of the unwritten constitution, a charter is too rigid, while the constitution that manifests itself in traditions enables a more flexible approach. That the judges have nothing to apply is more of an advantage, because it upholds the separation of the branches of power, inasmuch as it excludes the possibility of government by judges at the same time
[5] D. Grimm, Types of Constitutions, 98, in M. Rosenfeld and A. Sajó, eds. The Oxford Handbook of Comparative Constitutional Law (Oxford University Press, 2012) 100
[6] Black's Law Dictionary.

ment of the government, the state society relationship, the relationship between various governmental institutions, and the limits of the government." Today a constitution is easily identified with a legal document of the same name, arranging public institutions of government.

Constitutionalism stands for a set of interrelated concepts, principles, and practices of organizing and thereby limiting government power in order to prevent despotism. It suggests that power may be limited by techniques of separation of powers, checks and balances, and the protection of fundamental rights along a pre-commitment. It seeks to provide adequate institutional design to cool passions without forfeiting government efficiency. By formalizing these solutions in a legally binding instrument (the constitution), constitutionalism provides the necessary limitations of government (sovereign) power and affirms the legitimate exercise thereof.

Constitutionalism is often described as a liberal[7] political philosophy that is concerned with limiting government. Consequently, it is attacked for weakening the government when the state needs to be strong. Limiting what government can do, however, does not necessarily result in a weaker state. A community may need a government that is strong enough to defend it from its enemies. Beyond this point 'strength' is of little assistance. At first glance a government seems weak where the streets are not safe. But the U.S. is a country with a high incidence of violent crime: is the U.S. a weak state? In certain dictatorships there are policemen around every corner and the crime rate is low, so one would say that these are strong states. Yet, such strength and security are of dubious value where the police use their position to induce fear or extract bribes from the population. In short, strength is not an analytically helpful category for the study of constitutions and governments. Efficiency is a completely different matter.

Viable constitutions are pragmatic. Even revolutionary constitutions reflect concessions and actual compromises that enable the peaceful co-existence of different groups, including minorities and losers. A critical revisionist would say that constitutions are either victors' justice or—more often—dirty deals to protect the interests of elites which feel that they are losing their privileged position or face uncertain political outcomes.[8] Rights and strong remedies to cure the violations of rights are granted to all, not for the sake of constitutionalism's liberty, but simply in order to protect these elites from being called to account and loss of status in the future. Constitutions may be deals that consolidate the political power of elites. And yet, the resulting constitution may still serve the community as a whole (although often at the expense of certain groups living in that community).

## Principle of Constitutionalism

Constitutionalism often is regarded as a doctrine of political legitimacy. Constitutionalism prima facie requires justification of state actions against a higher law. At its core, this higher law is meant to structure the political process. Yet, as a concept, constitutionalism involves more than mere legality; it aims to posit a wider and deeper criterion of good governance as well as political conventions and norms to be attained in the collective life of a nation. The central principle in constitutionalism is the "respect for human worth and dignity. It is by no means a static principle and the core elements identified are bound to change as better ways are devised to limit government and protect citizens, it is the institutionalization of these core elements that matter. Nevertheless, constitutionalism needs to be distinguished from both democracy and the rule of Law.[9]

[7] 'Liberal' in this book is used in its nineteenth-century European sense ('classic liberalism'), meaning emphasis on individual liberty and the free market as an extension of this freedom and designing the defence of liberty against successive threats. Liberalism can be a political philosophy; as a political movement it animated constitution writing and it was a nationalist movement in many nineteenth-century societies. Liberalism is intimately related to constitutionalism. Liberal in U.S. political usage is close to 'progressive', social democratic, or welfarist in the European sense.

[8] Note that, in contrast to this criticism, many of the contemporary social values which were granted constitutional status and priority are not directly elitist: social rights and anti-poverty and equality programmes in the constitution may be intended by elites to deceive the public, but technically these are not about privileges of the elite of the day

[9] *Supra* Note 6

## Fundamental Rights and Constitutionalism

> "Fundamental rights should be such that they should not be liable to reservation and to changes by Acts of legislature" -Begum AizazRasul[10]

What kind of rights would one need in order to ensure freedom in a political system? What follows, if a right is claimed as 'fundamental'? Who is bound by it? The government, or the citizens, too? And what does 'being bound' mean: to honour the claim, or non-interference, or the unconstrained activity of the holder of the right? Or the protection and promotion of the right by the government? Could individuals or the authorities prevent anyone from obstructing an action that is based on a right? Shall the government call to account the violators of such rights? These are some of the questions that a constitution-maker and constitutional practice have to answer regarding fundamental rights.

The constitutional recognition of fundamental rights reflects a presumption in favour of the primacy of liberty. It expresses a social agreement and promises that the government will operate for the sake of free individuals. Fundamental rights are constitutionalized to counter majoritarian and statist bias. Sadly, the value and primacy of freedoms is far from selfevident, especially when it comes to the freedom of others, especially different others (be they intellectuals, sexual or ethnic minorities, or believers of another religion). To stand up for the freedoms of these other's is hardly 'natural'. Freedoms are vulnerable, especially where the resulting behaviour is unusual and repellent to traditional feelings. Liberty is not a matter of popularity, modesty, or courtesy. There are important moral reasons to respect freedom and the capacity of humans to choose the good life they like.

While a human or fundamental right claim indicates priority, the basis for the claim remains contested. At the time when fundamental rights were incorporated into the U.S. Constitution or the 1789 French Declaration, they may have had a narrow scope, but they were considered a matter of unconditional respect of the individual stemming from the nature of man (human being) or the nature of things (natural law). In a modern and also a much earlier (medieval) approach, these rights emanate from the equal dignity of humans that is to be unconditionally respected in the political community. Or, in a different perspective, all human beings have human rights simply by virtue of their existence as equal moral beings.[11]

The moral reading of fundamental rights blames the alternative consequentialist understanding as undermining the primacy of the individual who shall be the only measure of humans. Interestingly, there are certain justifications in international human rights law which refer to an instrumental concept of human rights, granting rights a status that is nevertheless hard to undermine on standard consequentialist grounds. For example, the Preamble to the Universal Declaration of Human Rights construes human rights as indispensable against barbarism: 'disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind.' Likewise, the French Declaration stated already in 1789 'that the ignorance, neglect, or contempt of the rights of man is the sole cause of public calamities and of the corruption of governments'. These arguments indicate how human (fundamental) rights fit into the programme of constitutionalism as anti-despotism.

## What do the Fundamental Rights Imply?

What follows from the constitutional requirement that freedom is the rule, and its limitation is the exception? As a minimum, it means respect of the maxim: "That Which Is Not Forbidden Is Permitted". Legislation must respect liberty. The government must have good, valid, even compelling reasons, if it wishes to prohibit a conduct. It can regulate, restrict, or prohibit what in itself does not harm anyone only if it is specifically authorized. The constitutional recognition of rights changes the nature of the political discourse and legitimate action. Certain arguments which are disrespectful of the fundamental rights are difficult to make, and become easy prey to the argumentum ad

[10] Constitutional Asembly Debates, 264 Vol. VII, 1948.

[11] 'The source of human rights is man's moral nature . . .' J. Donnelly, Universal Human Rights in Theory and Practice, 3rd ed. (Cornell University Press, 2013) 15.

Hitlerum: who praises censorship, denies the importance of independent courts, or praises racial discrimination will be compared to Hitler, a parallel which should have (or at least used to have in principle) annihilating effects for the targeted position. Human rights operate as conversation stoppers, representing the ultimate incontestable common values of the political community. Even censors have to stand up for freedom of speech and introduce restrictions only in the name of facilitating a better exchange of ideas. The contemporary attempts to dethrone human rights are intended to change the prominent cultural power of the fundamental rights.

The fundamental rights bind the State, but what does this bond mean? To a certain extent the government has a duty to guarantee the enforcement of the rights connected with liberty. Where a public actor hampers the exercise of a liberty, the government shall remedy this by giving effect to liberty and (perhaps) eliminating the causes of the curtailment by calling to account those who violated the fundamental right. But, the contours of the obligation are not at all clear. Does the individual have a right to compensation, if her constitutional rights are violated, but no further law specified these rights? Is there further compensation, if these rights were violated by an entity or individual acting in the name of the government? And what if they are infringed by a private actor? It took a long time (and legislative enactment) for the Constitution to become the legal basis for damages for constitutional torts, even in the U.S. where ordinary judges read the Constitution with perseverance.

Rights are rights, but sovereignty is sovereignty, since the days when the king could do no wrong. The binding force of constitutional rights means also that the government shall follow it in its own actions. The state's duty to respect rights does not necessarily entail legal responsibility for the disregard of a right even if it seems to be a logical necessity. Constitutional pragmatism does always follow logic, especially where tradition supports immunity.

## Limiting Fundamental Rights?

In some early constitutions rights were worded as if they were absolutes. However, the 1789 French Declaration clearly admits the possibility of limitations. Article 2 declares liberty, property, security, and resistance to oppression as imprescriptible and natural human rights. To be 'imprescriptible and natural', however, does not mean to be 'exempt of restriction'. The rights of man were to be determined by law. But the 1789 Declaration goes further. It names the grounds for restriction: not to harm others, be compatible with the rights of others, no abuse.[12] These limitations are accepted as compatible with the imprescriptible character of the natural rights as the right to liberty, property, security,[13] and resistance to oppression (Article 2).[14]

That the details of fundamental rights protection are defined by legislation is a source of constitutional problems. By its very nature, a legal definition means delimitation. Definitions include some and exclude others, therefore, it is important to know who sets the definitions, as this is the same person who decides on the exclusions. The legislative branch which is entrusted with setting out the details on the protection of fundamental rights (or of governmental obligations associated with rights) is also endowed with the duty to express and protect the common good or public interest. Views regarding the relation between individual rights and other constitutional interests often collide and people are trained to believe that public interest is above the private, although this maxim is missing from constitutions and for good reasons.

When it comes to fundamental and human rights, constitutions speak of rights and not interests. To claim that the public interest shall prevail against the private interest does not answer the dilemma of restricting fundamental rights: here an actual fundamental right protecting the freedom of an individual is curtailed by a putative public interest.

[12] Because of political resistance at this stage, when it comes to religion the 'established Law and Order' is the limit.
[13] Security (sûreté) as personal freedom means that no one can be arbitrarily arrested and convicted.
[14] 'Imprescriptible' or 'unalienable' does not mean that the rights cannot be limited; it means that people cannot resign from these rights. For example, a man cannot become a slave of his own accord

A right can be formulated as absolute: arguably in the U.S., as formulated by the 'First Amendment', free speech can be understood as absolute. Dignity is understood as inviolable in this sense, for example, in Germany, but it remains difficult to apply, as it offers little judicially applicable guidance.[15] The German Basic Law (and many other constitutions) define several distinct reasons for the restriction of fundamental rights. The scope (and hence the limits) of many rights are subject to definition by law (but subject to proportionality). Moreover, specific restrictions may apply to the military, and laws regarding defence may restrict freedom of movement and the inviolability of the home. Finally, the fundamental rights of those who abused specific fundamental rights can be forfeited by the Constitutional Court. Sometimes the restriction of rights has no separately attached condition.

For example, when people assemble in public places, it has to be without arms and peaceful.[16]

## Judicial Review and Constitutionalism

The literal meaning of the terminology judicial review refers to the revision of the decree or sentence of an inferior court by a superior court. It has a more specialized importance in pubic law, especially in nations having a composed constitution which are established on the idea of restricted government. The tenet of legal audit has been begun and created by the American Supreme Court, despite the fact that there is no express arrangement in the American Constitution for the legal survey. In Marbury v. Madison,[17] the Supreme Court clarified that it had the force of legal survey. Justice George Marshall said, "Absolutely each one of the individuals who have outlined the composed Constitution examine them as framing the basic and foremost law of the countries, and thus, the hypothesis of each such Government should be that a demonstration of the assembly, offensive to the Constitution is void"

The fair-minded organization of equity (the 'ability to pass judgment') requests the protection of the legal branch from the political branches (the assembly and the leader).[18] This was a long way from unimportant in the eighteenth century: in prior occasions in the European governments judging and law-production both served an undifferentiated equity. To exacerbate the situation, courts were frequently the apparatuses of illustrious absolutism and a wellspring of join. Despite this practice, the legal executive has gotten generally acknowledged as the third part of force in America. Yet to be determined sought after by means of detachment of forces the legal executive most importantly fills in as a beware of different branches. As it is less political than different branches, and it doesn't order its own assets, it is the 'most un-risky one.

When set up, the legal executive can be and will be more free in its activities of the other two branches than those can at any point be of one another. Until it goes to the requirement of legal choices, the legal executive is best off being left alone by different branches, given that its states of activity are managed and its accounts are accommodated. Constitutionalism attempts to restrict the potential for invasion with moderate achievement, however where lawmakers are adequately partitioned they will depend on sacred statutes and even implement those standards.[19]

The institutional plan of legal arrangements and association has become more intricate as of late with decent requests for the responsibility of the legal executive. Legal responsibility sounds contradictory to legal freedom and fair-mindedness from the start. How-

[15] Ch. McCrudden, Human Dignity and Judicial Interpretation of Human Rights, 19 European Journal of International Law (2008) 655. The inviolable and supreme dignity of the person as a right is practically never used directly by the German Constitutional Court for deciding cases.

[16] The need for the protection of public order led to the introduction of such measures in the Belgian Constitution as early as 1831.

[17] (1803) 1 Cranch 137.

[18] Ch.-L. Montesquieu, The Spirit of the Laws [1748], A. M. Cohler, B. C. Miller and H. S. Stone, trans. and eds. (Cambridge University Press, 1992) 157. The power to judge is not equal to the two other powers.

[19] Federalist No. 78 (Hamilton), 464, in A. Hamilton, J. Madison and J. Jay, The Federalist Papers [1787–8] (Mentor, 1961) 465. Least dangerous—'to the political branches'

ever, when the established assurance of legal freedom prevails with regards to protecting the legal executive from different branches, an arrangement for life is hard to shield notwithstanding wild negligence for proficient guidelines or broad defilement on the seat.

While the legal executive is intended to keep out of the political space, the goal of capability clashes and political race questions, legal survey of managerial activity, and protected arbitration fill in as minds the forces and desires of the political branches.

## United States of America

Judicial Review in the United States alludes to the force of a court to survey the defendability of a resolution or settlement, or to survey a regulatory guideline for consistency with a rule, a deal, or the actual constitution. Article III of the U.S. Constitution expresses, "the legal force of the United States, will be vested in Supreme Court, and in such second rate courts as the Congress may every now and then appoint and build up... the legal force will stretch out to all cases, in law and value, emerging under this Constitution, the laws of the United States, and deals made, or which will be made, under their position... In all cases influencing representatives, other public pastors and representatives, and those where a state will be party, the Supreme Court will have unique locale. In the wide range of various cases under the watchful eye of referenced, the Supreme Court will have re-appraising ward, both as to law and actuality, with such special cases, and under such guidelines as the Congress will make."

Along these lines, legal audit as perceived in the U.S.A., lays on a basic establishment. The Constitution is the incomparable law, which was appointed by individuals, a definitive wellspring of all political power. It presents restricted forces on the public authority. In the event that the public authority intentionally or unwittingly violates these limits, there should be some authority capable to hold it in charge, to upset its unlawful endeavour, and consequently to vindicate and protect intact the desire of individuals as communicated in the Constitution, courts practice this force.

In Marlbury v. Madison[20] Justice Marshall made legal survey not just the main foundation of the established superstructure, and yet the most critical of the American commitment to the craft of the public authority. Also, this precept was the brainchild of Justice Marshall who stated that judges are coordinated by the actual constitution, made vow to help the constitution, which comprises of the foremost rule that everyone must follow. It is an obligation put upon judges to survey any law which is repulsive to the constitution. The Supreme Court affirmed this force of legal inspecting over both government and the State laws in Fletherv. Peck and in this manner got for itself the part of boss mediator and authority of constitution.

Judicial review in the United States refers to the power of a court to review the constitutionality of a statute or treaty, or to review an administrative regulation for consistency with a statute, a treaty, or the constitution itself. Article III of the U.S. Constitution states, *"the judicial power of the United States, shall be vested in Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish... the judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority... In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make."*

## India

Under the constitution of India, powers are restricted in the two different ways. First and foremost, there is the division of power between the Union and the States. Parliament is capable to pass laws just as for those subjects which are ensured to the residents against each type of administrative infringement. Furthermore, the Supreme Court remains in a special position wherein it is able to practice the force of evaluating authoritative establishments both of parliament and the state governing bodies.

[20] 1803 U.S. LEXIS

Legal audit is an extraordinary weapon in the possession of judges. It involves the force of a court to hold illegal and unenforceable any law or request dependent on such a law or some other activity by a public power which is conflicting or in struggle with the essential tradition that must be adhered to. Truth be told, the investigation of sacred law might be portrayed as an investigation of the teaching of legal survey in real life. The courts have ability to strike down any law, in the event that they trust it to be illegal.

"Article 372 (1) builds up the legal survey of the pre-protected enactment comparatively. Article 13 explicitly pronounces that any law, which repudiates any of the arrangement of the part III of the Constitution of India for example, the principal rights will be void. The equivalent has additionally been seen by our Supreme Court. The Supreme and High courts are comprised of the defender and underwriter of Fundamental Rights under Articles 32 and 226. Articles 251 and 254 say that if there should arise an occurrence of in steadiness among association and State laws, the State law will be void."

In any case, in a few cases, it has held that the Supreme Court can go about as the caretaker, protector of privileges of individuals and popularity based arrangement of government just through the legal audit. In Keshwanandbharti v. State of Kerala,[21] it was held that the "judicial review is an 'essential component' of the constitution and can't be altered. The extent of legal review is adequate in India, to make the Supreme court an incredible organization to control the movement of the executive and legislature."

Under Indian Constitution, legal survey can advantageously be ordered under three heads:[22]

i) "Judicial review of Constitutional Amendments.- This has been the topic of thought in different cases by the Supreme Court; of them worth referencing are: Shankari Prasad case,[23] Sajjan Singh case,[24] Golak Nath case,[25] KesavanandaBharati case, Minerva Mills case,[26] Sanjeev Coke case[27] and Indira Gandhi case.[28] The trial of legitimacy of Constitutional corrections is adjusting to the essential highlights of the Constitution".

ii) "Judicial review of Legislation of Parliament, State Legislatures just as Subordinate Legislation. - Judicial survey in this classification is in regard of authoritative capability and infringement of central rights or some other Constitutional or administrative restrictions";

iii) "Judicial review of Administrative Action of the Union of India just as the State Governments and specialists falling inside the importance of State. It is important to recognize legal survey and legal control. The term legal audit has a prohibitive meaning when contrasted with the term legal control. Legal survey is administrative, as opposed to restorative in nature".[29]

## Comparative Study of Judicial Review Between India and U.S.A.

The extent of Judicial Review in India is to some degree surrounded when contrasted with that in the U.S.A. In India the principal rights are not so comprehensively corded as in the U.S.A. furthermore, limits there on have been expressed in the actual Constitution and this assignment has not been left to the courts. The constitution creators "received this methodology as they felt that the courts may think that it is hard to work act the constraints on the crucial rights and the

[21] AIR 1973 SC 1461.
[22] Justice Syed Shah Mohammed Quadri, "Judicial Review of Adminstrative Action", 6 SCC (Jour) 1 (2001).
[23] *Shankari Prasad Singh Deo v. Union of India,* AIR 1951 SC 458.
[24] *Sajjan Singh v. State of Rajasthan,* AIR 1965 SC 845.
[25] *Golak Nathv. State of Punjab,* AIR 1967 SC 1643.
[26] *Minerva Mills v. Union of India,* AIR 1980 SC 1789.
[27] *Sanjeev Coke Mfg. Co. v. Bharat Coking Coal Ltd.,* (1983) 1 SCC 147.
[28] *Indira Nehru Gandhi v. Raj Narain,* 1975 Supp SCC 1.
[29] M.P. Jain and S.N. Jain, *Principles of Administrative Law: An Exhaustive Commentary on the Subject Containing Case-law Reference* (Indian & Foreign) 1779 (Wadhwa and Company Nagpur, New Delhi, 6th edn 2007).

equivalent should be set down in the actual constitution". The constitution producers additionally felt that the Judiciary ought not be raised at the degree of 'Super assembly', whatever the support for the strategies logy received by the constitution creators, the unavoidable aftereffect of this has been to limit the scope of legal survey in India.

It must, in any case, be yielded that the American Supreme Court has burned-through its ability to decipher the constitution generously and has made so exhaustive a utilization of the "fair treatment of law condition that it has gotten in excess of a more translator of law. Be that as it may, took great consideration not to epitomize the fair treatment of law proviso in the constitution". Actually, the composers of the Indian constitution chose to exemplify the term 'methodology set up by law'. It can refute laws in the event that they disregard arrangements of the constitution however not on the ground that they are terrible laws. As such the Indian Judiciary including the Supreme Court is anything but a Third Chamber asserting the ability to sit in judgment on the strategy encapsulated in the enactment passed by the lawmaking body.

In this way, in the expressions of Justice Cardozo, the central worth of legal survey rather lies "in making vocal and perceptible thoughts that may somehow be hushed, in giving them congruity of life and of articulation, in controlling and coordinating the decision inside the cut-off points where decision officers."[30]

## Conclusion

Constitutionalism is a matter of taste and manners. There can be an invitation in the constitution that 'the conduct of government be transparent' (Ethiopia, Article 12(1)), but such words make little difference, if the rulers believe that they can do anything without any explanation. Contemporary constitutions exist on the foundations of a set of beliefs and commitments. Constitutional expectations are to be shared by the power holders and their constituency. As a result, a long-term perspective, applicable to future governments, emerges that is not limited to drafting technicians and politicians, but is deeply connected with public politics, with such problems and political conflict involving the people that require lasting institutional solution.

Constitutionalism is supposed to answer the question: how do we 'construct enduring forms of political order? The fate of revolutionary power sharing will depend on many things besides constitutional creativity; culture, economics, and geopolitics will make a tremendous difference. Nonetheless, the creative role of constitutionalism is easy to underestimate . . .'[31] Constitutionalism, written into law, does not replace the cement of society, but it is an important active ingredient of the cementing compound. Government may have a leading role in integrating society; and in such cases additives become particularly important. British constitutionalism survives without a written constitution.[32] There, so the canonical contemporary doctrine insists, judges cannot review the constitutionality of statutes, the majority of civil liberties and fundamental rights are not guaranteed by entrenched protective laws, and—at least in theory—Parliament can reshape the political system whenever it desires. Without idealizing the political system that seems to prevail in the United Kingdom, one can assume with near certainty that the withdrawal of constitutional freedom is out of the question in that country.

For constitutional provisions to be meaningfully and effectively operative there must be institutional and cultural machinery, which is partially created by the constitution itself, to implement, enforce and safeguard the constitution. Judicial Review is one of the key components in implementing and safeguarding the spirit of Constitutionalism. An independent judiciary, independent constitutional review, and the notion of the supremacy of law all work together to ensure that the letter and spirit of the constitution are complied with in the working of a constitutional government. Constitutionalism is the philosophy of the constitution, which imposes limitation upon the exercise of

[30] B.N. Cardozo, *The Nature of Judicial Process,* 94 (Universal Law publishing Co. Pvt. Ltd., 2004).
[31] B. Ackerman, The Future of Liberal Revolution (Yale University Press, 1992) 3 (emphasis added).
[32] For a less enthusiastic home-grown appraisal see K. D. Ewing, Bonfire of the Liberties. New Labour, Human Rights, and the Rule of Law (Oxford University Press, 2010).

power. So, the overall view can be concluded in the words of Frankfurter, J. that Judicial review, itself a limitation on the popular government, is a fundamental part of our constitution.

**Suggestions:**

1. "The first thing that needs to be done is to codify the law on the subject of Judicial Review.
2. The trend at present is to vest jurisdiction with new institutions of administrative nature but it is not clear what will happen to the concept of Judicial Review and how the independence of the administrative institutions will be protected.
3. The concept of Judicial Review at times has assumed political overtones; the amendments so often made to the Constitution have raised challenges before the Judiciary as to what it should do when they are challenged before them".

# India's Dire Need for a New Comprehensive Pandemic Law

*Romala Menon*[1]

***"This pandemic has magnified every existing inequality in our society" – Melinda Gates***

## Introduction

India, just like the remainder of the globe is affected due to COVID-19. On March 11th 2020, the eruption was declared by the World Health Organization as a public health exigency and defined as a pandemic. Legislation plays a critical role in the containment of the disease. Despite there being various legislations to control public health, a significant question arises as to whether colonial-era laws such as 'The Epidemic Disease Act 1897', 'The Indian Penal Code 1860', and 'The Disaster Management Act 2005' are sufficient enough to encounter the challenges posed by a twenty first century pandemic?"[2]

COVID-19 pandemic caused by the novel coronavirus SARS-CoV-2 as stated,[3] started at Wuhan within the Hubei province of China and has unfolded swiftly around the world. A year has passed, and the virus still remains wreaking mayhem in several nations including India. Throughout such pandemic times, legislation plays a key role in the containment of the disease and legal acts have to be implemented to manage and overcome the pandemic.[4] Pandemic and Epidemic are the two terms people exchange frequently to refer to the stages of the spreading of any infectious disease. An Epidemic is a disease that affects a large number of people within a community, population, or region. Whereas a Pandemic is an epidemic that spreads over multiple countries or continents. Pandemics have occurred throughout human history. Pandemics seem to be increasing in frequency over the last century on account of zoonotic transmission of diseases, urban development, alterations in the way lands are used, rise in international travel, and exploitation of natural resources. The consequences of the Pandemic are devastating to humanity. Future Pandemics are inevitable and unpredictable.

Humanity has been ravaged by plagues and epidemics throughout its existence, typically ever-changing the course of history and at alternative times obliterating entire civilizations. It is relevant to trace the timeline of the worst epidemics and pandemics from prehistoric to the present time to grasp the background and analysis the context of this epidemic. The past provides an introduction for any discussion that pertains to Covid 19.[5]

The Athenian Plague occurred in 430-26 B.C., during the Peloponnesians War which was fought between the city – states of Athens and Sparta. The historic account of the Athenian plague is provided by Thucydides, who survived the plague himself and described it in his *History of the Peloponnesian War.*[6] The

[1] Ph.D Research Scholar, Alliance School of Law, Alliance University, Bangalore.

[2] Ijphrd August 2020, SCRIBD available online at https://www.scribd.com/document/495356157/Ijphrd-August2020 (last visited Feb 13, 2020).

[3] Pandemics: Risks, Impacts, and Mitigation, NATIONAL CENTRE FOR BIOTECHNOLOGY INFORMATION, https://pubmed.ncbi.nlm.nih.gov/30212163/#::text=Evidence%20suggests%20that%20the%20likelihood, will%20continue%20and%20will%20intensify. (last visited Feb 21, 2020).

[4] Coronavirus Disease (COVID-19) - events as they happen, WORLD HEALTH ORGANIZATION, available online at https://www.who.int/emergencies/diseases/novel-coronavirus-2019/events-as-they-happen (last visited Feb 15, 2020).

[5] Damir Huremović, BRIEF HISTORY OF PANDEMICS (PANDEMICS THROUGHOUT HISTORY) PSYCHIATRY OF PANDEMICS: A MENTAL HEALTH RESPONSE TO INFECTION OUTBREAK (2019), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7123574/(last visited Feb 18, 2020).

[6] A. Thucydides, HISTORY OF THE PELOPONNESIAN WAR, Book 2, Chapter VII. Pages. 89–100., trans. Crawley R. available online on Digireads.com Publishing; 2017 Sept. ISBN-10: 1420956418.

Athenian plague originated in Ethiopia, and it spread throughout Egypt and Greece. The Antonine Plague was yet another outbreak that occurred between the period of 165-180 A.D., which was a couple of centuries after the Athenian Plague. The Justinian Plague which was popularly known as a pandemic wherein "No One Was Left to Die". It originated during the mid of sixth century A.D. which was also known as the "real plague" pandemic (i.e., caused by Yersinia Pestis) from Ethiopia, moving through Egypt, or in the Central Asian steppes, where it then travelled along the caravan trading routes.

The pestilence quickly spread throughout the Roman world and beyond from either of these two locations. The Justinian plague generally followed trading routes, like most of the other pandemics, providing an "exchange of infections as well as of The Black Death Plague was a global outbreak of bubonic plague that originated in China in 1334, arrived in Europe in 1347, following the Silk Road. Within 50 years of its reign, by 1400,[7] it almost swept the global population and reduced it from 450 million to below 350 million, The Great Plague of 1665 was the last and one of the worst pandemics of the centuries-long outbreaks, killing 100,000 Londoners in just seven months. All public entertainment was banned and the victims were forcibly shut into their homes to prevent the spread of the disease. The lethal outbreak took place in Jessore, India. It spread to Myanmar, Sri Lanka and around 1820 in Thailand, Philippines, Iraq and Europe. This then spread to other parts of the world, from 1829-1833, Moscow, Finland, Poland, Canada, US.

There were about six waves that resulted in deaths as well. The epidemic that started in India spread to Europe moving rapidly along with the expansion of trade in the nineteenth century. Influenza or 'the flu' has been categorised under three types, namely, Type A, Type B and Type C.[8] Type A is responsible for regular outbreaks in humans. A flu is further divided into three, pandemic, seasonal and zoonotic. Historical data illustrates the danger of transmission of influenza between animals and humans that can potentially contribute to the emergence of a pandemic."[9] The Spanish flu pandemic appeared during the first decades of the twentieth century and got established as the first true global pandemic. It also became the last true global pandemic with devastating consequences for societies across the globe.[10] It was caused by the H1N1 strain of the influenza virus,[11] Within months, the deadly H1N1 strain of influenza virus had spread to every corner of the world. This pandemic was also the first one where the long-lingering effects could be observed and quantified. Smallpox was a highly contagious disease for which Edward Jenner developed the world's first vaccine in 1798. Caused by the Variola virus, it was a highly contagious disease with prominent skin eruptions (pustules) and mortality of about 30%.

One of the deadliest diseases because of its mortality, Ebola virus, is transmitted from animals to humans. The first epidemic occurred in Republic of Congo in 1976. Ebola virus, endemic to Central and West Africa, with fruit bats serving as a likely reservoir, appeared in an outbreak in a remote village in Guinea in December 2013. The total number of cases figured to 28,652 with affected countries include Italy, Mali, Nigeria, Senegal, Spain, United Kingdom and The United States. HIV/AIDS is a slowly progressing global pandemic cascading through decades of time, different continents, and different populations, bringing new challenges with every new iteration and for every new group it affected. It started in the

[7] The Editors of Encyclopaedia Britannica. Black death, Encyclopaedia Britannica; 2018 Sept available online in https://www.britannica.com/event/Black-Death.

[8] FAQs on zoonotic influence: WHAT ARE THE KNOWN TYPES OF INFLUENZA VIRUS? World Health Organization, Regional Office for South East Asia, 2017

[9] FAQs on zoonotic influence: WHAT ARE THE KNOWN TYPES OF INFLUENZA VIRUS? World Health Organization, Regional Office for South East Asia, 2017

[10] CDC: Remembering the 1918 influenza pandemic, available online in https://www.cdc.gov/features/1918-flupandemic/index.html.

[11] A. Antonovics J, Hood ME, Baker CH Nature, MOLECULAR VIROLOGY: WAS THE 1918 FLU AVIAN IN ORIGIN? 2006 Apr 27; 440

early 1980s in the USA, causing significant public concern as HIV at the time inevitably progressed to AIDS and ultimately, to death. Severe Acute Respiratory Syndrome (SARS) was the first outbreak in the twenty-first century that managed to get public attention. Caused by the SARS Corona virus (SARS-CoV), started in China. The outbreak of SARS provided an opportunity to study the use and impact of public health informatics and population health technology to detect and fight a global epidemic. A disease that has a high fatality rate, Nipah Virus infection was first detected in Malaysia and Singapore in 1990s.[12] An onslaught of nature, deforestation that led to the fruit bats (the carriers of the virus), losing their habitat and coming in close contact with domestic animals and humans resulted in Nipah outbreak.[13] Nipah is a sort of a new-age plague.

The Nipah outbreak reported in Kozhikode and Malappuram districts of Kerala in May 2018 was the third of Nipah Virus Outbreaks in India, the earlier being in 2001 and 2007, both in West Bengal. The outbreak was managed by the state government and the central government agencies acknowledging a success story.

Therefore, it is evident that unsanitary environments and pollution caused by humans are the most important reasons for the fast-spreading of pandemics. In additional to the present, developments in transport and information technology created the world as a global village, which makes the spreading of contagious diseases inevitable.[14] The world currently is in the middle of an ongoing pandemic - Covid 19 conjointly known as SARS-CoV-2 was 1st reported in Wuhan, China early as December 2019 when a bunch of patients affected by the respiratory illness of unknown cause was connected to the live wet markets existing in China. A pandemic outbreak of this size, proportion, and consequences was unique, unparalleled, and unprecedented. The world was forcibly shut down on account of Covid-19. All spheres, sectors, and aspects of human life are impacted negatively due to the pandemic.

## The Impact of Covid19 in India

The pandemic and the nationwide lockdown imposed on account of COVID 19 has adversely affected the economy and livelihoods of millions in India.

## Economic Impact:

The effect of the (COVID-19) pandemic had not just carried the worldwide economy to a halt and had also crashed important global stock exchanges which prompted the loss of billions of dollars wiped out very quickly. Studies done by UBS globally predicts that 20-30% of industries will leave China because of the course of Coronavirus and continuous trade wars. Being the rate of infection & rate of death (compared to 1 M pop) in India did not appear to be as high as in different nations, prudent steps received in 2020 managed a serious hit to the nation's significant business areas - with the service industry bearing the biggest brunt of the assessed loss. India's growth in the fourth quarter of the fiscal year 2020 went down to 3.1% as per the Ministry of Statistics. Every one of the significant business sectors in India confronted the individual set of difficulties because of the pandemic, MSMEs and unorganised sectors are said to be the worst hit. On the record of Covid-19, the fundamental areas involve a significant dip in part of India's GDP: Agriculture, Industry, Service areas impacts appear in the table beneath.[15]

- April to June:

  The growth output of the Agricultural Sector was 3.40%

  The growth output of the Industrial Sector was -20.60%

[12] Epidemics and Pandemics in India throughout History: A Review Article/ Nippah virus

[13] What is Nipah Virus? The Indian Express, Express Web Desk, February 9, 2020

[14] LePan, Nicholas. "Visualizing the History of Pandemics." Visual capitalist, 14 March 2020, available online at www.visualcapitalist.com /history-of-pandemics-deadliest

[15] ESTIMATED ECONOMIC IMPACT FROM COVID – 19 IN INDIA 2020, by Sector, Published by Statista Research Department, available online at https://www.statista.com/statistics/1107798/india-estimatedeconomic-impact-of-coronavirus-by-sector/

The growth output of the Services Sector was -38.10%

- July to September:

  The growth output of the Agricultural Sector was 3.40%

  The growth output of the Industrial Sector was -2.10%

  The growth output of the Services Sector was -11.40%

- October to December:

  The growth output of the Agricultural Sector was 3.90%

  The growth output of the Industrial Sector was 2.70%

  The growth output of the Services Sector was -1.00%

India's unemployment rate has skyrocketed to nearly 23.52% in Aug 2020, which forced millions of migrant workers to go back to their native villages and their livelihood was critically affected.[16]

## Political Impact:

The COVID-19 pandemic has led to an enormous impact on politics both internationally and domestically. It has affected the political systems and governments of multiple countries that indulge suspension of some legislative conferences, international political meets, deaths of multiple politicians and even the elections were rescheduled because of the concern of virus spread.[17] The pandemic has placed governments within the world to react resolutely and quickly, however, the political responses are varied across the countries. In the Republic of India additionally, the political responses between the state and the centre are variable that has political changes within the country. Politically several super-power nations started supporting one another and extended their political support to low developed nations. India extended its support by donating & supply of the vaccines to 95 countries, though in India, the percentage of people given the 1st dose of vaccination stood at 14.14% and the percentage of completely vaccinated was only at 3.7% as of May 2021.

## Legal Impact:

The COVID-19 had an impact on the global court functioning and the legal system. Ultimately, the impact of Covid-19 on the legal market is proven by new regulations enacted impromptu in many areas, including leases; finance or commercial agreements; employment regulations concerning temporary or definitive dismissals; tax exemptions, payments or returns delays; licences or authorisation terms and foreign investments etc. On march 2020, the Supreme Court of India has declared that, it'll be hearing only the urgent matters. Similar announcements are made by all High Courts and other courts of various states, that wedged the legal profession in India, particularly the litigating legal professionals. The Supreme Court plans the judicial proceedings step by step to be shifted towards technological integration into the Indian legal system which led the Honourable Supreme Court to send notices and summons through digital platforms. The virtual courts and dispute resolution held online are now a reality being a hybrid model of physical and virtual court processes and has its pros and cons between the lawyers, the clients and also the legal systems.

## Social and Cultural Impact:

COVID-19 had social effects on the lives of the population. It had an impression on the psychological well-being of the individuals as their social life was disrupted. The closure of schools and colleges, offices,

[16] 6 COVID-!9 IMPACT ON UNEMPLOYMENT RATE IN INDIA 2020 – 2020, Published by Statista Research Department, available online at https://www.statista.com/statistics/1111487/coronavirus-impact-onunemploymentrate/#::text=COVID%2D19%20impact%20on%20unemployment%20rate%20in%20India%202020%2D2021&text=In%20January%202021%2C%20India%20saw,rate%20of%20over%20six%20percent.&text=A%20damaging%20impact%20on%20an,24%20percent%20in%20April%2020 20.

[17] Van Holm, E., Monaghan, J., Shahar, D. C., Messina, J. P., & Surprenant, C. (2020). The impact of political ideology on concern and behaviour during COVID-19. Available online at SSRN 3573224.

hotels, restaurants, malls, and multiplexes has disrupted the relationships among individuals and their perceptions of fellow feeling towards others due to social distancing.[18] The gatherings reduced, and the people were forced to remain at their home. Anxiety, depression, distress, and insomnia showed higher percentages throughout the lockdown period resulting in psychoneurotic thoughts. There has been progressive closure of the people with reduced social relationships moving their social support because of mobility restrictions. People are considered as social entities engineered on social facts and forceful distancing from others to tackle the emergency incremented social phobias among the population.[19] At this juncture, technological devices started getting vital roles in the way of life.

## Deficiencies in the Existing Indian Legal Framework to Deal With the Pandemic- Glaring Drawbacks That Require Redressal

India has a plethora of laws to deal with an epidemic or pandemic. India has largely depended on The Epidemic Disease Act 1897, the Indian Penal Code 1860, and The Disaster Management Act 2005 to decide its response to the current pandemic - COVID 19.The Epidemic Disease Act, 1897, Indian Penal Code, 1860 and The Disaster Management Act, 2005 that India has largely depended on to decide its response to the pandemic are archaic, obsolete, insufficient, and weak to deal with the consequences of a pandemic of this size, such as the coronavirus.[20] There are no substantiative provisions in either of the Acts that provide solutions to the innumerable issues that have cropped up on account of COVID 19. The Executive is drafting laws on matters under the Act by issuing Notifications and Orders, assuming the role of the Legislature. The Government is utilising the Epidemic Diseases Act, 1897 and The Disaster Management Act, 2005 as if the Legislature has granted limitless powers to the Executive. No such boundless powers are granted to the Executive under the Acts. Even an Emergency declared under Article 352 requires parliamentary supervision. Checks and balances have to be put in place appropriately to supervise the powers exercised by the Executive.

## The Epidemic Disease Act of 1897[21]

Following the bubonic plague of 1896, the Infectious Disease Act of 1897 became obsolete. It comprises only four parts and has undergone a few amendments. The Antique Epidemics Disease Act has been revised recently with many reminders, as it does not include any recommendations to prevent or mitigate epidemics. What constitutes a 'dangerous infectious disease' is not described by the old three-page-and-four-section EDA. It provides the executive with unfettered powers to enforce orders. The EDA has been relied on by the state and central governments to deal with the health aspect of this scourge that has invaded our country.

The Infectious Disease Act, 1897 leaves the state with the power to determine which steps to initiate, and it is difficult for them to make the correct response since those leading the states are not medical experts. EDA has not specified what a harmful or contagious disease is, and there are still no procedures for determining if such diseases are an epidemic. Another drawback of the EDA is that there are no provisions on the sequestering and sequencing of medication and vaccine distribution and how the preventive measures can be implemented.

**Act Not Comprehensive -** This Act is short. It only contains four sections and has gone through a few

[18] Bhagat, R.B., Reshmi, R.S., Sahoo, H., Roy, A.K. and Govil, D., 2020. *The COVID-19, migration and livelihood in India: challenges and policy issues.* Migration Letters, 17(5), pp.705-718.

[19] Saladino, V., Algeri, D. and Auriemma, V., 2020. *The psychological and social impact of Covid-19: new perspectives of well-being.* Frontiers in psychology, 11, p.2550.

[20] 20 missing ???????

[21] Harleen Kaur, CAN THE INDIAN LEGAL FRAMEWORK DEAL WITH THE COVID-19 PANDEMIC? A REVIEW OF THE EPIDEMIC DISEASES ACT BAR AND BENCH - INDIAN LEGAL NEWS, available online at https://www.barandbench.com/columns/can-the-indian-legal-framework-deal-with-the-covid-19-pandemic-a-review-of-the-epidemics-diseases-act

amendments. There have been several reminders recently to update the antique Epidemics Disease Act, as it does not contain any guidelines to prevent or alleviate epidemics.

**Unbridled Power Granted to Government -** It gives unfettered powers to the executive to promulgate notifications and orders. The State and Central Governments have banked on the EDA to deal with the health aspect of this scourge that has invaded our nation. The state has been coercive, dictatorial, and arbitrary in its action of handling the pandemic. Regulations have been crafted one after another to exact public obedience, failure of which invited imprisonment.

**Scope of the Act Exceeded -** The Doctrine of Ultra Vires is likely to be invited as the scope of the Act has been transcended through the regulations that have been passed under the Epidemics Diseases Act 1897.[22]

**Blanket Immunity to Public Servants -** Disobedience to the regulations is made a punishable offence while providing immunity to public officers for performing functions under the law. Extensive powers are granted to the government officers - to admit and isolate a person, powers of surveillance of individuals and private premises.

**Lack of Coordination -** It does not establish any coordination mechanism between states and the union government at the time of a dangerous epidemic outbreak.

**Misuse -** The State can misuse the law for profiling, mass quarantine, and targeting of individuals.

**Drugs -** Another limitation of EDA is that it has no provisions concerning sequestering and sequencing for the dissemination of drugs and vaccines as well as how preventive measures should be enforced.[23]

## The Disaster Management Act, 2005

The DMA has been built to overcome the threats of natural disasters such as tsunamis, earthquakes, and cyclones, to rapidly shut down and isolate a small portion of the country. The architects of DMA did not include provisions to handle an epidemic or pandemic outbreak, where such natural disasters occur only in a certain part of the place, by disrupting for a few hours or feeding days the usual day-to-day life. During a pandemic, the first and foremost rule is for human beings to maintain a social distance. The coronavirus outbreak has been announced by NDMA as a confirmed disaster. Lockdowns were enforced by MHAissued circulars and alerts.

**Basis of Regulations issued by MHA Questioned -** The regulations given by the MHA under the DMA lacks a legal basis. The government is not empowered to pass orders under section 10(2) of the DMA, 2005. Section 10 under which the orders are issued, empowers the government to give guidelines or directions only to the government machinery and cannot be imposed on private individuals or establishments. The orders passed can be nullified under the Doctrine of Substantive Ultra vires.[24]

***Punishments for Disobedience* -** The punishments prescribed in the DMA 2005 are for disaster-centric acts like reconstruction, relief assistance, false warning, raising a false claim to obtain repair during the period a disaster strikes, and not for the outbreak of a communicable disease.

***Punishments provided in the Act are Unused and Dormant –*** *A complaint has to be raised to the National* or State Disaster Management Authority by giv-

[22] Cclsnluj, COVID-19 – VII: IS THE INDIAN LEGAL FRAMEWORK CAPABLE OF HANDLING THE CORONAVIRUS PANDEMIC THE CRIMINAL LAW BLOG (2020), available online at https://criminallawstudiesnluj.wordpress.com/2020/04/19/covid-19-vii-is-the-indian-legal-framework-capableof-handling-the-coronavirus-pandemic/

[23] Manish Tewari, INDIA'S FIGHT AGAINST HEALTH EMERGENCIES: IN SEARCH OF A LEGAL ARCHITECTURE ORF (2020), https://www.orfonline.org/research/indias-fight-against-health-emergencies-in-search-of-a-legalarchitecture-63884/

[24] Cclsnluj, COVID-19 – VII: IS THE INDIAN LEGAL FRAMEWORK CAPABLE OF HANDLING THE CORONAVIRUS PANDEMIC THE CRIMINAL LAW BLOG (2020), available online at https://criminallawstudiesnluj.wordpress.com/2020/04/19/covid-19-vii-is-the-indian-legal-framework-capableof-handling-the-coronavirus-pandemic/

ing a 30 day's notice under Section 60 of the DMA for taking cognizance of any offence committed under the act, thereby hindering quick action which is essential at the time of an epidemic.

### The Indian Penal Code, 1860

People are being charged under sections 188, 269, and 270 of IPC for violating lockdown orders. If the orders passed by any government authority are violated, the same is prosecutable under Section 188 of IPC. This is a broad provision that deals with the disobedience of an order passed by any government authority.

### Conclusion

The Indian State's response to the Covid-19 pandemic reveals a stark truth: The central government, has invoked the Disaster Management Act of 2005 (DMA), whereas many state governments have invoked the Epidemic Diseases Act of 1897 (EDA), both the existing laws, one is colonial vintage and the other has wide, vaguely-worded with umbrella clauses that enable the Central and the State governments to initiate any measure they see necessary to handle a disaster or epidemic. India's administrative authorities have used these two different and non-related laws to impose a nationwide "lock-down"—the precise legal definition of that remains unclear as it seals the state borders, suspend transportation services and individual movement and justify intensive quarantining and social distancing necessities. It is necessary to notice that neither of those laws are classic "emergency laws". Neither the EDA nor the DMA involves politically risky, formal measures such as the proclamation of an emergency or the deferment of Parliament. Rather, within the context of COVID-19, the EDA and DMA functioned as sanctioning laws, permitting governments expansive, nearly unchecked, powers without requiring the politically fraught task of declaring an emergency and suspending civil liberties. Going forward, therefore – and beyond Covid-19 – the task seems to be twofold: that specialize in narrowing the scope of umbrella legislation that effectively authorizes rule by decree without the legal safeguards and political responsibilities of an emergency declaration, and on articulating a brand new "EPIDEMIC AND PANDEMIC ACT" and within the same approach contributively to a legal culture aimed towards restoring a robust judicial review over government action supposedly for the benefit of the people at large.

### Suggestions

A suggestion to revisit, revise, update and amend the existing Epidemics Disease Act 1897 or to strike it down to pave way for a new exclusive comprehensive law for Pandemics is a need of the hour. Based on challenges observed from the current laws, it is suggested that there is a necessity to develop a new comprehensive pandemic law to replace the 1897 Act and to deal with future pandemics by considering the following recommendations:

- The Bill drafted by the Union Ministry of Health and Family Welfare – PUBLIC HEALTH PREVENTION, CONTROL, AND MANAGEMENT OF EPIDEMICS, BIOTERRORISM AND DISASTERS BILL 2017 – should replace the 100-year-old Epidemics Diseases Act 1897 to counterstrike any emergency swiftly.
- Most importantly, the new legislation should lay down clear definitions of epidemic, pandemic and what an infectious disease is the need of the hour.
- The act must provide for the following stringent Covid appropriate behaviour and Covid protocols during the pandemic – To Wear a Mask, Keep Social Distance and Sanitise.
- The Act must ban social gatherings like weddings or funeral and mass gatherings for religious congregations, sporting events and election campaigns during a pandemic.
- The Act must protect doctors and frontline health workers in terms of their health, salaries, work hours, insurance and safety.
- Since health is a state function in India, the states must be involved in the development of this law and their views incorporated.
- The Act must ensure that India has a proper healthcare infrastructure in place to meet future pandemics. All the healthcare systems should ensure that people are provided with equal and

qualitative care in both private and public hospitals without any form of discrimination based on gender, race, religion, or age.

- The new law must provide procedural guarantees against abuse of State power when interfered with the Right to Privacy of an individual.
- The new law should have the provisions to impose immediate lockdowns to stop the spread on a larger level.
- The new law must define the procedures that the central and local government must undertake during the pandemic, promoting cooperative federalism. The procedures should be proposed by health and medical experts and strictly followed in case of a pandemic. Measures such as lockdown should be clearly defined and the times where they can be applied.
- The new law should ensure that such measures do not comprise the Indian Constitution, especially on human rights, fundamental rights and the freedom of people and the same are not trampled upon in the name of national interest. Separation of powers is enshrined in the Constitution and the Act should ensure that the Executive does not assume the role of the Legislature.
- The new law should recommend establishing a National Authority that will coordinate all the responses in case of a pandemic or epidemic making it responsible for ensuring that resources are allocated evenly in the case of an epidemic.
- The new law requires the government to invest and develop high technology such as artificial intelligence to facilitate surveillance which shall clearly state when and how such technology can be used to avoid infringing on people's privacy. While conducting surveillance, the individuals being surveyed must be informed, and such surveillance must not invade the basic rights of the person.
- The development of the new law should involve public participation in making it an effective law in force during an outbreak.
- The new law should have a flat rate policy introduced during a pandemic situation to curb black marketing and increase in the price of essential commodities, such as, vaccines, medical equipment's, medicines etc.,
- The new law must impose on the Government and the political parties to work under the concept of "ONE PARTY, ONE NATION", setting aside their political differences, ideologies and vendetta, so as to unitedly eradicate the common enemy – "The Virus".
- The new law should be capable to instruct the medical fraternity to work with only a specific set of expertise doctors in treating the pandemic and not to involve all the doctors compromising the treatments for other health-oriented diseases.
- The Act ought to accommodate an NDMA like power or body, having portrayal from both the Centre and states, answerable for planning and executing, recognizable proof, contact-tracing, isolation, segregation, testing techniques, and treatment. The NDMA should also authorise the executive to plan for lockdown strategy, supply of essential and non-essential services, food and relief support, and all non-health services.
- The Act must give freedom to States to draft and implement as per their local assessments, preparing health facilities to face challenges at the respective district and gram panchayats.
- The Act must provide for a combination of civil and criminal penalties for violating the orders issued by government authorities and protect frontline workers like sanitation staff, nurses, doctors, village-level health workers, and police personnel.
- The Act must provide for distribution of foreign aid that pours in for India
- The Act must provide that the executive should be transparent while projecting actual numbers of live cases /fatalities and not conceal real figures to the public.
- The Act must protect the freedom of speech and expression of protestors who voice their con-

cern over incorrect and excessive executive action during the pandemic, prevent the executive to arrest them and curb resistance. The Act must also protect social media from being clamped down by the executive who wants to silence criticism and police online content.

- The Act must safeguard children and cancel all public examinations during a pandemic, to protect them from getting infected and spreading the infection. The Act must also provide for alternative sources of internal assessment to examine them at home online and get the desired results to move forward.
- The Act must also protect the rights of patients during a pandemic.
- The Act must make provisions to ramp up laboratories, testing, ICU beds, PPE Kits, Supply of Oxygen, Critical Medicines etc.
- The Act must promote genome sequencing, to gauge the impact of the new mutant variants.
- The Act must provide for relief measures to migrant labourers who are registered in a national database of migrant workers
- The New law must provide for estimating the country's requirement and controlling the price, production, availability, distribution, export, import, licencing, patenting, efficacy, administration and sequencing of vaccines
- The Act must give importance to the fundamental principle of human dignity which not only speaks about the dignity of a living person but also includes the dignity of a person even after his death by performing their last rites according to their religious rituals at the time of disposing Covid infected bodies of the deceased.

One can partially blame the Government's arbitrary, vacillating, haphazard and dictatorial reaction to COVID-19 on the lack of a national protocol and law, which is designed to regulate pandemics. The laws India has depended on were not originally crafted to meet the threats presented by a modern-day pandemic. India desperately needs an exclusive comprehensive law to control and manage epidemics and pandemics.

# Globalisation and its Implication on Law Relating to Women and Their Work-Life Balance

*Dr. N. Dasharath[1] and Sujatha V. Durgekar[2]*

## Introduction

Indian women have been revered in the Indian society giving them the form of Goddesses. In all the Hindu scriptures, she is revered and worshiped as an all-empowering force. The Ramayana and the Mahabharata, both the stories were woven around the women only. But from time immemorial, she has been confined to domestic work. Work and life are interrelated. It is impossible to live a life without work. Every human being has to work to earn his bread. Indian society has been a patriarchal society where man is the bread earner of the family. In this patriarchal society a woman has always been subordinate to men. Even the term "Women" is not independent of the word "Men". Ever since ages, women were considered to be the weaker section of society and her role was limited to domestic work at home.

However, the modern civilization and globalization has set in considerable changes in the society especially with regard to the entry of women in work force by providing them with ample opportunities. This has also resulted in violation of the international as well as national laws prescribing eight hours of work, which has been discussed below, in order to achieve the global target thereby conflicting work and family life. The main causes for conflict in worklife balance being gender discrimination, work area ethics and various policies and family culture, despite the 'Equal Remuneration Act', various provisions of Constitution, Factories Act etc. This has been substantiated by the International Labour Organisation's Wage Report and the World Economic Forum's Global Gender Gap Reports. "The Strategy for New India75" document has also suggested inflexibility in hours of work and absence of parttime works as causes for imbalance in work and family life.

## The International Laws Empowering Women

The movement to realise the women electoral rights was started in 1848 and gradually, it became a mass movement. In the late nineteenth century, women in the United States sought equal rights, opportunities and liberty for women. The Brandeis[3] case was the first eye opener for the international community with respect to the hours of work of Women. The famous case of Brandies brief became a landmark case which took place in the United States legal history. The Supreme Court, in this case, upheld the law of the state of Oregon which restricted the working hours of women in factories and laundries.

Women in India realised the importance of the right to vote in the early nineteenth century which was granted subsequently. In the year 1945, to maintain peace and security, friendly relations and promote human rights and equal rights internationally, the United Nations Organisation was established. The year 1975, the International year of women, the first 'World Conference on women' was held in Mexico by the United Nations to focus only on women's issues. Subsequently, in the very next year, there were discussions on policies and issues that impact women such as equality in pay, promotion of equal rights and opportunities for women around the world. The United Nation assented to the 'Convention on the Elimination of All Forms of Discrimination Against Women' in 1979, which ensured abolition of all practices of discrimination against women. Article 1 of the Treaty defines discrimination against women as "Any distinction, exclusion or restriction made on the basis of sex which

[1] Professor and Chairman, Dean & Faculty of Law, University Law College and Department of Studies in Law, Bangalore University
[2] Research Scholar, University Law College and Department of Studies in Law, Bangalore University
[3] Muller v. Oregon, 1908 US SC, www.encyclopedia.com/politics/encyclopedias-almanacs-transcripts-andmaps/brandeis-brief

has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field".[4] Then again in 1995, during the fourth world conference on women in Beijing, "The Beijing Declaration and the Platform for Action", was adopted by 189 countries for 'women empowerment and gender equality'[5].

In addition, there are various conventions of International Labour Organisation (ILO) for women providing gender equality. One of the ILO Conventions, Convention No. 100 of 1951, provides for equal pay for men and women workers for equal work. This is to make sure that there is no discrimination in the society on the grounds of gender with respect to the determination of basic or minimum wage and other emoluments in cash or kind by employer to worker in employment. The Convention No. 111 of 1958, for Discrimination (Employment and Occupation) excludes discrimination on the basis of race, colour, religion, gender, etc. which deprives equality of opportunity in occupation and employment and behaviour in employment. In the Convention no. 156, 1981 of workers with family responsibilities includes men and women workers. It also includes workers with children, elders who need their care and such responsibilities restrict them from participating in economic activity. The problems of workers with additional responsibilities of family and others are wider issues and in the modern context necessary to be considered in the national policies for implementation. Convention No. 183 of 2000 for maternity protection ensures safe work for pregnant ladies, maternity leave of 14 weeks, to protect the health of child and mother, six weeks compulsory leave after child birth. Prenatal leave can be extended and woman can return to same position after maternity leave. There can be no termination from employment on the grounds of pregnancy.

Convention No. 175 of 1994 on Part-time work, defines part time work as hours of work less than normal hours of work. It also promises same protection for the part time workers similar to that of full-time workers such as right to organise and bargain collectively, to form unions, safety and health of workers, no discrimination in employment and occupations, social security, paid leave, maternity protection etc. This helps women to continue their work despite family responsibilities. Home Work Convention No. 177, 1996, also gives an opportunity to work from home for remuneration with equal treatment like other workers. Home workers also have the right to join unions, safety, health, social security, training etc. Convention No. 89 of 1948, Night Work for women (Revised) is not applicable to manager and health and welfare services but only to those engaged in manual work. There is no provision for night work for women in public or private industrial undertakings except in family undertaking. Convention No. 171 of 1990, the Night Work Convention, 1990, provides for night work which is not less than 7 consecutive hours. This includes the work done from the midnight to early morning of 5 a.m. This limit on night work for workers needs to be determined by competent authority after consulting the representative organisations of employers and employees and workers or by collective agreements. It is necessary to take specific measures for night workers to protect their health, assist them to meet their family and social responsibilities, maternity protection, free health assessment, alternate work for prenatal and postnatal workers.[6] In India the night work for women has not been followed except for the women in IT and ITES sectors. However, "The Occupational Safety, Health and Working Conditions Code, 2020, provides for night shifts for women. Women can be employed in all establishments for work between 7

[4] Sylvanna M. Falcon, *Convention on the Elimination of All Forms of Discrimination Against Women,* (December 12, 2020), https://www.britannica.com/event/Convention-on-the-Elimination-of-All-Forms-ofDiscrimination Against Women.

[5] *World Conferences on Women,* UNWOMEN, (Dec. 10, 2020), http://www.unwomen.org/en/how-wework/intergovernmental-support/world-conferences-on-women.

[6] ILO,NORMLEX,https://www.ilo.org/dyn/normlex/en/f\&p=NORMLEX/PUB:12100:0::NO::P12100_INSTRU MENT_ID:312316 (Dec. 12, 2020).

p.m. and 6 a.m. with their consent. The employer has to follow safety measures, working hours and working conditions as prescribed by the appropriate government while employing women on nigh shifts".[7] The government notification for IT and ITES companies exempting these employees from the application of Industrial Employment (standing Orders) Act 1946[8] which was again extended for another five years from the date of publication of the notification in the official gazette, also mandates formation of grievance and internal committees to prevent, prohibit and redress sexual harassment to ensure adequate measures for their protection.

## Empowerment of Women at the National Level

After the Constitution of India came into force, equal rights were granted to both men and women under various provisions such as Article 14 dealing with equality before law and all are equal in the eyes of law. Under Article 15(3) of the Indian Constitution there can be special provisions for only women and children. Under 73 and 74th Constitutional Amendment Act, 1992, constitutional status was granted to Panchayati Raj Institutions and Urban local bodies. And also, as per article 243D (2) of the Constitution of India, there are one third number of total seats reserved for SC&ST women in the Panchayats. The Constitution 108th amendment bill, 2008, prescribes one-third reservation of all seats for women in the Lok Sabha and State Legislative Assemblies. Under the Directive Principles of State Policy, Article 39(d) of the Constitution of India provides for equal pay for equal work. In pursuance of Convention No. 100, 1951, the Equal Remuneration Act, 1976 was brought into force. The Equal Remuneration Act, 1976 proposes for equal pay for equal work for both men and women. It prohibits discrimination against women workers at the time of recruitment, promotion, training etc. Article 42 of the Constitution of India, stipulates for just and humane conditions of work and maternity relief. The Maternity Benefit Act, 1961 provides for full paid absence from work. It also provides for a twelve weeks leave in which not more than six weeks of maternity benefit before delivery can be availed. Maternity Benefit Amendment Act, 2017 increased paid maternity leave to 26 weeks from 12 weeks out of which not more than eight weeks maternity leave before delivery can be availed and work from home options in applicable cases. Even for women adopting baby a below 3 months, maternity leave of 12 weeks is provided. Article 43 of the Indian Constitution provides for a living wage and conditions of work ensuring decent standard of life. Various labour legislations such as Factories Act, 1948, Mines Act, 1952 etc. provide for specific provisions for safety and welfare of women and also restrict working hours to 8 hours or 9 hours in a day.

## Globalisation and Women

The whole of mankind, irrespective of religion. race, creed or gender, do have the right to participate and pursue in material well-being and their spiritual development with their fundamental freedom and dignity, to achieve economic security and equal opportunity as provided under the ILO Declaration of Philadelphia, 1944.[9] The International Labour Organisation's first Convention No. 1, 1919, on working hours limits the working hours to eight hours in a day. Subsequently, many other conventions related to working time came into force. However, globalisation induced competitive scenario led to long working hours to meet the global market requirements. Because of the extended responsibility, the quality and life balance also were affected. A focus on improvement in working hours can facilitate compatibility between work life and family life. Long working hours, night shift, lead to conflicts in happy family life. Women prefer part-time work as they can devote more time to family responsibilities. The International Labour Organisation's 'workers with family responsibilities' Convention No. 156, 1981, provides for equal opportunity and equal treatment for both men and women and it aims to enable persons with family responsibilities in em-

[7] The Occupational Safety, Health and Working Conditions Code, 2020, S. 43, No. 37, Act of Parliament, 2020 (India).
[8] Government of Karnataka, Labour Department, LD 194 LET 2016 (Notified on May 25, 2019).
[9] ILO, *Gender Equality and Non-Discrimination,* www.ilo.org/legacy/english/inwork/cb-policyguide/declarationofPhiladelphia/944.pdf (Dec. 12, 2020).

ployment to exercise their right without being discriminated and without any conflict between their employment and responsibilities and also to cater to the needs of workers having family responsibilities by providing child care, family services and facilities.

Globalisation opened up the trade barriers between various countries. It brought in the global production and market culture and practice but seemingly left behind the advanced work culture with the focus on quality work-life balance. It increased competition and the entry of women in work force. The production and sales target gained more importance than the health and the well-being of the workers. This also resulted in change in working conditions, especially, increased working hours to meet production targets for the day or for the year. There were drastic changes in working hours of workers. The standard 9-5 jobs were compromised by different working schedules. Cost reduction, long working hours, shift work and night work are a few important aspects of globalization. Though, as discussed above, there are umpteen number of legislations in favour of women for their empowerment, we find women struggling to manage home and office with multifarious responsibilities. As women are burdened with more responsibilities, it has taken a toll on their career. Therefore, there is a gap in their salary when compared to that of men. Equal Remuneration Act, 1976, was enacted with an objective to pay equally for the same kind of work without any discrimination. Even though this Act has been passed, the economic participation, opportunities, educational attainment, health and survival and political empowerment remain a distant dream. According to the wage report of the International Labour Organisation, the gender remuneration gap is very high in India by International Standards, though it has decreased from 48% in 1993-94 to 34% in 2011-12. The gender wage gap is there among casual, regular, urban and rural workers. The average remuneration of casual rural female workers is the lowest in India. Low pay and wage inequality remain a serious challenge to India's path to achieving decent working conditions and inclusive growth for women.[10] As per the World Economic Forum, Global Gender Gap Report 2018, India has occupied 142$^{nd}$ position out of 149 countries.[11]

## Women and Work-Life Balance

The balance between time allocated to work and other aspects of life i.e., work-life balance includes family and social life of the worker. The various factors affecting work-life balance are excessive work load which forces them to work long hours without rest. As a result, they are unable to manage the responsibilities at home. Because of which their mental well-being as well as their physical well-being may be affected by stress and anxiety which will hamper their performance both at home and office leading to work-life imbalance. In France, 35-hour week legislation was introduced under the reduction of weekly hours of work recommendation, 1962, (No. 116) with an objective to improve work-life balance did prove to be effective. Even part time work promotes better work- life balance. As per a Japanese study in 2010, there has been job stress, shift work and long working hours which has resulted in a poor work-life conflict and physical as well as mental well-being.

There are various kinds of work arrangements which can bring in work-life balance in the life of women. Flexible work schedule can bring in harmonious family environment at home. Flexible working and part-time working arrangements such as extended lunch breaks to enable care of elderly relatives, variable hours to enable staff to complete school pick up and a gradual change in hours to facilitate the return to full time working for parents of young children.[12] Workers' friendly working hours can result in quality of pro-

[10] ILO, *India Wage Report: Wage Policies for decent work & Inclusive growth,* https://www.ilo.org/ wcmsp5/ groups/public/asiaa/ro-bangkok/sro-new delhi/ documents/ publication/ wcms_638305.pdf.

[11] *India ranks 108$^{th}$ in WEF gender gap index 2018, The Economic Times,* https://economictimes.indiatimes.com/ news/economy/indicators/india_ranks_108th-in-wef-gendergap-index2018/articleshow/67145220. cms/

[12] Andukari Raj Shravanthi et.al., *Work-Life Balance of women in India,* International Journal of Research in Management Sciences, 1, (2013) , http://www.researchgate.net/publication/ 266374097_ Work_Life_Balance_ of_Women_in_India.

duction and increased output as there will be work-life balance in their lives. Work sharing among workers can reduce the load on them and thereby reduce stress. However, there are cases where there is a need, during emergency, for production of essentials due to high demand resulting in increase in working hours. This can be achieved with increased number of shifts to meet the requirements. The case mentioned below showcases it.

In the case of Pfizer (P) Ltd. Bombay v, The Workmen,[13] the appellant company was manufacturing life-saving drugs at its factory. The factory had multiple shifts with different timings and the machinery installed in the factory was not completely used. There was insufficient production. As a result, the appellant could not meet the demand for its products. Therefore, it decided to have three shifts to increase production and quality of a particular drug P.A.S. The appellant issued notice to the respondents to introduce three shifts to increase production.

Conciliation efforts failed and the matter was referred to Industrial Tribunal. The Tribunal gave its award against the appellant. The Tribunal held that the three shifts was inconvenient to the workers. The workers will be compelled to work at night and better quality of products will not be produced. The Tribunal also held that production of the drug known as P.A.S. did not require continuous working in three shifts. But the Tribunal reduced the number of holidays from 27 to 10.

The Indian Supreme Court held that the appellant be allowed to introduce three shifts in the factory. The process of manufacture of the drug P.A.S. was continuous and as it took 20 hours, three shifts were inevitable. In order to improve the quality and avoid rejection of the products, it was important that the shifts system should have three shifts. By introducing three shifts, both quality and quantity will improve. Three shifts were also allowed for Pharmaceutical Departments which produced ointment, injections, other pharmaceutical products, packing, filling, washing, tablet and capsules three shifts were allowed. The objection of the workers that three shifts would involve work at night and hence was not desirable was rejected. Another objection that the introduction of three shifts would involve the beginning of the work at 7-20 a.m. which was an unduly early hour for work, was also rejected. The honourable court rejected the contention of the appellant that the standing orders stipulated more than one shift, it was entirely in the discretion of the management to carry out changes without the due diligence by industrial adjudication. While allowing the introduction of three shifts, the court considered the importance and necessity of more production of the drug and the court was influenced by the existence of emergency in the country. The Supreme Court increased the number of paid holidays annually from 10 to 16 and reduced the number of public holidays to 16 every year. Both appeals were allowed.

Another consequence of long working hour is suicides of workers. Suicides due to pressure of work are increasing all over the world. Recent studies in the United States, Australia, Japan, South Korea, China, India and Taiwan have shown an increase in suicides due to deterioration in working conditions. A lot of changes have taken place due to globalisation which has changed their working patterns. Earlier, there were strong trade unions in industries to demand their rights and working conditions. But now, there exists the job insecurity, heavy work load, etc. In Foxconn Technology Group in China, eighteen migrant workers who were of the age between 17 and 25 attempted suicide at one of Foxconn's main factories in 2010. Fourteen of them died. They were working on assembly lines manufacturing electronic gadgets for multinational companies such as Dell, Sony, Apple etc. One of the women suicide survivors of Foxconn, a seventeen-year-old girl, Tian Yu, said that she was forced to work 12 hour shifts without meals to work overtime and had only one day off every second week. Subsequently, Apple published a set of standards for treatment of workers. In a documentary 'Apple's Broken Promises' by BBC, it was shown that exhausted workers were asleep on 12 hour shifts and workers pressurized by managers at new supplier, Pegatron Shanghai, latest iPhone assemblers. Apple states that it monitors its

[13] AIR 1963 SC 1103

supplier's practices with its annual supplier responsibility reports. However, the labour rights activists and researchers continue to allege that the workers in Apple's supply chains are abused.[14]

## Judiciary on Gender Equality

### Case 1

Vishaka & Others v. State of Rajasthan,[15] is a landmark case on prevention of sexual harassment at work place. A social worker was gang raped in a village in Rajasthan. The writ petition was filed by certain social activists and NGOs as a class action for securing the true principle of gender equality and to protect women from sexual harassment in all work places through a defined process. Also, for ensuring the protection of the fundamental rights of working women under articles 14, 19 and 21 of the Indian Constitution.

The Supreme Court issued certain guidelines to govern the behaviour of employers and others at work place. Gender equality includes protection from sexual harassment which is a universally recognised basic human right. In the absence of specific law to protect women from sexual harassment at workplace, the Supreme Court issued the following guidelines:

1. It is the duty of the employer or other responsible persons to prevent acts of sexual harassment and provide procedures to resolve, prosecute such activities.

2. Express prohibition of sexual harassment at workplace by notification, circular.

3. Rules of public sector include prohibitions and penalties against the offenders.

4. Standing orders under Industrial Employment Standing Orders Act, 1946 to include prohibition of sexual harassment at workplace.

5. Proper working conditions, work leisure, health and hygiene to be provided and there should not be any hostile environment to women.

6. Complaints for such acts under Indian Penal Code.

7. Complaint mechanism to be provided.[16]

Subsequently, the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013 came into force.

### Case 2

Mackinnon Mackenzie & Co. Ltd. v. Audrey D'Costa & Another[17] On an application by the respondent under section 7 of the Equal Remuneration Act, 1976 before the authority on the ground that the total wages of confidential lady stenographers were less than the male stenographers in the general pool who were performing the same duties and it amounted to gender discrimination under the Act. The authority held that the respondent was not entitled to the relief as she was not paid at rates less favourable than those paid to male stenographers. On appeal, the appellate authority held that there was discrimination between male and female stenographers and the respondent was entitled to reliefs. The petitioner petitioned under article 226 of the Constitution of India challenging the order of the Appellate Authority. The Supreme Court upheld the order of the Appellate Authority and the matter was remitted back to the Appellate Authority, the Deputy Commissioner of Labour (Enforcement), under the Equal Remuneration Act, 1976 for computing the amount payable to the respondent.

## Factors Affecting Balance of Work and Family

The India Strategy75 report of Niti Aayog[18] indicates that the female Labour Force Participation Rate (LFPR) has reduced from 23.7 (26.7% in rural areas

[14] Sarah Waters and Jenny Chan, *Workplace Suicides are rising and globalisation is to blame,* NEWSWEEK (Dec 14,2020), https://www.newsweek.com/workplace=suicides-are-rising-and-ceos-are-blame-490941.

[15] (1997) 6 SCC 241

[16] https//indiankanoon.org/doc/1031794.

[17] (1987) 2 SCC 469

[18] NITI AAYOG, *Strategy for New India*75, http://niti.gov.in/sites/default/files/2019- 01/Strategy_for_New_India_0.pdf

and 16.2% in urban areas) more so in the rural areas where it has gone down from 49% to 26.7%. Because of which she needs to balance between her professional commitment and the domestic responsibility. At times, it is challenging and most of them opt out of the professional role to manage the domestic chores. This fact has weakened the cause of women independence in India. To manage both the roles, an effective balance is essential between the professional and personal domestic responsibilities. Balancing to have an effective equilibrium between the personal and the professional commitment is what is dealt as the subject of 'work- life balance'. There are three factors which generally affect the work- life balance. One is the gender discrimination, work area ethics and policies and the family culture. When these three different areas are not complementing with each other in its performance, there is a conflict to disturb the work-life balance leading to high stress. To march ahead in this highly competitive world and more so the Indian demographic scene, it is needed to demonstrate the reduction of excessive work hours for women and increasing the time spent at home with their family.

In the present shrinking world, the work stress due to the lack of balance has led to the high levels of stress among women. A few Indian Corporates have identified this challenge and have undertaken many measures to balance the work-life but many remain blind to this fact in the race to achieve higher and higher targets for profit maximization. The globalization did bring the employment opportunities but it has taken away the happiness from the dining hall of our families. In the present-day, women is employed in many Corporates, more so in the Information Technology and Information Technology Enabled Services. In both these sectors, the working hours framework has been a challenge for the job seeking employees. They have to keep working in silence because if they raise issues they may be sacked by their bosses. Though there are many safeguards for the women working in Factories the same has been compromised in the Information Technology and Information Technology Enabled Services Sector. These companies have been exempted from the purview of the labour laws vide the Karnataka Government notification LD 53 LET 2013 dated January 25, 2014.

In an empirical analysis of call centre employees carried out to examine the intricate relationship between the structure and the employees, to withstand long hours of work, it was observed to undergo certain transformations in the characteristics. The study also revealed the cultural transformation of urban Indian Labour into a global proletariat. In the participant observation conducted at International Tech Park, Bangalore, it was found that 53 per cent. workers worked in nine hour's shift while 29 per cent worked in eight hour's shift and 3 per cent were working in 10-12 hours shifts with a break of one hour. The schedule is same for sweatshop labourers who worked for MNC ancillary factories on the outskirts of Bangalore city. Sometimes, they had to work for 15 hours due to the shortage of staff. It was also observed that when call flow is high, group leaders do not let them take breaks.[19] The shift working hours of the women working for Information Technology Enabled Services has seriously affected their work-life balance. And also, the project related works in the Information Technology organisation has also life-threatening challenges for women to work alone during holidays and off - work time. This has exposed women to mental stress and also physical threat also. Even though some companies have taken precautions, overall, the issues remain still a challenge without any positive commitment from the management of many companies. The law also has been compromised by giving exemption by the policy makers in the pretext of employment generation.

Research shows that flexible work arrangements allow individuals to integrate work and family responsibilities in time and space and are instrumental in achieving a healthy work and family balance. The presence of large number of women in their workforce and their

[19] Divya C. McMillin, *Outsourcing Identities: Call Centres and Cultural Transformation in India,* 41, Economic and Political Weekly, 235-241, (2006).

[20] Reimara Valk & Vasanthi Srinivasan, *Work-Family Balance of Indian Women in Software Profession: A Qualitative Study,* (Dec 12), www.sciencedirect.com/science/article/S0970389610000832.

drive for careers have resulted in increasing attention to work and family balance issue.[20]

## Government's Initiative to Empower Women

The NITI Aayog (National Institution for Transforming India), is the Indian Government's think tank to provide advice on specialized subjects for innovation and entrepreneurial support to the Government of India, It has drafted a document for the purpose titled, 'The Strategy for New India75"[21] which states that the women employment needs to be increased. It also advised on the increased Maternity Benefit Leave under the new Maternity Benefit (Amendment) Act, 2017, and the Sexual Harassment of Women at Workplace (Prevention, Prohibition and redressal) Act, 2013, which have empowered and ensured the balance of the work stress at the working place. It redresses inequalities on gender bias. The document also states that in the provision of the 'Swacch Bharat' mission compulsory toilets for women at work place and educational institutions needs to be initiated and their working conditions needs to be improved. It also covers the gender issues in the workplace, by committing to create and strengthen the institutional and structural barriers to enhance the female working environment and participation. The document further concludes by identifying the constraints as the inflexibility in working hours, lack of availability of creches, safety etc. The absence of opportunities for part-time work has also been identified as a factor affecting the work-life balance.[22]

## Conclusion and Suggestions

Every worker gets pressurized by long working hours without rest and breaks. It takes a toll on their health. Especially, women have more stress and anxiety due to dual role played by them. Worker friendly non-standard work arrangement can reduce conflicts between work and family and reduce stress leading to a harmonious family life.

Three broad types of work life balance strategies have been created to help employees balance their work and non-work lives. Flexible work options, specialised leave policies and dependent care benefits. The flexible work options have become once again a topic of importance in the COVID-19 situation where companies and the employees have taken up work from home policies as the thing of the present and future. Flexitime, Job Sharing, Home telecommuting, Work-at-Home Programs, Part-time Work, Shorter work days for parents, Bereavement of Leave, Paid Maternity Leave, Paid leave to care for sick family members, Paternity Leave.[23] should be looked into as the options for balance in the changing environment of work culture more so for the working women.

Flexibility in work schedule options help women perform better and can ensure good health. There should be appropriate laws to protect women from working excessively long hours and unsocial working hours. There should be gap between the actual hours of work and preferred hours of work for women. The exemption of the Industrial Employment (Standing Orders) Act, 1946, for Information Technology and Information Technology Enabled Services should be reviewed or modified to suit the conditions and ensure the compliance with applicable laws on working time and adhere to the standards to stop exploitation of women. All the industries need to provide the dependent care assistance, child care facilities, laundry facilities and canteen facilities.

Women have to set their priorities in their professional as well as family lives to strike a balance between their work and family. They need support at work as well as at home. Policies and practices at work place should be supportive of women to carry out their dual responsibilities without any conflict and lead a peaceful life. The governments also need to relook into these above concepts of work from home and the flexible working time in the present era of technology and the Pandemic. Women being the torchbearers of society need all the help from the national and international law makers to ensure balanced work and quality life for a better future generation.

[21] NITI AAYOG, `https://niti.gov.in/writereaddata/files/Strategy_for_New_India` (Dec. 12, 2020).
[22] *Id.*.
[23] Supra note 11.