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Journal of Legal Studies

The Performance of Human Rights on Rights-Based Welfare State in Iran

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&
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Abstract

This research is the main guide of the Iranian government through reports and general comments to demonstrate the requirement for the gradual realization of full economic, social and cultural rights (ESCR), especially for government budgets as well as and political rights (CPR). The starting point of this legal review was the contradictory findings of research on some characteristics of the rights-based welfare state (RBWS) and inequalities in ESCR as well as CPR. The study shows that the comprehensive system proposed for the RBWS in Iran, which is based more on the principles of equal opportunities, equitable distribution of wealth and poverty reduction, has not yet been able to provide at least a good living for many. Despite these evolving programs, there is still a long way from the implementation of these RBWS programs in Iran, and the politicization of these rights by enforcers can make more difficult the process of progressive realization of the state's obligations in achieving a RBWS.

Keywords*: Economic, social and cultural rights (ESCR); Civil and political rights (CPR); Rights-based welfare state; Equality and poverty alleviation*

Introduction

The welfare state, or modern state, is a government based on right-based approaches, which is called the RBS. The RBS is a way of governing the people in which the state or a group of social institutions are able to provide economic, social and cultural security for their citizens to alleviate poverty and deprivation by relying on non-political issues and by achieving gradual realization of “improving health, education, employment and social security to develop justice and equality." The question is, under what circumstances can we move towards a rights-based state with a right-based approach? Are independent bodies, such as the courts, available to governments to assess how resources are mobilized (especially through taxation and prioritization of expenditures)? Can economic and social law, under international human rights law, provide a reliable standard for such assessment? These questions play an

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important role in the interpretation and principles of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

The United Nations Committee on Economic, Social and Cultural Rights (CESCR) is the body that provides the most authoritative interpretation of the meaning of Article 2 in the ICESCR. CESCR is responsible for overseeing the implementation of ICESCR. Countries ratifying the ICESCR must regularly report to the CESCR, as part of their obligations under the treaty, the steps they have taken to implement the treaty and the enjoyment of ESCR in the country. The committee provides comments and recommendations on each country's report. These comments and recommendations often reflect the committee's best understanding of the meaning of the provisions of a particular treaty. Occasionally, the Committee also issues public opinion to the GC on an issue that has been raised frequently during its discussions to provide greater clarity to countries and others on the meaning of specific rights and obligations in the ICESCR (Ann Blyberg and Helena Hofbauer, 2014).

Roosevelt's lecture on the economic realities of his time on January 11, 1944, left a significant legacy and laid the foundations for the Human Rights Commission in the newly established United Nations Organization from 1946-1948 to later prepare the Universal Declaration of Human Rights (Olivier De Schutter, 2018). The ICESCR, as one of the two international treaties that constitute the International Charter of Human Rights (together with the Universal Declaration of Human Rights), provides the legal framework to protect and safeguard the most fundamental ESCR, including the right to just and fair work. The ICESCR was adopted in 1966 to protect the economic and social rights enshrined in international law in the form of a binding international treaty. ESCR are important tools for holding governments and non-government actors accountable for violations, as well as mobilizing collective efforts to develop societies and global frameworks for economic justice, social welfare, participation and equality (Case A/6316 at the United Nations, 1996).

Moreover, when the UN General Assembly, a little before midnight on December 10, 1948, adopted the Universal Declaration of Human Rights with 48 votes in favor and 8 abstentions, for the first time ESCR such as health rights, food rights or education rights along with civil liberties such as freedom of religion or expression, political rights such as the right to free elections were included in the Universal Declaration (GA Res, 2017). Governments were then determined to continually improve the conditions for the realization of fundamental ESCR. Because governments in this world have not had and will not have enough time to do this and may have limited resources, they cannot take steps delaying such as developing policies and programs that are necessary for a sound development process and do not require a lot of resources. Therefore, governments must move as quickly and effectively as possible towards the full realization of rights in the ICESCR (Ann Blyberg and Helena Hofbauer, 2014) to pave the way for the gradual realization of theRBWS's goals.

Research Structure

The theoretical aspects of this issue are stated in the first section. In the second section, after describing the set of jurisprudence, economic, social, cultural rights, civil and political rights and right-based approaches that the analysis of the RBS focuses on, two sections (third and fourth) are followed in which regulatory policies and strategies for evaluating a RBWS are reviewed, respectively. Finally, the fifth section discusses the results.

Research Literature

ESCR and CPR in RBWS

First of all, a keyword is described here to prove the role of law (ESCR, and civil and political rights) on this keyword. The key word that is the main subject of this research is called RBWS. First, the welfare state is a concept of government in which the government plays a key role in protecting and promoting the social and economic well-being of its citizens based on the principles of equal opportunities, and the fair distribution of wealth, and is responsible providing the opportunities with everyone so as to use the minimum facilities for a good life. Such a government can be defined as a RBWS; because all right-based approaches have been implemented to ensure the principles of equality among the citizens of a society and to reduce poverty. An American sociologist, Marshall, described the modern welfare state as a distinct combination of democracy, welfare, and capitalism (Marshall, 1950).

In this way, the government is responsible for ensuring the social and economic security of the people through pensions, social security benefits, free health care and free education. In addition, government ensures access to basic resources such as housing, health care, insurance, education and employment (Béland et al., 2021; Skocpol, 1991) to approach the goals of a RBWS. The commitment to the gradual access of the full realization of ESCR in a RBWS reflects the understanding that the full realization takes time and depends in part on the resources available to a state.

This commitment should be considered important along with the commitment to use the maximum resources available. Thus, while gradual achievement is a realistic commitment, governments are not immune to problems. As governments take steps to gradually realize ESCRas well as CPR, they must show that they are using the maximum resources available to further improve the conditions of their people (Ann Blyberg and Helena Hofbauer, 2014). For the gradual realization of these rights, Roosevelt asked Congress to consider the means of enforcing the Charter of Economic Law, because he said it was certainly the responsibility of Congress, but the courts could intervene, perhaps to protect the public from restrictions on freedom of expression, and irrational detentions or cruel or unusual punishments. But in cases where law requires resource mobilization and therefore has budgetary implications, legal action is required through the courts (Olivier De Schutter, 2018).

In fact, the real measure of this gradual realization of rights was what happened to the people's real enjoyment of their rights, and any negligence (without the intervention of the courts) in setting the budget in turn negatively affected the rights of the people. For this reason, the rule of law in Iran, by strengthening participation of citizens in a parliamentary democracy,

increases the transparency and efficiency of government commitments, ensures the fairness of ESCR, CPR, as well as administrative rights among all sections. Consequently, it can reduce challenges to the stark differences between freedom and restrictions.

Administrative rights in RBWS

In Iran, in recent decades, the government has tried to adopt a scientific, modern and economic approach, and the result has been principles in which the applied approaches are in line with the specific needs of a particular region, with no any contribute to instability and dissatisfaction of local people and with no any difficult in the realization of right approaches in administrative matters.

According to William Robson, administrative law (as the body of law), in order to protect the private rights of individuals within the law, establishes a framework for the functioning of organizations and departments by establishing regular procedures, so that everyone can appropriately fulfill their duties in accordance with their obligations in front of other people or institutions. The tasks of these administrative laws today are very extensive in the government's timeline, and the task of dealing with their internal problems in planning, organizing, directing, coordinating, and controlling is much faster and easier than in the courts (William Robson, 1948). In Iranian administrative law, the government can establish justice with right-based approaches for its citizens through administrative suitable instructions containing all ESCR.

Van Der Walt argues that welfare state social security activities, including housing, health care, education, and other social services, are regulated by broad, complex, and ever-expanding legal networks, in the broadest possible sense. These include formal legislation, administrative laws and decisions, and most recently the constitutional welfare law or the law, as described in court rulings. The law in question is of a special kind, and this law is "regulatory" and "instrumental", not as the law traditionally dealt with specific and separate disputes, but in the formulation, guidance, formation and implementation of social security plans and the implementation of government goals (Van Der Walt, 1987, 1995). In Iran, these benefits are provided to the general public with special administrative rights, but if all economic aids and unemployment benefits along with insurance for the affected individuals and groups are considered, it will certainly be possible to gradually realize the obligations of an RBS.

The administrative affairs and structure of the courts, the characteristics of the government cabinet and their role in Iran are already specified in the provisions of the constitution, which may have slightly changed depending on the circumstances of the country. In these decades, governments by maintain the economic and political system in the most difficult conditions of the country have tried to lessen poverty and discrimination by providing the best social and administrative services and by setting standard administrative laws and to shorten the way of getting to an RBS.

Flexibility of legal provisions in a RBWS

That is, is there any reason for courts and lawyers to use their current knowledge and creativity to find sources that are able to change the predefined legal implications (for example, human rights law, currency law, freedom law, expression law, commercial law, discrimination law, justice law,etc.) for the benefit of the people of the society? Courts must act in such a way that their amended or enacted laws and procedures are consistent with various human rights instruments.

Legal provisions can be manipulated instead of being fixed and definitive forever. Judgment itself is a strategic activity in which judges use those legal arguments that provide the best justification for their desired outcome. Despite this flexibility, however, judges are limited to the fact that only certain "pairs of reason-assisted arguments" are considered valid. In order for their arguments to be accepted in the area of expertise to which they belong, judges must reduce their arguments and the characteristics of the consequent cases in a way so as to accommodate a set of valid arguments (Jacobus Frederick Daniel Brand, 2009).

During his presidency in the United States, Kennedy, like the mainstream legal scholars, seems to assume that law must be either decisive, or irrevocably subjective and ideological. Kennedy also seeks meta-principles to limit the application of conflicting rules. When he finds none, he declares that judgment is merely an ideology established by law. In short, Kennedy's report is structured based on one of two cases or conventional understanding logic (Butha, 2004). It is true that a large number of human rights in Iran may be absolute for decades, but they may be corrected by interpreting and weighing the scope of rights against other legitimate interests, such as the rights of others. In most cases, these reforms may be abused by the government and not apply best practices to individuals in the community who differ in race, culture, religion, language or region. This reflects the fact that the government has not implemented the minimum human rights standards for all members of its community and has distanced itself from a welfare state.

The role of the courts in determining the budget of a RBWS

In Section 3.1 above, we see the viewpoint of Roosevelt et al. on the importance of budgeting in the RBWS. At the heart of the issue of the fairness of ESCR is the fact that the implications of budgets imposed on states (or within the state, in other branches of government) follow such rights. It is mainly because of these budgetary implications that the so-called multipolar problem arises: courts or quasi-judicial bodies generally decide on a case-by-case basis and focus on the interests of individual litigants, as defined by litigants to decide community issues. They are not well taken care of; Such as how priorities are ranked in spending between education, health, public housing, or defense; Or, more importantly, saving the lives of those in need of expensive medical care; Or funding primary health care services for more people in low-income environments (Stephen and Sunstein, 1999).

It is also because of these budgetary implications that the courts' ability to decide on economic and social rights is frequently challenged. For example, how much should be spent on

education or health care or national security, and whether the tax system is sufficiently advanced to enable the realization of economic and social rights (Olivier De Schutter, 2018). That is why tools must now be put in place to allow independent oversight bodies, including the courts, to evaluate the budgetary choices made by governments to ensure that the welfare state's goals are gradually achieved.

Discussion and Results

Introduction

The starting point of this study was the contradictory findings of research on some features of the RBS and inequalities in ESCR, as well as CPR. These studies show that the politicization of these rights by enforcers can reduce the gradual fulfillment of government obligations to achieve a RBS. Thus, regulatory bodies in an RBS can impose penalties and punishments commensurate with the significance of the issue, misconduct, or negligence, which includes a set of institutions or bodies, their directors and employees, and sometimes major shareholders. On the other hand, in spite of laws and regulations in governmental and non-governmental organizations in various fields, we see a lack of training on right-based approaches as well as significant weaknesses in the methods of reporting injustice. Thus, this makes the laws and regulations ineffective in the gradual realization of the welfare state. Therefore, increasing the quality and stages of monitoring the proper implementation of laws, along with increasing fines and public information about injustices is considered important.

Therefore, religious people are needed to create political, intellectual, social and economic structures and bases (centered on the Qur'an and Sunnah) for governing and administrating the country. For the gradual fulfillment of these commitments, careful and serious supervision of righteous and devoted people is needed to provide the conditions of active participation for all classes and races through growth and guidance. Because only under such conditions, "realization of right-based approaches" will it lead to a RBWS. The executive branch, along with other branches, must eliminate the source of fundamental challenges and the bureaucratic factor in order for administrative law fulfills administrative obligations more efficiently. The administrative law was described in detail above and the importance of its serious implementation was clarified.

The Islamic society of Iran, in order to observe the principles of ESCR in which the freedom and human dignity of individuals and groups are respected, must choose wise and committed representatives so that administrative law can fulfill administrative obligations more efficiently. It is clear to every Iranian that the competence and responsibilities of the three branches are specified in the constitution of Iran, but it is important that the coordinating, supervisory and judicial councils of these forces in the city, region, district and village perform their duties well so that gradual realization of right-based approaches in all dimensions in all environments to preserve freedom, independence, unity and territorial integrity. When this RBWS is established, the economic, social, cultural, political and military dependence on foreign and international institutions and powers will decrease. Iran has experienced a number of these challenges in the period of sanctions. Therefore, it is clear that

in such unfavorable conditions of the country, due to the abuse of some powers inside and outside the country, disturbing the internal order and inciting dissatisfaction of some groups, races and or important people, the path of getting to an RBS has been longer.

Minimum living standards in a RBWS and structure defined in this research

In reviewing this research, according to the issues described in previous chapters, to achieve a RBWS, must be a communication between three conditions: 1. providing employment, housing and insurance, 2. deprivation, non-discrimination and equality, and 3. right-based approaches and good governance. This communication should be in such a way that the gradual realization of right-based approaches and good governance lead to a RBWS. The following three conditions (a, b, and c) are separately interpreted, and then the relationship between them is plotted as shown in **Fig. 1**.

Condition (a). This condition states: "Everyone in a society has the right to a standard living, adequate for the health and well-being of himself and his family [employment, housing and insurance]. In order for he can have food, clothing and healthy drinking water, energy for cooking or heating and lighting, medical care, necessary social services and the right to participate in various aspects of life, and provide security and well-being for himself or his family".

This is a right that all countries, especially Iran, recognize it. Only in these circumstances the right to dignity of an individual is protected by the authorities of a government, and that government can claim that have fulfilled condition (b) [deprivation, non-discrimination and equality], the condition which I describe below, and has paved the way for the gradual realization of the welfare state.

Condition (b). Non-discrimination and equality require equal treatment of an individual or group or ethnicity, regardless of "age, color, nationality, appearance, race, religion, sexual identity, culture, disability, ethnicity, gender and sexual or social orientation." Applying such inappropriate behaviors may systematically deprive people with these characteristics in a society of many material benefits for a short or long period of time.

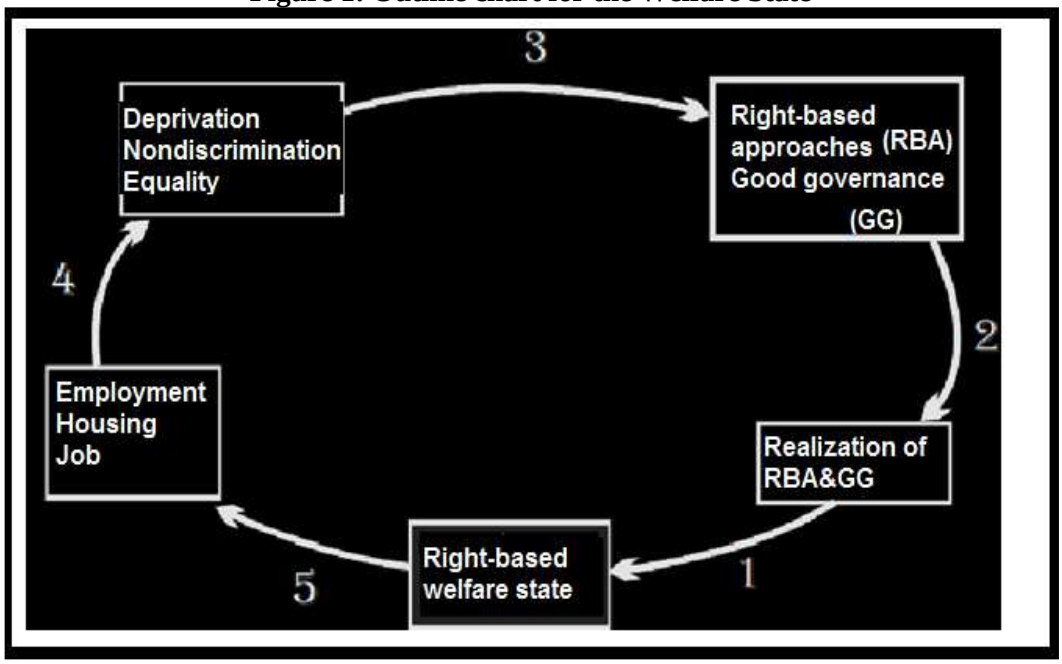
Subsequently, by imposing such irreparable harms (such as, directly or indirectly unfair job and employment practices with various excuses and scenarios, failure to provide health care, insurance and education at an appropriate age, lack of social security) for these people and their families the grounds for the formation of poverty are provided.

Condition (c). Right-based rights or human rights-based approaches are a series of approaches based on international human rights standards designed to support individuals and groups of different languages and races in a society to meet condition (b) above (i.e., deprivation, non-discrimination, and equality). Therefore, these approaches should be acted upon (by respecting and responding appropriately and timely to the priorities of these

individuals) by legislators, executives and officials so that rights holders achieve their rights by participating in the affairs of society.

In implementing and then analyzing social and political policies, these right-based approaches and criteria for a long-term vision the transparency must be conducted using new technologies in a method that the authorities are aware of the injustice that has occurred to an individual or a group in a timely manner. In an e-government, which today in most countries, as such in Iran, have been established for the welfare of citizens, smartening government actions and to achieve the goals of the welfare state, these new technologies have demonstrated their great advantage. Therefore, legal observers should be more aware of the weaknesses and possible breaches of this type of welfare state, whose main goal is for the gradual realization of RBS.

Figure 1: Outline chart for the Welfare State



5. 3 Possible vulnerabilities in a right-based welfare or modern state

Potential vulnerabilities in a right-based welfare or modern state, which has often relied on e-government in the last decade, may cause the tampering or erasing of the personal information of individuals or groups. Typically, these types of infringement tactics and procedures may be due to the negligence of the authorities in handling the archived files in the system (apart from the discussion of targeted malware or hacker attacks, which is less obvious here), weakness or lack of timely access to electronic systems. In this regard, due to the possibility of free access of these middle-class authorities to the most sensitive information of individuals and the treatment of these individuals in a favorable manner, the field of discrimination and injustice flourishes and the gradual realization orb's goals becomes more difficult.

In such cases, the laws of information security should be enforced by the courts with the advice of lawyers to determine the cause of weakness, poverty, backwardness of some individuals or groups compared to their peers at the same time. For example, if a ministry or company (governmental or non-governmental) has had a negligent in recruiting, selecting, hiring or providing welfare should face large government fines, court costs, e-discovery costs, legal fees, notification fees, and brand devaluation fees, via executors or legislators of those governmental or non-governmental organizations. Although in most cases the abolition of the basic rights (mentioned in the condition a) of an individual is irreparable in comparison with his peers, but the development of these injustices can reverse the path of the RBWS. [For example, a person who is currently receiving a subsidy in Iran or has not benefited from insurance and employment benefits for a long time will certainly face irreparable salary deficiencies.] If the current trend of supporting these people (for example, receiving a subsidy of 45,500 tomans (nearly 1.3 USD) per member in each month in 2021, due to high inflation in the country) continues, we should not expect the conditions for the gradual realization of a welfare state, even if this trend of cash or commodity support is strengthened as a gradual step. Unless a strong legal and regulatory team is formed to analyze the lack of access to the minimum living requirements of these people and compensate for in a short-time period so that these individuals or their families and subsequently their children benefit of a healthy life in the not-too-distant future at the same time as their peers.

The appropriate and timely time in this study is that [two people of two different "color, nationality, appearance, race, religion, language, sexual identity, culture, disability, ethnicity, gender, sexual or social orientation" characteristics, probably in Iran the characteristics of culture, ethnicity, language and religion be more distinct and discussable, simultaneously apply for the minimum living requirements (condition a: housing, job and insurance).Among these two individuals, despite having the same privileges, only the congenial and arbitrary person is selected and called and the other person for years with different excuses and scenarios is deprived of his right. Instead, the person selected does not have moral-scientific or moral-political or moral-social or moral-artistic competencies. As a result, time when unselected person (lost property, invalidated, humiliated, with older information, for example, in graduates who are now competing with new graduates and whose competition has become more difficult due to dropping out of school for a long term and getting older) should be included in the list of people in need of government, with attention to current methods of government support it is no longer completely reparable.] This process of government support for its citizens (especially those with high capabilities), which is completely contrary to human rights standards, makes the gradual realization of the RBS's goals far-fetched for years for domestic and international observers. As long as such injustices and ambiguities are evident in a society, larger crimes against these people become so common that their touch may be difficult for many.

Possible strategies to deal with potential vulnerabilities in a RBWS

In Iran, good strategies have been taken to develop the goals of a RBWS in order to provide the grounds for the gradual realization of the right-based approaches by fulfilling the three

conditions (a, b and c) presented in the discussion and results (6-2). In this study, based on our studies and experiences, we concluded that a strong legal advisory team should be formed so that in the face of such injustices:

1. Investigate what kinds of rights of individuals, when and where have been violated.
2. The result of the report should be presented to the independent supervisory authorities and after reviewing the completeness of the information, it should be sent to the judicial authorities.
3. Judicial authorities must seek suspicious activities in related organizations as soon as possible to prevent irreparable damages in order to investigate the cause of the damages in the individual or group. Because most of the time, an individual or a group, with the cooperation of a number of responsible people in some important domestic bodies, seeks to create schism and repress some people inside the country via a third country in order to fully support their supporters in that country. It happens time when the power in third country has bipolar aspect. Especially in e-government, as well as in the era of international sanctions, these harms have been remotely facilitated by new technologies.
4. The judicial result to the Court of Justice must be submitted to announce the immediate methods of helping these people to the relevant organizations (housing and urban development sector, the country's employment sector and the insurance sector). These supportive methods must benefit the vulnerable person in the shortest possible time from the minimum subsistence requirements.
5. At this stage, the legal team should communicate directly with the vulnerable parties and announce the result of the support provided to the judicial authorities.

The gradual realization of SECR obligations in a RBWS

In Iran has been good and continuous support from the government for the effective implementation of social, economic and cultural rights through the gradual realization of relevant issues. A right-based approach, with the gradual realization of social, economic and cultural rights, can be developed by the courts in a way that leads to an RBS. A right-based approach with gradual realization can review relevant policies and focus on improving access. The government must choose the appropriate paths for the gradual realization of these rights. Since the gradual realization of these goals by the government requires the fulfillment of various obligations with different dimensions, the evaluation of this work along with the courts can be carried out with more confidence.

Because reviewing right-based approaches and identifying shortcomings can help the government to use all available resources and respect human rights frameworks to meet all types of rights in its community with revised procedures. In order not to impair the provisions of human rights during the gradual realization of these rights, the Constitutional Court must take a firm step to continuously review the policies in order to focus more on the concept of equality as well as respect for the deprived. Therefore, the complexity of the problems regarding the basic rights of each individual is so great that the government alone cannot claim to have solutions for all of them. It is better, with the participation of those who take

advantage of these problems, to be taken steps for sustainable development of society for the benefit of the poor individuals. Moreover, the programming must be in line with gradual realization of human rights to be considered an RBS from the viewpoint of observers.

Assessment of the gradual non-realization of SECR obligations in a RBWS

Inadequate access to health care and social services, inability to present in some partnerships, non-payment of insurance even at older ages, poor social assistance and education leading to socio-economic rights claims, as well as different understandings of Iranian politicians in official political institutions as a dilemma in society can sometimes lead to violated human rights commitments and raise major political concerns. In addition, the causes of poverty and lack of access to the minimum basic necessities may be (1) purely political, not addressed for a long time by important domestic authorities, or (2) due to a lack of domestic funding and widespread universal recession. In case (1), poor or impoverished people with political goals, in spite of their endeavor through all lawful options to achieve the minimum basic needs, do not succeed due to the strict laws set against the individual. Furthermore, in case (1) all dominant groups consider this need of poor people as non-political and may attribute the problem to the personality and behavioral characteristics of these poor people and not to the provisions laid down against the ESCR of these poor people, which its comprehension is hard. In case (1) the government considers the process of obedience for a limited number of people, while many are completely free to enjoy ESCR, and these people may not attend this kind of freedom and obedience (usually non- absolute) in their society. In such society, government is no longer able to gradually achieve the goals of RBS.

However, despite the constraints imposed, domestic observers, with new interpretations of Iranian legal provisions and the implementation of enforceable laws, can fuel evolving policies, diminish the gap between restrictions (not interpretable macro-cultural restrictions) and freedom (freedom for some, rightful access to the basic necessities of life) and provide the best justification for their desired results. In spite of all them, sometimes some inequalities may not be related to political and social justice issues defined through higher authorities, and this deprivation, dependence, and poor status may be related to incompetent local issues, technology, etc. (especially in some Middle Eastern countries). In both cases, the process of interpreting and applying ESCR with right-based approaches must be established and then implemented in order to defend those whose rights have been violated so that these individuals as their peer’s timely benefit from opportunities, dignity and rewards in appropriate age.

In fact, these are the privileges and benefits that these wronged individuals should have received at a younger age (like other their dominant peer groups), but given to them after enduring the worst living conditions that have not been commensurate with their dignity and literacy, something that is really visible in some cases in Iran. As a result, one should not expect the formation of an RBS in such societies very quickly. Because the fulfilled obligations are not in line with right-based approaches of human rights, and in major decision-making those dominant groups have formed a bipolar process in society. In addition, the main

decision-makers in political discourses may see the causes of poverty and deprivation of vulnerable groups as nonpolitical and special agencies and the three branches of government in Iran may seek different and irrelevant interpretations for the politicized needs of the protesters.

Conclusion

Our conclusion is based on previous studies and our own efforts to analyze the reasons for the growing variety various findings on the characteristics of the RBS. Good and continuous support from the government for the effective implementation of social, economic and cultural rights, and CPR is possible through the gradual realization of issues. In studying these important approaches and the gradual realization of the government to achieve an RBS, we concluded that there have been good and continuous supports from the Iranian government for the effective implementation of social, economic and cultural rights through the gradual realization of relevant issues. But the following legal problems have remained.

The role of the courts in realizing the minimum basic standards of living in a RBWS

In order not to impair the provisions of human rights while the gradual realization of the minimum basic rights, the Constitutional Court must take a bold step to continuously review the policies in Iran to focus more on the concept of equality and respect for the deprived individuals. Therefore, the complexity of the problems regarding the basic rights of each individual is so great that the government alone cannot claim to have solutions for all of them. As a result, it is better with the participation of those who take advantage of these problems, a series of effective steps to be taken by government for sustainable development of society for the benefit of the poor individuals and for gradual realization of human rights, so that be considered an RBS from the viewpoint of observers and supervisors.

Interpretation of the ESCR and CPR of the courts in a RBWS

Studies demonstrate the Iranian courts, as an interface between "poor groups and individuals" and the "government", play an important role in dealing with economic, social, cultural, as well as CPR. Therefore, they can contribute to democratic development for the benefit of the deprived "provided that there is civil and political equality and guaranteed individual access to the minimum basic rights [housing, health, insurance, education and minimum income] and a dignified life". Moreover, courts can contribute to development processes for the benefit of a right-based society's economy to take effective steps in order to legitimize the foundations of RBS by creating competition between civil society and the government.

Iranian courts, as a set of tools with their positive approach, can help to establish a right-based society and state by creating a positive change in the process of fulfilling the obligations of ESCR. In this mission, the courts need to focus on the processes, performance method, reasoning procedure, fulfillment trend, and enforcement practices of executive systems and smaller bodies. Because this can prevent any targeted deprivations, inequality and social ostracism. Most importantly, [simultaneously] provide access to housing, health care, insurance, education, social assistance, and the promotion of equality or human dignity for

members of society [without any political, racial, linguistic purpose]. This enforcement practice of the courts should be conducted by the Iranian courts with caution and without compromising the integrity of other branches of government (legislature and executive) to analyze the commitments made by the government and decide on a variety of legal issues.

Interpretation of the Legal Provisions of the Courts in a RBWS

In Iran, homelessness, disease, poverty, inequality, and social and political ostracism (ostracism from home, ostracism from hometown, ostracism from workplaces commensurate with one's dignity and literacy) may be among the problems that require immediate solutions by the three branches. Otherwise, the consequences of this can increase the anger of the people of the society and prevent the gradual realization of the right-based approaches in the country. The solutions offered by judges, lawyers and interpreters should be much more flexible than the legal provisions of traditional legal thinkers. They should be aware that the forward restrictions of an RBS are not usually permanent, and their legal interpretation with new possibilities and their implementation with other branches may be challenging. In contrast, the gradual realization of their legal provisions, if is enforced in accordance with human rights obligations, will be generally accepted by the public.

The impact of government obligations on ESCR in a RBWS

In Iran, larger analyzes of the government's commitment to the economic, social, and cultural rights of individuals in society, as well as social costs, inequalities, various policy processes, and trend of dealing with deprivation and poverty, show further studies of our current approaches to problem solving does not promote injustice and inequality among individuals in society. Rather, those governments and their main authorities should lead to the consolidation of right-based approaches to the gradual fulfillment of human rights obligations in order to achieve an RBS. In addition, we need to closely analyze economic and social resources among affected individuals, families, or groups.

This is because it can help the government identify faster and better people who have been inflicted by discrimination, lack of funding, and so on. It should be noted, however, that very minor and periodic benefits (such as subsidies, first for most sections of society [middle and poor] and then for less sections [only the poor] may conflict with long-term social policy strategies. Therefore, relying on the primary and basic needs of individuals in these identified poor families (through housing, employment, education and insurance) can prevent the loss of national capital. Concurrently, the life expectancy of some people in need of housing, employment and marriage will grow in these families to pave the way for justice and equality. Thus, in an overview of the above results, we see that the RBWS focuses on the elimination of corruption and poverty, economic progress and justice or non-discrimination (in providing the minimum basic needs, such as housing, employment, insurance).

The current position of RBWS in Iran

To answer the question of "whether or not the RBWS has been established in Iran or whether there have been any changes “can be seen in the discussion and results above and in the

conclusion section. The comprehensive welfare system in Iran includes subsidized public health services, health insurance plans, pensions and other social security benefits. Furthermore, the idea of a RBWS is based more on the principles of equal opportunities, equitable distribution of wealth and public responsibility for those who are unable to enjoy the preparations of a good life. Despite these growing programs, there is still a long way for actualizing these programs of RBS in Iran. Dealing with the issue of administrative capacities is one of the biggest legal constraints of higher authorities in Iran, which has fueled administrative corruption and incurred huge costs for the government. No effective efforts have been made to identify effective human resources and administrative changes.

In addition, in Iran, inefficiency of inspection and monitoring in administrative systems (especially financial), inefficiency of managers, operational compression and defect in monitoring work, unwillingness of the monitoring system to announce and inform about discoveries, lack of fair analysis of violations by monitoring systems and other issues lead to the failure of right-based approaches in RBWS. In cases where the content of the provisions has been well established on right-based approaches, have been consider so significant and actions have been taken for their enforcement, it has not been carefully thought out in practice. Therefore, discrimination has prevented the realization of the goals of a RBWS in Iran.

Limitations

This research is based on pre-published empirical studies and our experiences in the courts to give us an overview of the RBS (a welfare state with right-based approaches) in Iran. Since the number of previous studies on costly approaches (somewhat institutional) was slight, evaluating their results than the third approach (i.e., conservative) was more difficult.

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Double Jeopardy: A Global Doctrine

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Abstract

The doctrine of Double Jeopardy developed by the common law countries simply means that a person cannot be punished for the same offence more than once. The doctrine has been followed by many countries throughout the world. Over centuries, the rule of double jeopardy, also known as autrefois acquit in law, evolved as a safeguard against unjust prosecution. The idea of double jeopardy is crucial for the integrity of the criminal justice system, as well as the protection of the rights of an accused. This research paper contains an analysis of the historical background of the concept of the Double Jeopardy and also a complete analysis of the conceptual understanding of the term "Double Jeopardy" in which there is a mention of all the legal terms which are directly related to the double jeopardy. The paper attempts to study the concept of double jeopardy in Indian law, with a focus on the unique preference of the Indian Constitution, as well as how it safeguards the rights of an accused. It also examines judicial decisions on the limitations and boundaries of double jeopardy in depth. In this paper, the author has also mentioned the important concept of double jeopardy which follows by different countries in the world, and also discusses how the concept of double jeopardy is different from the Indian concept.
The central topic of this research paper is the idea of double jeopardy. It appears to be a straightforward concept but has far more serious implications. Because the basic premise of this research article is that double jeopardy is an important idea. We will start with the introduction of the title and then move on to the extent to which it is covered by due process of law.

Keywords: *Single Prosecution, Double Jeopardy, Protection, Common Law, Autrefois Acquit*

Introduction

The concept of human rights is relatively a new phenomenon that has gotten a lot of attention in the early twenty-first century. The rights and liberties of a person accused of a crime, which guarantee him a fair trial, in legal terms are known as the rights of an accused. The rights of an accused have developed throughout the time as the countries are moving towards constitutional democracy and the constitution of a country provides various rights to the citizens as well as non-citizens. Primarily the rights of an accused only dealt with the trial but later on after the first half of the twentieth century the concept of rights of an accused widened and it not only included the rights of an accused at the time of the trial but also included the rights before and after the trial. Going to jail or prison means having one's rights restricted. That does not, however, imply that detainees are denied bassic human rights.

India is a democratic country having the longest written constitution which not only recognizes human rights as mentioned under part III of the constitution but also tries to ensure

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the protection of these rights and provides remedies in case these rights get violated. The Indian constitution also protects even the basic rights of the most vicious criminal which was proved by the Indian judiciary in the Kasab trial case.[3] In India an accused has the right to know the grounds of arrest, to be presented before the magistrate within 24 hours of their arrest, to consult legal expert, to have free legal aid, to be heard, etc. One of the very important rights guaranteed in a conviction for criminal offences is the freedom from double jeopardy. The paper tries to analysis the concept of double jeopardy with reference to the Indian constitution, its emergence, and its development over time.

The expression Jeopardy relates to the risk of the indictment that an alleged offender faces when placed on trial for a criminal offence, while the term Double Jeopardy refers to the act of subjecting a client to a retrial for an infraction for which he or she has already been tried or condemned once. Article 20 (2) of the Constitutional Provisions includes the concepts of "autrefois convict" and "double jeopardy," which say that an entity cannot be punished repeatedly for the same conduct. An example of the same would be if a person, A murders B, A cannot be tried for the offence of murder twice.

Furthermore, a person cannot be tried for different crimes based on the same conduct provided that the offences are described in such a way that they prohibit the conduct of significantly different kinds. Thus, in the above-mentioned example, A cannot be tried for both murder as well as manslaughter, but he can be charged for both murder and theft if the murder resulted from the theft. It should also be noted that this doctrine is only limited to criminal offences and does not include civil offences thus, in the case of civil offences no remedy will be entertained against double jeopardy.

To get a better understanding of the concept the history of the Doctrine is to be focused on. Although the legal context was much different, the notion of double jeopardy was not wholly unknown to the Greeks and Romans[4].This principle found final expression in the Digest of Justinian as the precept that “the governor should not permit the same person to be again accused of a crime of which he had been acquitted.”[5]The double jeopardy clause is not explicitly stated in Magna Charta, nor can it be inferred. The doctrine of double jeopardy was derived from the same source in both the continental and English systems of Canon law. In the present-day society, we find Different understanding of this topic in each country. It is for the promotion of this doctrine that an independent and strong Judiciary also acts as a key element.

Conceptual Understanding

It is very important to understand the conceptual meaning of the term Double Jeopardy. The term Jeopardy refers to the word “danger” of conviction that an accused person is subjected to

[3] “Kasab trial showcased India’s protection of human rights,” *Times of India*, Feb 9, 2019http://timesofindia.indiatimes.com/articleshow/67908504.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppstlast visited on 11 October 2021.

[4]Jay A. Sigler, *History of Double Jeopardy*, Vol.7 Issue 4 American Journal of Legal History, 283-309 (1963).

[5]Alen Waston, *The Digest of Justinian* (first published 533, University of Pennsylvania Press 1985).

when on trial for a criminal offence. Thus, the term "Double Jeopardy" simply means, the act of putting an accused on the second trial of an offence for which he or she has already been prosecuted or convicted once. In order to avoid the wrong double jeopardy should be prohibited which is double trial and double conviction, and not necessarily double punishment. In other words, we can say that if a person is punished or convicted once he or she cannot be punished for the same cause or offence or the criminal act for which he or she was earlier punished or convicted that is "autrefois convict". If the person is prosecuted again for the same criminal act in the court, then he or she can take the plea of Double Jeopardy as a valid defense. There are five policy considerations in the Double Jeopardy doctrine[6]:-

1. Preventing the Government from employing its superior resources to wear down and erroneously convict innocent persons.
2. Protecting a person from the emotional, financial, and social consequences of incessant prosecutions.
3. Preserving the finality and integrity of criminal proceedings.
4. Eliminating judicial discretion over the charging process.
5. Restricting prosecutorial discretion over the charging process.

The phrase "double jeopardy" is derived from the legal adage "nemodebet duo vexari pro unoeteademcausa," which implies "no one should be tormented repeatedly for the same reason." The terminology "Double Jeopardy" clarifies the idea of prohibition of proceedings for the same charge more than once. The core principle of double jeopardy includes the old pleas in bar of jurisdiction, namely *autrefois acquit* and *autrefois convict*[7], which means previously tried and acquitted and previously tried and convicted respectively. These two doctrines are only aimed to protect or defend criminal defendants from the tedium and trauma of re-litigation[8], when a felony prosecution is evaluated by a competent court, it is final, regardless of whether it is an acquittal or convict, and it may be pled in the bar of a subsequent accusation for the same violation.

The Doctrine of Double Jeopardy Worldwide

Many countries accepted the concept of double jeopardy globally. There are a number of international instruments and legal regimes which provide restrictions on successive criminal proceedings, these are: -

United State of America

One of the leading countries in the world, the United State of America retain very strong prohibitions against double jeopardy. The clause of double jeopardy in the constitution of the USA came in the Fifth Amendment which prohibits anyone from being prosecuted twice for substantially the same crime. The relevant part of the fifth amendment of the US constitution

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[6]The Legal Dictionaryhttps://legal-dictionary.thefreedictionary.com/double+jeopardy last visited 12 October 2021.
[7]Autrefois acquit is a defense plea available to the accused in the criminal cases, that he has been acquitted previously for the same offence and thus entitling a discharge. Likewise, Autrefois convict discharges an accused, as he has been convicted previously for the same offence.
[8]Daniel K. Mayers and Fletcher L. Yarbrough, "*Bisvexari: New Trails and Successive Prosecutions*, Vol.74 Harvard Law Review 1 1960, https://www.jstor.org/stable/1338213.

says that *"No person shall be subjected for the same offence to be twice in jeopardy of life."* The idea of double jeopardy was first exposed in *US v. Lanza* (1922)[9], and is now also known as the dual sovereignty doctrine. Additionally, in any case, if a trial begins, but it does not end in judgment (innocent, guilty, or acquitted), the criminal defendant can often be retried. This often arises in cases where a jury can't reach a decision, and a mistrial is declared.

United Kingdom

The doctrines of autrefois acquit and autrefois convict, which was discussed above, have been a part of the common law since the Norman Conquest, and they were regarded as crucial components for the protection of the liberty of people. The rule of law against double jeopardy is an important part of the criminal law of the United Kingdom, although the exception to this rule of law was created in the year of 2003. The parliament of the UK passed legislation in the criminal act 2003 introduced by then Home Secretary David Blunkett to abolish the previously strict prohibition of Double Jeopardy in England[10]. It simply means that a person cannot be tried twice for the same offence or crime, once she or he has been acquitted from the case. They can't be prosecuted again even if new evidence emerges or they later confess.

Germany

The notion of double jeopardy is included in the Grundgesetz, which is also known as the basic law of the Federal Republic of Germany. Where a final verdict is pronounced and no further appeals lie against it then in that case Article 103(3) of the Grundgesetz provides that, "According to the basis of general criminal law, no one should be punished more than once for the same crime." German court held that the provision not only prohibits double jeopardy but it also prohibits multiple prosecutions.[11] Immediately just after the German Constitution was enacted, the court ruled that the constitutional protection against double jeopardy is the same as that granted in criminal law and criminal procedural law as construed by ordinary courts.[12]

There are some exceptions to this rule, such as if the documents produced were false or forged, if the witness violated his oath willfully or negligently if the judge violated his official duties in the case, and if the person discharged or acquitted makes a credible confession, in or out of court, that he committed the criminal offence.

Indian Constitutional Provisions

The notion of double jeopardy existed prior to the independence of India as it was presented under the provision of the General Clause Act which states that, when an offence is punishable under two or more enactments, the person who committed the offence is not subject to authorizing twice for the same offence[13]. The Indian Constitution came into force on 26th January 1950 which incorporated the provision of double jeopardy. The rule against

[9]*US v. Lanza* [1922] 260 U.S 377.
[10]The Criminal Act 2003 (asp 7) strict prohibition of Double Jeopardy in England.
[11]BVerfGE 12 62
[12]BVErfGE 3 248
[13]The General Clause Act, 1897 § 26.

Double Jeopardy has been recognized as a fundamental right in the Indian Constitution but it is subject to some exceptions.

Section 26 of the General Clauses Act

This clause of our country states that [14]as to offence punishable under two or more enactments, where an omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted or punished under either of any of those enactments, but shall not be liable to punished for the same offence.

Article 20 of the Constitution of India

Part III of the Indian Constitution provides protection in the respect of conviction for offences. The rule against double jeopardy is a fundamental right under the Indian Constitution reads as *"no person shall be prosecuted for the same offence more than once.[15]"*Though Article 20(2) of the Indian Constitution was borrowed from the fifth amendment of the US Constitution, however, it does not include the notion of "Autrefois acquit", which is included in the US Constitution. Autrefois acquit is a French phrase that means "to acquit" thus autrefois acquit simply means that any person who was previously tried and was acquitted or found not to be guilty of the offence for which he was tried in that case the person cannot be tried for the same offence again as this will be considered as double jeopardy.

Indian Constitution only recognizes "Autrefois convicts" which simply means that any person who was previously tried and was convicted or found to be guilty of an offence and was accordingly punished for the same then that person cannot be prosecuted for the same offence twice as this will be considered as double jeopardy which is the violation of a fundamental right in India. It must be noted that Article 20(2) does not apply if there is no punishment for the same offence as a result of prosecution, as well as it also does not apply in the cases where an appeal against acquittal, if authorized by the procedure, is present. As it is in essence a continuation of prosecution and not the violation of a fundamental right[16].

The most important in Article 20(2) is that it has no application unless there is no punishment for the offence in pursuance of a prosecution. Under the provisions of the Constitution of India, the conditions that have to be satisfied for raising the plea of autrefois convict are:

1. Firstly, there must be a person accused of an offence.
2. Secondly, the proceedings or the prosecution should have taken place before a court or judicial tribunal in reference to the law which creates offences.
3. Thirdly, the accused should be convicted in the earlier proceedings.

Furthermore, it is worth noting that Article 20(2) of the constitution protects the double trial or punishment only in criminal matters and there exists no fundamental right in cases of civil matters.

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[14]The General Clauses Act, 1897§ 26.
[15]The Indian Constitution Article 20(2)
[16]*Smt. Kalawati v. State of H.P.,* AIR [1953] SC 131.

Section 403(1) Of CrPc 1898 (Section 300 Of the Amended Criminal Procedure Code,1973[17]*)*

The protection of double jeopardy under section 20(2) of the Indian Constitution is more limited as compared to the American and British concepts. Double Jeopardy protection is provided by the American and British constitutions for a second prosecution for the same offence, regardless of whether an accused was convicted or acquitted in the first trial. However, that is not the case in India, under Article 20(2), the accused is only protected against double punishment if he or she has already been prosecuted and sentenced for the same offence and is seeking to be prosecuted again for the same offence, but it does not mean that India does not recognize autrefois acquit.

The Indian procedural law, the Criminal Procedure Code, 1973 states that a person who has been prosecuted for an offence by a court of competent jurisdiction and convicted or acquitted of that offence shall not be liable to be tried for the same offence again while that conviction or acquittal is in effect, neither on the same circumstances nor for any other offence for which a different charge than the one brought against him might have been brought under section 221 sub-section (1) or (2)[18]. Here the term "same offence" shows that the offence for which the accused shall be tried and the offence or crime for which he is again being tried must be identical, and based on the same set of facts[19]. Thus, it can be said that the Code of Criminal Procedure accepts both the autrefois acquit and autrefois convict pleas. In order to raise either of the pleas under the Code, the following elements must be proved:

firstly, there must be a previous conviction or acquittal;

Secondly, the conviction or acquittal must be by a court of competent jurisdiction; and

Thirdly, the subsequent proceeding must be for the same offence[20].

Section 71 of the Indian Penal Code

Section 71 of the Indian Penal Code deals with an offence that has multiple parts, each of which might be defined as an offence under various legal definitions, for example, man slaughtering and murder. It states that in such a circumstance, the offender should only be charged with one of the charges unless expressly provided differently. The Section also talks about the possibility that the offence committed by the offender may fall under two or more legal definitions, or that parts of the offence may be combined to form a new offence, for example, theft as well as murder, in such a case, the court trying the offender is not empowered to impose a punishment that is more severe than what it is competent to impose. The competency of the court is provided under section 31 of the Code of Criminal Procedure[21] Firstly, if a person is guilty of two or more offences, the court can sentence that person for such punishment for which the court is competent, and if the punishment consists of

[17]The Criminal Procedure Code, 1973, § 403(1).
[18]Act No. 5 of 1898.
[19]*State of Rajasthan v. Hat Singh,* AIR (2003) SC 791.
[20]*State of Rajasthan v Hat Singh, (*2003) 2 SCC 152.
[21]The Criminal Procedure Code, 1973, § 31.

imprisonment, it will be commencing the one after the expiration of the other in such order as the Court may direct unless the Court directs that such punishments shall run concurrently.

Secondly, in the case of the consecutive sentence, the Court is not required to refer the offender to a higher court because the total punishment for the many offences exceeds the maximum punishment that it is authorized to impose on conviction of a single offence. Provided thatneither that person be sentenced to more than fourteen years of jail nor the total punishment shall exceed twice the maximum penalty that the Court is authorized to impose for a single offence.

Thirdly, for the purpose of appeal in such cases, the whole of the consecutive sentences given will be considered as a single sentence.
Thus, it can be said that a person can be tried for more than one offence at a time but cannot be tried after conviction or acquittal.

Additionally, there is an extra burden on both the police as well as the magistrate to ensure that the charges are framed against the accused are proper and without any error. If charges are not framed cautiously, it can lead to double victimization of an accused, and on the other side, it also creates problems for the state to prosecute a person as it should be.Since man can remember, the doctrine of double jeopardy has been a feature of the legal system, and it is an honest attempt to safeguard the innocent. As a result, it can be regarded as a positive and just ideology based on equality, justice, and morality.

Legal Provisions
As mentioned above that in India protection from double jeopardy is both a constitutional as well as legislative provision. The principle has also been recognized under the provision of the General Clauses Act. Only autrefois convicts are recognized under the Indian Constitution, whereas autrefois acquits are included in the Code of Criminal Procedure, 1973. The conditions that have to be satisfied for raising the plea of autrefois convict have been discussed in the case of *Maqbool Hussain v. State of Bombay*[22].

In *Venkataraman v. Union of India*[23], the appellant was investigated by the inquiry commissioner under the Public Service Enquiry Act, 1960 and as a result, he was terminated from the service. Later on, he was accused of violating the Indian Penal Code and the Prevention of Corruption Act. The court held that the proceeding held by the inquiry commissioner was an only inquiry and did not amount to a prosecution for an offence. As a result, the second prosecution was not subject to the notion of double jeopardy or the protection afforded by Article 20 of the Constitution.
The Supreme Court concluded in *Rao Shiv Bahadur Singh v. State of V.P.*[24] that what is prohibited under article 20 is only the conviction or sentence under an ex post facto statute,

[22]*Maqbool Hussain v. State of Bombay* AIR (1953) SC 325.
[23]*Venkataraman v. Union of India* 1954 AIR 375.
[24]*Rao Shiv Bahadur Singh v. State of V.P.* AIR (1953) SC 394.

not the trial thereof. It is not reasonable to argue that the provision against double jeopardy only applies when both incidents occur after the Constitution. Article 20 does not have retroactive implications; however, laws made with retroactive implications should be limited to that article. The court went on to say that the entire purpose of Article 20 would be destroyed if it were to apply to ex post facto laws enacted after the Constitution was ratified.

It is to be noted that Article 20 (2) will be applicable only where punishment is for the same offence, , In *Leo Roy v. Superintendent District Jail*[25], the Court held that if the offences are distinct the rule of Double Jeopardy will not apply Thus, where an individual was prosecuted and sentenced under the marine customs act, and then later charged with criminal conspiracy under the Indian Penal Code, it was held that the subsequent prosecution was not prevented because it was not for the same offence.

In the case of *The State of Bombay v. S.L. Apte and anr.*, 1961[26]the Constitution Bench held, to function as a bar, the second prosecution and the resulting sentence must be for "the same offence." The most important criteria for attracting Article 20(2) are that the offences be the same. Though the two offences are distinct, the benefit of the prohibition cannot be asserted, even if the accusations of facts in the two complaints are substantially identical. As a result, not the charges in the two complaints, but the ingredients of the two offences must be analyzed and compared to see if their identity can be established.

In *Manipur Administration v. Thokehom Bira Singh*[27], the Supreme Court concluded that Article 20(2) does not apply if there is no penalty for the offence as a result of the prosecution. Although the sub-Article expresses the idea of autrefois convict, Section 300 of the Code of Criminal Procedure incorporates both the principles of autrefois convict and autrefois acquit. Section 300 has broadened the protecting wings even further by prohibiting a second trial on the same facts, even for a different crime, if a different charge might have been brought against him for that crime under Section 221(1) of the Code. Under Section 221(2) of the Code, he may have been convicted of any other crime. It should be noticed that the idea of "autrefois acquit" is not mentioned at all in Article 20(2) of our Constitution.

In *KollaVeeraRaghavRao v. GorantlaVenkateswaraRao& Others*[28], the Supreme Court of India ruled that Section 300(1) CrPC has a broader scope than Article 20(2) of the Constitution. While Article20 (2) of the Constitution merely specifies that "no person shall be prosecuted and punished for the same offence more than once," Section 300(1) of the Criminal Procedure Code specifies that no one can be tried and convicted for the same or even a different offence based on the same circumstances. As may be observed, Section 300(1) of the Criminal Procedure Code is more expensive than Article 20(2) of the Constitution.

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[25]*Leo Roy v. Superintendent District Jail* AIR (1958) SC 119.
[26]*The State of Bombay v. S.L. Apte and anr.*, 1961 AIR 578
[27]*Manipur Administration v. Thokehom Bira Singh* AIR (1965) SC 87.
[28]*KollaVeera Raghav Rao v. Gorantla Venkateswara Rao & Others* AIR (2011) SC 641.

It is by referring to all these cases that it can be reasonably concluded that over centuries the global understanding of the issue of jeopardy has evolved and the courts have had a major role in interpreting the circumstances where this rule can be placed.

Comparative Analysis between Double Jeopardy and Issue-Estoppel or Res Judicata

Estoppel is a legal principle that forbids someone from claiming or asserting a right that contradicts what they have declared or what the law has agreed to. Its purpose is to protect people from being injured unjustly as a result of the contradictions of another's statements or deeds. The 'issue estoppel' is one of several types of estoppels in which a litigant is prevented from presenting the same issue in a subsequent case if the issue has already been resolved in a previous case.

Blair v Curran[29], *last Para of page 531 of an Australian High Court judgment*, established the principle of "issue estoppel."

This idea has been used by the Supreme Court in a number of decisions. The Supreme Court held the following on 'Issue Estoppel' in the case of *Ravinder Singh vs. Sukhbir Singh &Ors.* The theory of issue-estoppel, sometimes known as "cause of action estoppel," is distinct from the principle of double jeopardy, or "otherwise acquit," as enshrined in Section 403 CrPC. It also held that to utilize the rule of issue estoppel, not only the parties in the two trials be the same, but the fact in question, whether proved or not, must be the same as what is sought to be re-agitated in the second trial.

The doctrine of *issue-estoppel* is distinct from the plea of double jeopardy, which states that no one may be prosecuted twice for the same offence.

Issue estoppel is different from jeopardy as it makes no changes to the way the investigation, inquiry, or trial is conducted under the Code of Criminal Procedure. It does not exclude the prosecution of any crime, as the law of double jeopardy does, but it does prevent evidence from being presented to show a fact in the dispute about which a finding has already been made at a previous trial before a court of competent jurisdiction.

In the case of *Piara Singh vs. the State Of Punjab*[30], it was stated with regard to '*issue estoppel'* and *'autrefois acquit'*: The principle of issue-estoppel is a different principle, viz when a competent court has previously considered a factual issue and rendered a decision in favor of an accused Such a finding would constitute an estoppel or res judicata against the prosecution, not as a bar to the accused's trial and conviction for a different or distinct offence, but as a bar to the reception of evidence to disturb that finding of fact when the accused is tried later, even for a different offence permitted by the terms of s.403(2), CrPC.

[29]*Blair v. Curran* (1939) 62 CLR464.
[30]*Piara Singh v. State Of Punjab* (1969) AIR 961, (1969) SCR (3) 236.

Conclusion

There are two types of key elements in a legal system of a country one is Legal Certainty and the other is Equity. When a criminal is prosecuted and sentenced for a crime, he must understand that paying the penalty expunges his guilt and removes the threat of further punishment. Similarly, if the offender is acquitted, he must be confident that he will not be persecuted again in the future. Thus, in order to remove the fear of being prosecuted again the concept of Double Jeopardy originated, which simply says that no person shall be punished twice for the same offence.

The doctrine of Double Jeopardy varies from country to country. Some countries like the U.S.A and many more even cannot allow a trial for a victim, if that victim is convicted once in his early trial. But in India, we can allow many trials of a victim if he or she is not punished in his or her last trial. The rule of double jeopardy cannot be made rigid; thus, it is interpreted differently in different situations. Judges usually keep an eye out while interpreting the provisions to ensure that no innocent persons are penalized. The idea of Double Jeopardy includes the desire to protect the individual from repeat prosecutions that would subject him to live in a continuing state of anxiety and insecurity.

Protection of Traditional Knowledge in India

Mamatha Ramapriya[1]

Abstract

India must adopt a fair and inclusive stance as it advances in the twenty-first century to become a major role on the world stage. Approximately 8.6% of the enormous population is made up of marginalized and vulnerable tribal communities, which play an important role in this regard. One can use their ancestor knowledge to install the ethos in a variety of academic fields. In fulfilling the Sustainable Development Goals of the United Nations, this would unquestionably bring about the proper balance. Promoting Traditional knowledge could become a project for its rebuilding in post-COVID 19 circumstances when the globe is rapidly losing its natural resources. In addition to restoring the rights of these indigenous communities, taking this action would help the nation's economy by incorporating Traditional knowledge into the field of intellectual property. It would be a stroke of genius for India to take the lead in the Global South. India has taken various initiatives regarding the protection of traditional knowledge under intellectual property rights, including the Traditional Knowledge Digital Library (TKDL), which is a major step to curb biopiracy. The paper discusses the significance of traditional knowledge and the methods of protecting it.

Keywords: *Indigenous knowledge,* ***local*** *knowledge, traditional knowledge, COVID 19*

Introduction

Indigenous knowledge (IK), local knowledge (LK), and traditional knowledge (TK) all generally refer to the well-established, long-standing customs and practises of certain local, indigenous, or regional populations. It alludes to the global indigenous and local cultures' knowledge, inventions, teachings, and traditions. Traditional knowledge is passed down orally from generation to generation and is developed from experience gathered over many years and fitted to the local culture and environment. It typically consists of tales, songs, folklore, proverbs, cultural values, beliefs, and rituals as well as local laws, dialects, and agricultural techniques, such as the evolution of plant and animal breeds. Because it has been practised, sung, danced, painted, carved, recited, and performed for millennia, it is occasionally referred to as an oral tradition.[2] Traditional knowledge is primarily of a practical nature, especially in areas like agriculture, fishing, health, horticulture, forestry, and general environmental management.[3]

Traditional knowledge is defined by WIPO (World Intellectual Property Organization) as the knowledge, skills, customs, and know-how that have been established, maintained, and passed

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[2]Shodhganga.inflibnet.ac.in. 2022. *Shodhganga : a reservoir of Indian theses @ INFLIBNET*. [online] Available at: <https://shodhganga.inflibnet.ac.in/bitstream/10603/22605/11/11_chapter4.pdf> (Accessed 15 July 2022).
[3]Convention on Biological Diversity, Cbd.int. 2015. Introduction. [online] Available at: <https://www.cbd.int/traditional/intro.shtml> (Accessed 12 July 2022).

down within a society, frequently forming a part of its cultural or spiritual identity.[4] Although Traditional Knowledge does not yet have a universally recognised definition, it may be claimed that it accepts both the actual content of information and shared cultural representations, such as recognisable traditional signs and symbols.[5] Knowledge as a whole, namely knowledge derived from traditional intellectual effort, which includes know-how, habits, skills, and inventions, is referred to as Traditional Knowledge. For instance, Ayurveda uses readily accessible plant and animal resources, making it available to everyone and particularly effective in treating chronic illnesses. Since a long time ago, basic ingredients like turmeric, onions, and "doob" grass have been used to treat exterior wounds at low cost.[6] Although Ayurveda is well-established as a science, Traditional knowledge has a lot to contribute to it.

This has developed over many ages in harmony with nature and has been passed down from one person to another via practice and occupation. It is a valuable source of knowledge for indigenous societies. A contemporary society, including India and other countries, may benefit from its inclusion in terms of knowledge. Indian culture and civilization have a long history and a significant amount of Traditional Knowledge. Although contemporary technology has mostly superseded the technology used in manufacturing processes, traditional knowledge is still valuable because of its environmentally benign, time-tested techniques and historical culture.[7]

The Significance of Traditional Knowledge

The majority of local communities' identities are rooted in their traditional knowledge. It is an essential part of the social and physical environment of a community, making its maintenance of the utmost significance. The interests of its lawful custodians may be harmed by attempts to misappropriate the knowledge or to use it for industrial or commercial purposes. This must be protected and nurtured for sustainable development in accordance with the interests of knowledge holders in the face of such hazards. For developing nations in particular, it is crucial to preserve, defend, and promote local communities' inventions and practices that are founded on traditional knowledge. Their indigenous practices and biodiversity endowment, which is rich, is essential to their development, trade, environment, culture, religion, identity, and health care systems. However, this priceless asset is in danger in India.

Despite having only 2.4 percent of the world's surface area, India is home to 7-8 percent of all species known to science, including approximately 45,000 plant species and 91,000 animal

[4]Wipo.int. n.d. Traditional Knowledge. [online] Available at: <https://www.wipo.int/tk/en/tk/#:~:text=Traditional%20knowledge%20(TK)%20is%20knowledge,its%20cultural%20or%20spiritual%20identity.> (Accessed 17 July 2022).

[5] *Ibid.*

[6] Mishra, Garima & Singh, Pradeep & Verma, R. & Kumar, Sachin & Srivastav, Saurabh & Jha, K. & Khosa, R.L. (2011). Traditional uses, phytochemistry and pharmacological properties of Moringa oleifera plant: An overview. Der Pharmacia Lettre. 3. 141-164 (Accessed on 14-07-2022).

[7]Hirwade, M. and Hirwade, A., 2012. Traditional Knowledge Protection: An Indian Prospective. *DESIDOC Journal of Library & Information Technology*, 32(3), pp.240-248.

species. Four of the 34 biodiversity hotspots on the planet—the Himalaya, the Western Ghats, the North-East, and the Nicobar Islands—are located in India.[8] Additionally, India is the world's largest supplier of medicinal herbs, and the philosophies underlying the traditional medical systems known as Ayurveda, Siddha, and Unani originated there between 2500 and 500 BC.[9]

Yoga and Ayurveda were both developed in India. India is the country where yoga first emerged as a way to unite the body, mind, and spirit via exercises, postures, and other good habits. Even though it is currently widespread over the globe, its importance has to be shared more widely among everyone. Nearly all religions and sects with Indian roots, such as Hinduism, Jainism, and Buddhism, have their roots in yoga. Due to the size and diversity of the population in India, there is a need for scientific data gathering and distribution for research and practical use. Tribal populations that are marginalised and vulnerable make up about 8.6% of the huge population, and they are crucial in this regard.

India was a successful exporter of cotton and silk garments, but after using machines to produce them in Great Britain, this industry was decimated by the British government's high tariffs. Many families who were employed in this work in many states of India lost their jobs. Indian clothing was of excellent quality, and several families continue to work in the industry today. Good examples include Banarasi saris, Balaramapuram Handlooms' cotton and silk from Kancheepuram. Such clothing's make knowledge is crucial for Indian industry as well as for future research.

In India, there are numerous dances performed in various languages with a wide range of themes, costumes, attitudes, and musical instruments. Some things have been written about in literature, but others were too vivid to be recorded. Indian skills and agriculture are unique. Traditional wisdom is demonstrated through crops like dheincha and sun hemp, which are grown for compost on farms and take 30 to 40 days to grow. When planted together, turmeric, potatoes, and chiles produce more. Products from some plants and animals are utilised to increase the yield and safeguard a few particular crops. Various techniques are used to manage livestock as well.[10] Darjeeling tea's distinctive flavours were developed locally too.
Indian sculpture and art are well known worldwide. However, they are frequently exploited without giving credit to their creators. For instance, Madhubani or Mithila paintings, which are thought to have begun during the Ramayana period, are created using the hands, matchsticks, pen nibs, twigs, etc. Paints are typically made from natural materials, typically trees. The painting depicts weddings and other special events. Animal, bird, and plant sketches are utilised to embellish the paintings. It features three caste-based styles. It is

[8]National Biodiversity Authority, India's Fifth National Report to the Convention on Biological Diversity, 2014, available at <http://nbaindia.org/uploaded/Biodiversityindia/5th_NationalReporttoCBD.pdf>, last visited on 14-07-2022.
[9]M.M. Pandey, Subha Rastogi and A.K.S. Rawat, Indian Traditional Ayurvedic System of Medicine and Nutritional Supplementation, Evidence-Based Complementary and Alternative Medicine (2013), available at <https://www.hindawi.com/journals/ecam/2013/376327/cta/>, last visited on 15-07-2022.
[10] *Supra Note* 8.

exquisitely designed on many clothing in India as well. Many other painters have since replicated this painting style without paying credit to the creators.

There are worries that this information is being used and patented by third parties without the previous informed agreement of knowledge holders and that few, if any, of the profits earned from it are distributed to the communities in whom it originated and now resides. Such worries have elevated traditional knowledge to the top of the international agenda and sparked a heated discussion on how to safeguard, protect, advance, and sustainably use the knowledge. Traditional knowledge has always been a valuable resource that is simple to obtain and is therefore vulnerable to theft. Traditional knowledge, particularly that pertaining to the treatment of various ailments, has given technology-rich nations ideas for developing biologically active compounds. In other words, bio prospecting makes use of traditional knowledge. Additionally, because it is simply thought that because TK is in the public domain, communities have renounced any claims to it, it is frequently misappropriated. India is a biologically varied country, and it is well known that the traditional knowledge it possesses about many resources, particularly the medical system, makes it a wealthier country. Nonetheless, this information must be both conserved and developed. India has faced numerous challenges in her efforts to preserve her traditional wisdom. These came up as a result of firms receiving patents for knowledge that originated in India. An efficient way to preserve traditional knowledge and stop others from stealing it is by documenting and digitising it in the form of a TKDL.

Cases of Biopiracy

The theft of biomedical information from traditional and indigenous communities or individuals is known as biopiracy.[11] The word also refers to bioprospecting without the permission of the local community and can be used to denote a breach of a contract governing the access to and use of traditional knowledge to the harm of the provider. Only seven medicinal plants with Indian ancestry were included in nearly 80% of the 4,896 references to individual plant-based medicinal patents in the USPTO in 2000, according to the CSIR.[12]

Three years later, these medications were the subject of nearly 15,000 patents dispersed across the US, UK, and foreign patent offices' registries. This number increased to 35,000 in 2005, which amply indicates the developed world's interest in the knowledge of the developing world.[13] It just so happens that none of the patent examiners are from developing nations, giving them a virtual pass on stealing native knowledge from the Old World.[14]

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[11]Srivastava, M., 2011. Bio Piracy of Medicinal Plants & Practices: Sacrilege of Aboriginal Indian Traditional Knowledge. *SSRN Electronic Journal*.

[12]Sen, S., & Chakraborty, R. (2014). Traditional Knowledge Digital Library: a distinctive approach to protect and promote Indian indigenous medicinal treasure. *Current Science*, *106*(10), 1340–1343. http://www.jstor.org/stable/24102476

[13]Wipo.int. n.d. [online] Available at: <https://www.wipo.int/edocs/pubdocs/en/patents/901/wipo_pub_901_2005.pdf> (Accessed 14 July 2022).

[14]Hirwade, M. and Hirwade, A., 2012. Traditional Knowledge Protection: An Indian Prospective. *DESIDOC Journal of Library & Information Technology*, 32 (3), pp.240-248.

- **Turmeric**

Indian cuisine uses turmeric rhizomes as a spice to add flavour. Additionally, it possesses qualities that make it a useful component of medications, cosmetics, and colours. It has been used for millennia as medication to treat burns and rashes.[15] A US patent on the use of turmeric in wound healing was issued to Suman K. Das and Hari Har P. Cohly, two Indian expatriates working at the University of Mississippi Medical Centre in 1995.[16] The patent was challenged in a re-examination proceeding by the Council of Scientific & Industrial Research (CSIR), India, New Delhi, citing the existence of previous art. According to CSIR, turmeric has been used medicinally for thousands of years to treat burns and rashes. Documentary proof of traditional knowledge, such as an old Sanskrit manuscript and a 1953 article from the Journal of the Indian Medical Association, was used to support their assertion. After determining that the invention was not innovative and that it had been known in India for centuries, the US Patent Office cancelled the patent in 1997.

- **Neem**

Numerous patents have been issued for neem (Azadirachta indica), a widely distributed tree species in India with medical benefits.[17] The oil extracted from neem seeds can be used to treat colds and flu; neem extracts can be used to combat hundreds of pests and fungal diseases that threaten food crops; and when mixed with soap, neem can treat malaria, skin conditions, and even meningitis.[18]

The US Corporation W.R. Grace Company and the US Department of Agriculture received a patent from the European Patent Office (EPO) in 1994 for a method of using hydrophobic Neem oil to control fungus on plants. A collection of foreign NGOs and lawyers for Indian farmers opposed the patent in court in 1995.[19] They provided proof that Neem seed extracts' fungicidal properties, which have been employed for generations in Indian agriculture to safeguard crops, are not patented. According to the evidence, all of the elements of the current claim were known to the public before the patent application, and the EPO decided in 1999 that the invention did not constitute an innovative step.[20] The EPO cancelled the patent that had been issued for neem in May 2000. Nearly all rural and semi-urban groups are aware of the numerous health advantages of neem. Indian people of all backgrounds were divided in their opposition to an American company's

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[15]*Supra note* 13.
[16]*Biotechnology Law Report*, 1996. {BLR 2306} India - Prior Art - Turmeric. 15(6), pp.1065-1072.
[17]Alzohairy, M., 2016. Therapeutics Role of Azadirachta indica(Neem) and Their Active Constituents in Diseases Prevention and Treatment. *Evidence-Based Complementary and Alternative Medicine*, 2016, pp.1-11.
[18] Bhattacharjee, S., 2020. The promise of nanomedicine research with Sourav Bhattacharjee. *Video Journal of Biomedicine*.
[19]Cordis.europa.eu. 2022. *CORDIS | European Commission*. [online] Available at: https://cordis.europa.eu/article/id/23505-epo-accepts-biopiracy-argument-and-revokes-patent. (Accessed 16 July 2022).
[20] India: Traditional Knowledge And Patent Issues: An Overview Of Turmeric, Basmati, Neem Cases, Saipriya Balasubramanian (Accessed 16 July 2022).

attempt to patent neem. They dreaded the looming tyranny that the patent holder may unleash after they had gained the IP rights.[21]

- Basmati Rice

Another instance that caused a lot of trouble included a patent that the USPTO issued to the American business RiceTec for "Basmati rice lines and grains." In India and Pakistan, basmati rice is a traditionally cultivated aromatic kind of rice. Before the UK Trade Mark Registry, Rice Tec. Inc. submitted an application for registration of the mark "Texmati." The granting of this invention gave rise to several IP concerns outside of those covered by patent law, such as those involving trade names and geographical indications.

Due to the inferior quality of Basmati rice grown in the US compared to the high-quality Basmati rice being cultivated in northern India and Pakistan, RiceTec had been granted a patent for the invention of hybrid rice lines that combined desirable grain traits of Basmati rice with desirable plant traits.[22] This would help in growing a better crop of Basmati rice in the western hemisphere, especially the US. It was successfully opposed by the Agricultural and Processed Food Exports Development Authority (APEDA). Along with two scientists' statements, various papers on Basmati rice and the research done on the grain in India were submitted with the re-examination request; one of these publications prompted the USPTO to recognise that the basic assertions of RiceTec were not evident. As a result, RiceTec decided not to appeal the USPTO's ruling and reduced its twenty claims to just three. It was contested, and afterwards the USPTO revoked it.

Protection Methods

The World Intellectual Property Organisation takes cognizance of the problem. It has reaffirmed the necessity of using intellectual property rights to defend conventional knowledge systems. There are primarily two ways to safeguard conventional knowledge systems.[23]

Defensive protection: Giving the community access to legal remedies that stop the exploitation of their knowledge systems is one strategy to safeguard traditional knowledge systems. Defensive protection is created through a combination of legal options and techniques that can stop outsiders from abusing community knowledge networks. Making a list of current traditional knowledge systems available to patenting authorities is one effective approach to do this. Patenting authorities may use these quick reckoners or lists when awarding patents.

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[21]Cordis.europa.eu. 2022. *CORDIS | European Commission*. [online] Available at: <https://cordis.europa.eu/article/id/23505-epo-accepts-biopiracy-argument-and-revokes-patent.> (Accessed 16 July 2022).

[22]Rangnekar, Dwijen & Kumar, Sanjay. (2010). Another Look at Basmati: Genericity and the Problems of a Transborder Geographical Indication. The Journal of World Intellectual Property (Accessed 13 July 2022).

[23]Iptse.com. 2022. *Importance of Protection of Traditional Knowledge | IPTSE*. [online] Available at: <https://iptse.com/what-is-traditional-knowledge-and-can-ipr-protect-it/> (Accessed 14 July 2022).

Positive protection: Knowledge holders have the authority to seek redress against improper use of traditional knowledge and to profit from economic success. Many nations have put in place particular regulations that give knowledge owners the freedom to choose how they want to use their information. They can advertise their information repository and cooperate with business entities to advance the knowledge system.

There are legal remedies within the Indian judicial system that can help protect traditional knowledge. For instance, two parties, including indigenous people, can sign an agreement to share the benefits of using the knowledge bank commercially. Prior Informed Approval, which allows a third party to utilise knowledge with the knowledge holder's full consent, is another effective protection measure available to communities and third parties.

India's Efforts in Protecting Traditional Knowledge

The curious case of turmeric brought India to the attention of the world. The Council of Scientific and Industrial Research (CSIR), India, achieved a significant victory in 1997 when it was able to withdraw a patent that two US-based scientists had filed.[24] The dispute started in 1995 when the US Patents and Trademarks Office (USPTO) granted a patent to two researchers from the University of Mississippi Medical Center for their discovery of turmeric's capacity to treat wounds.

In India, where people have used turmeric for many centuries to cure various illnesses, including wounds, this came as a shock. On the grounds that it was "prior art," a type of customary knowledge, the CSIR then requested that the USPTO invalidate the patent.[25] The USPTO and CSIR then engaged in combat. The incident with the turmeric patent was viewed as a warning sign for the appropriation of local traditional knowledge, particularly in the area of medicine. Since then, a digital library of traditional Indian medical knowledge has been created by the government and the CSIR. This library was established to safeguard Indian traditional medical knowledge and prevent theft at international patent offices.

Traditional medical information, including Ayurveda and unani, has been collected over time by the Traditional Knowledge Digital Library through systematic, scientific recording.[26] Additionally, these recordings have been translated into a number of world languages. The Central Government's then-Planning Commission established a "Task Force on Conservation and Sustainable Use of Medicinal Plants" in June 1999. Finding ways to make the protection

[24] India: Traditional Knowledge and Patent Issues: An Overview of Turmeric, Basmati, Neem Cases, Saipriya Balasubramanian (Accessed 16 July 2022).

[25]Braendli, P., 1986. Trilateral co-operation EPO-USPTO-JPO 1983–1985 and associated projects of the EPO. *World Patent Information*, 8(2), pp.66-69.

[26]Sharma, D., 2022. *Intellectual Property Rights* and *Protection of Traditional Knowledge: A General Indian Perspective | SCC Blog*. [online] SCC Blog. Available at: <https://www.scconline.com/blog/post/2020/06/22/intellectual-property-rights-and-protection-of-traditional-knowledge-a-general-indian-perspective/> (Accessed 12 July 2022).

of "patent rights and IPR of medicinal plants" easier was one of its goals.[27] One of the Task Force's many recommendations was the establishment of a library to ensure the collection of traditional knowledge on a single platform. This library would be accessible online and would help demonstrate to the rest of the world that traditional medical knowledge in India is prior art, meaning that patent applications based on such knowledge would not satisfy the criteria for novelty.[28] As a result, a database of traditional knowledge in India was created.

The Traditional Knowledge Digital Library (TKDL)[29] is a database that contains more than 2,50,000 formulas from the Ayurveda, Siddha, Unani, and Yoga traditional medical systems in India. TKDL is an innovative attempt by India to stop the misappropriation of the nation's traditional medical knowledge at foreign patent offices, which is essential to meeting the healthcare demands of more than 70% of India's population as well as millions of people's daily needs.[30]

The development of India's digital library as a defensive measure to combat biopiracy and the theft of traditional knowledge has drawn attention from around the globe. However, merely acknowledging something does not suffice; it is essential to put in place a fair benefit-sharing system.[31] In 2005, the TKDL expert group estimated that approximately 2000 incorrect patents relating to Indian medical systems were being granted on an annual basis at the international level, primarily as a result of the fact that Indian traditional medical knowledge, which is available in local languages such as Sanskrit, Hindi, Arabic, Urdu, Tamil, etc., is neither accessible nor understandable for patent examiners at the international patent offices.[32]

Protection of Knowledge- A Double Edged Sword

The concept of indigeneity can nevertheless be employed for the opposite purpose of integration even when it is given priority with the apparent goal of promoting indigenous businesses as a separate category. Under the guise of indigenous enterprise, it promotes trades that are basically capitalistic and use tradition and difference to further the integration agenda. This is consistent with past research by Lindroth that demonstrate how capitalism has spread in a flexible way.[33] Capitalist systems have the ability to take on many garbs and secure their own spread by being versatile to a large degree. By disguising the exploitative class-based

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[27]V.K. Gupta, An Approach for Establishing a Traditional Knowledge Digital Library, 5 JIPR 307 (2000), available at <http://nopr.niscair.res.in/bitstream/123456789/26010/1/JIPR%205%286%29%20307-319.pdf>,(Accessed 12 July 2022).

[28]Prashant Reddy T., Sumathi Chandrashekaran, *Create, Copy, Disrupt: India's Intellectual Property Dilemmas*, 271 (Oxford University Press 2017) [Accessed 13 July 2022].

[29]Tkdl.res.in. 2022. *TKDL Traditional Knowledge Digital Library*. [online] Available at: <http://www.tkdl.res.in/> (Accessed 16 July 2022).

[30]*Ibid.*

[31]Chakrabarty, S.P., Kaur, R. A Primer to Traditional Knowledge Protection in India: The Road Ahead. *Liverpool Law Rev* 42, 401–427 (2021) (Accessed 16 July 2022).

[32]*Ibid.*

[33]Lindroth, M., 2014. *Indigenous Rights as Tactics of Neoliberal Governance: Practices of Expertise in the United Nations*. [online] Available at: <https://journals.sagepub.com/doi/10.1177/0964663914524265> (Accessed 25 July 2022).

relationships that are crucial to capitalism in indigenous contexts as traditional social bonds, capitalism can grow there.[34]

In this way, the same style of indigenous building used by colonial authorities to further their interests is also exploited today to benefit capitalism.[35] Even when indigenous businesses function in a largely uniform manner inside the capitalist system, their claims of differentiation based on particular interpretations of indigenousness serve to advance capitalism while giving the impression of genuine distinction. As entrepreneurship is carried out inside capitalism's broad framework and by using unavoidable relationships with various aspects of capitalism, the integration endeavour thereby displays the effect of capitalism as a whole.

The resistance project, on the other hand, demonstrates that indigenous people living on the periphery do have some agency in the face of capitalism's escalating assault. In a society where cultural distinctions are more and more overlooked, statements that invoke tribal institutions and use tribal sensibilities in the context of developing capitalism express indigenous assertion and claim to existence.

Indigenous people are able to and frequently do so in order to advance specific forms of resistance. Additionally, this is consistent with earlier studies that mention such agency from different contexts. By conceptualising potential communal reactions to the global economy, some of the complexity involved in this expression of resistance can be understood.[36]

It is important to think about the two major decisions that communities face while adapting to enforced economic systems. First is the option to join or leave the forced system. According to the study's findings, the most common response was choosing to interact in various ways with the global capitalist system. However, a second option concerns how the choice to opt in might be put into practise in two ways, resulting to an active or passive form of participation. A passive opt-in would mean that the rules of the global economy are unquestioningly accepted as they are. An active opt-in would entail making significant changes to capitalism institutions and practises to fit local goals and cultural norms. Therefore, unless more attention is devoted to how precisely indigeneity and entrepreneurship are articulated to create resulting formations, attempts to portray indigenous knowledge groups as a substitute for capitalist formations are not likely to be successful. If attempts are made to preserve indigenous

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[34] Abdullah, Muhammad & Othman, Azmah & Jani, Rohana & Bartholomew, Candyrilla & Pesiu, Elizabeth & Abdullah, Mohd. Tajuddin. (2020). Traditional Knowledge and The Uses Of Natural Resources By The Resettlement of Indigenous People In Malaysia. Journal of Southeast Asian Studies. 25. 168-190. 10.22452/jati.vol25no1.9 (Accessed 25 July 2022).

[35]BANERJEE, S., 2011. *Embedding Sustainability Across the Organization: A Critical Perspective*. [online] Available at: <https://www.jstor.org/stable/23100442> (Accessed 22 July 2022).

[36] Anderson, R., Dana, L. P., & Dana, T. (2006). Indigenous Land Rights, Entrepreneurship, and Economic Development in Canada: "Opting-in"' to the Global Economy. Journal of World Business, 41 (1), 45–55 (Accessed 22 July 2022).

methods, these efforts must be backed up by coordinated action on the many institutional institutions that support such ways.

The development of alternative financial inclusion systems, the facilitation of the operationalization of common property for community goals, the encouragement of the formation of tribal cooperatives, etc. are examples of potential support actions that might help these policy objectives achieve better realisation. The Nagoya protocol has been crucial in this situation. Both the user and the owner are intended to gain from the protocol. Addressing the fact that protection wouldn't have been necessary if the knowledge weren't tried to be capitalised is urgently essential. Giving fair shares and protection instead than just a little portion of the earnings is the way to go.

Conclusive Remarks

Traditional knowledge has enormous potential to answer man's emerging issues because knowledge is power. Exploiting this knowledge is crucial, but it must also be accompanied with benefit sharing, promotion, and protection.

One could consider traditional knowledge to be the newest member of the IP family. However, in addition to the unwillingness of nations, there are other considerations that must be made when deciding how to handle this child. Correctly stated, the informal sector's knowledge system, or customary knowledge, is frequently oral and improperly documented, making it non-defendable.[37] India has advanced and established a reservoir of its ancient knowledge, which expands on occasion, but at the world level the demand for a legal instrument grows more pressing.

Traditional knowledge is frequently cited as needing a sui generis law as a potential answer for adequate preservation, however until such a law is developed, programmes and initiatives like Start-up India, Digital India, and the National IP Policy can save the rapidly disappearing system of traditional knowledge.[38] It would not be incorrect to state that in order to ensure the survival of the species and humanity, the younger generation must assist in safeguarding the invaluable knowledge of an older generation.

[37]*Supra note* 26.

[38]SCC Blog. 2022. *Protecting Traditional Knowledge - the India story till date | SCC Blog*. [online] Available at: <https://www.scconline.com/blog/post/2018/04/23/protecting-traditional-knowledge-the-india-story-till-date/> (Accessed 17 July 2022).

Socio- Legal Dimension of Live in Relationship

Ripunjay Singh[1]

"Married in haste, we repent at leisure"

……William Congreve

Introduction

India is widely known as a country with strong moral values and traditional integrity. Perhaps, that's why bold exhibitions of romance go for a toss in such a typical society, least being something like live-in-relationships in India. The union of a man and a woman is considered as one of the most sacred acts in this country. No wonder, living together before marriage is a bitter dampener for the staunch ethic upholders. However, the new millennium has ushered in great changes even within the country that has forever been enshrouded in a blanket of rich culture and heritage. India is a country, which is slowly opening its doors for western ideas and lifestyles and one of the most crucial episodes amongst it, is the concept of live in relationships. A relationship of a man with a woman in legal parlance is legitimate if is based on proper marriage and illegitimate if not as per Marriage Laws. Live in Relationship is a living arrangement in which an unmarried couple lives together in a long-term relationship that resembles a marriage.

All over the Hindu and Christian worlds, marriage began as a sacrament. Marriage began as a sacrament implied a permanent and indissoluble union. It was a union not merely in this life but also in all lives to come-an eternal union. The Shanskarars ordained that once is a maiden given in marriage, and the injunction was: "A true wife must preserve her chastity as much after as before her husband's death.

In this light one trend in the recent times that has been sticking out like a sore thumb has been the issue of "live in relationship". The impression that one gets from the expression itself is that of a relationship which is of a casual nature, though if we delve deeper into the issue it is far from the truth. The couples who are entering into live in relationships are mature, financially stable and above all independent individuals, who are ready to contribute what is expected of them in a relationship of marriage. The only thing that they are not ready for is to enter formally into the relationship of marriage. The term used by the Hon'ble Supreme Court for such relationships is "relation in the nature of marriage[2]".

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[2] Amartya Bag, Succession Rights in Case of Live-In Relationships: An Analysis in the Indian Context (March30, 2011 also available at SSRN: http://ssrn.com/abstract=2011751 or http://dx.doi.org/10.2139/ssrn.2011751.

Due to the multiplicity of people entering into such kind of relationship the Apex Court thought it imperative to lay down some kind of precedent in relation to such relationships. While deciding the above case the Court made a reference to the landmark US judgment of *Marvin v. Marvin*. The given case involved the famous film actor Lee Marvin, with whom a lady Michelle had lived for many years without marrying him, and was then deserted by him and she claimed palimony. The term 'palimony' is a combination of the word's 'pal' and 'alimony' i.e., alimony being claimed by a pal or close friend[3].

Live in relationships, also called as 'cohabitation' is an alternative for marriage, by which two persons of same or different sex can live together without any legal rights against each other. However, it is more common in western countries than in India. It is a pure form of modern adultery which is formed purely on the pillars of fashionable and individual life style. [4]Youth generation of today is more interested in cohabitation by which they can get a more friendly approach to their relationship. Youngsters accept cohabitation to flee from responsibilities and commitment or to explore each other's life before marriage. Usually, it is accepted by the high classes' society people.

Meaning of Live in Relation

"It's better to have a live-in relationship rather than having a divorced life!"

This is common and line favouring live-in relations in the world. Live in relationship are not new for western countries but these days the concept is adjusting its roots in east also. The word live in is controversial in many terms in eastern countries[5].

The legal definition of live in relationship is *"an arrangement of living under which the couples which are unmarried live together to conduct a long-going relationship similarly as in marriage."*

In some parts of world these types of relationships are valid but some countries are highly strict for accepting the concept. It has been found that younger generation is wider to accept the live in relationships. Live in relation i.e., Cohabitation is an arrangement whereby two people decide to live together on a long term or permanent basis in an emotionally and/or sexually intimate relationship. The term is most frequently applied to couples who are not married.

Today, cohabitation is a common pattern among people in the Western world. People may live together for a number of reasons. These may include wanting to test compatibility or to establish financial security before marrying. It may also be because they are unable to legally marry, because for example same-sex, some interracial or interreligious marriages are not legal or permitted. Other reasons include living with someone before marriage[6] in an effort to

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[3] Available on www.airwebworld.com/articles/index.php?article=1266 (Accessed on 28th August 2012.

[4] Available on http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2011751&download.

[5] Shahista Pathan "Emerging concept of live in relationship" February, 2012 also available at http://legalservicesindia.com/article/article/emerging-concept-of-live-in-relationships-1013-1.

[6] Available on http://legal-dictionary.thefreedictionary.com/Live-in+relationship.

avoid divorce, a way for polygamists or polyamorists to avoid breaking the law, a way to avoid the higher income taxes paid by some two-income married couples (in the United States), negative effects on pension payments (among older people), and philosophical opposition to the institution of marriage and seeing little difference between the commitment to live together and the commitment to marriage. Some individuals also may choose cohabitation because they see their relationships as being private and personal matters, and not to be controlled by political, religious or patriarchal institutions.

Some couples prefer cohabitation because it does not legally commit them for an extended period, and because it is easier to establish and dissolve without the legal costs often associated with a divorce. In some jurisdictions cohabitation[7] can be viewed legally as common-law marriages, either after the duration of a specified period, or the birth of the couple's child, or if the couple consider and behave accordingly as husband and wife.

Mentality behind "Live-In- Relationship"

We know marriage is of two types 'Arrange marriage and Love marriage'. After marriage, we don't know, whether it is successful or not? That's why? When arrangement of marriage is for two persons in love then why couples are leaning towards the live-in relationships. This question can have multiple answers, but this have been found that almost all the couples perusing a live-in relation are willing to get married someday. But before that they want to spend some time with one another, for understanding each other and to figure out their compatibility. Because they believe that if they found themselves incompatible after marriage then they will have no choice other than compromising their life-styles.

Further, some couples believe that going for a weeding is just a waste of money, because they think their love doesn't need any paper certification or social drama[8]. The reasons can be numerous depending upon different mental set-ups.

The concept of live in relationship moves towards 'Modernization. Today many traditional communities are heading up in the world who opposes live-in relationships; they found it against their religious concerns and social foundations. But it has to be understood that the emotional bindings and relationships can never be pressed by power. Live-in concept is not a problem, it is just thinking. And it has to be entertained rationally. If youth is getting more influenced with the concept, then ethical and legal communities of world must take some necessary steps to keep the concept original and rational. In spite of threatening people about live-in relationships, the need says to support and help the couples who are living together, so that one day they go for some healthier and more social relationship[9].

Legal Status of Live in Relationship:
Under Indian Law

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[7] Available on http://www.boldsky.com/relationship/love-and-romance/2008/live-in-relationship-130608.
[8] Available on http://www.ariseindiaforum.org/live-in-relationship.
[9] Caesar Roy Emerging trend of live in relationship.

The Fundamental right under Article 21 of the Constitution of India grants to all its citizens "right to life and personal liberty" which means that one is free to live the way one wants. Live in relationship may be immoral in the eyes of the conservative Indian society but it is not "illegal" in the eyes of law. In case of Kushboo, the south Indian actress who endorsed pre-marital sex and live in relationship, criminal appeals were filed against her which the Supreme Court quashed saying that how can it be illegal if two adults live together, in their words "living together cannot be illegal[10]."

Now the problem is not just limited to the legality of the relationship but now people are coming up about the rights of the live in partners and the status of children born out of such wedlock. The Hindu Marriage Act 1955 gives the status of legitimacy to every child, irrespective of birth out of a void, voidable or valid marriage. However, they don't have property and maintenance rights. In case the couple break up then who would maintain the child in case none wants to take responsibility remains a big problem.

The status of the female partner remains vulnerable in a live in relationship given the fact she is exploited emotionally and physically during the relationship. The Domestic Violence Act provides protection to the woman if the relationship is "in the nature of marriage". The Supreme Court in the case of *D. Velusamy v. D. Patchaiammal* held that, a 'relationship in the nature of marriage' under the 2005 Act must also fulfil the following criteria:

a) The couple must hold themselves out to society as being akin to spouses.
b) They must be of legal age to marry.
c) They must be otherwise qualified to enter into a legal marriage, including being unmarried.
d) They must have voluntarily cohabited and held themselves out to the world as being akin to spouses for a significant period of time, and in addition the parties must have lived together in a 'shared household' as defined in Section 2(s) of the Act. Merely spending weekends together or a one-night stand would not make it a 'domestic relationship[11]'. It also held that if a man has a 'keep' whom he maintains financially and uses mainly for sexual purpose and/or as a servant it would not, in our opinion, be a relationship in the nature of marriage'.

In June, 2008, The National Commission for Women recommended to Ministry of Women and Child Development made suggestion to include live in female partners for the right of maintenance under Section 125 of Cr P C. This view was supported by the judgement in *Abhijit Bhikaseth Auti v. State of Maharashtra and Others.*

The positive opinion in favour of live in relationship was also seconded by Maharashtra Government in October, 2008 when it accepted the proposal made by Malimath Committee and Law Commission of India which suggested that if a woman has been in a live-in

[10] Available on www.indialawjournal.com/volume2/issue_2/article_by_saakshi.
[11] Available on http://legalservicesindia.com/article/article/socio-legal-aspect-of-live-in-relationships-811.

relationship for considerably long time, she ought to enjoy the legal status as given to wife. However, recently it was observed that it is divorced wife who is treated as a wife in context of Section 125 of Cr P C. and if a person has not even been married i.e. the case of live in partners, they cannot be divorced, and hence cannot claim maintenance under Section 125 of CrPC.

In the Veluswami[12] case note has been taken of the inclusion of a female partner in the Domestic Violence Act, 2005. The relevant part is extracted below: "However, the question has also be to be examined from the point of view of The Protection of Women from Domestic Violence Act, 2005. Section 2(a) of the Act states:
2(a) "aggrieved person" means any woman who is, or has been, in a domestic relationship with the respondent and who alleges to have been subjected to any act of domestic violence by the respondent;

Section 2(f) states: 2(f) "domestic relationship" means a relationship between two persons who live or have, at any point of time, lived together in a shared household, when they are related by consanguinity, marriage, or through a relationship in the nature of marriage, adoption or are family members living together as a joint family;

Section 2(s) states: 2(s) "shared household" means a household where the person aggrieved lives or at any stage has lived in a domestic relationship either singly or along with the respondent and includes such a household whether owned or tenanted either jointly by the aggrieved person and the respondent, or owned or tenanted by either of them in respect of which either the aggrieved person or the respondent or both jointly or singly have any right, title, interest or equity and includes such a household which may belong to the joint family of which the respondent is a member, irrespective of whether the respondent or the aggrieved person has any right, title or interest in the shared household."

Section 2(f) of the act includes within its ambit a partner who has lived with a person in a relationship in the nature of marriage. This includes a female partner in a liv in relationship. The act being recent in nature has taken cognizance of the trend of live in relationship. The question now comes that what amount of time would be optimum for a relationship of live in to be accorded all the rights of a regular relationship. The facts of the Veluswami[13] judgment which indicate the acceptable time for a live in relationship are:

"It appears that the respondent-D. Patchaiammal filed a petition under Section 125 Cr.P.C. in the year 2001 before the Family Court at Coimbatore in which she alleged that she was married to the appellant herein on 14.9.1986 and since then the appellant herein and she lived together in her father's house for two or three years. It is alleged in the petition that after two or three years the appellant herein left the house of the respondent's father and started living in his native place, but would visit the respondent occasionally. "

[12] *D. Veluswami v. D. Patchaiammal*, 2010(4) KLT 384 (SC): 2010(9) UJ4721(SC).
[13] *Ibid.*

The extract above gives a hint as to the acceptable period for a live in relationship which is two to three years. We may take three years as a minimum time for a live in relationship to be considered for at par with a regular marital relationship. Justice Markandey Katju has further remarked:

"Having noted the relevant provisions in The Protection of Women from Domestic Violence Act, 2005, under section 2(g). we may point out that the expression 'domestic relationship' includes not only the relationship of marriage but also a relationship 'in the nature of marriage'…In our opinion Parliament by the aforesaid Act has drawn a distinction between the relationship of marriage and a relationship in the nature of marriage, and has provided that in either case the person who enters into either relationship is entitled to the benefit of the Act…When a wife is deserted, in most countries the law provides for maintenance to her by her husband, which is called alimony. However, earlier there was no law providing for maintenance to a woman who was having a live-in-relationship with a man without being married to him and was then deserted by him…In USA the expression 'palimony' was coined which means grant of maintenance to a woman who has lived for a substantial period of time with a man without marrying him, and is then deserted by him..."

A woman who is subject to any form of violence in a live-in relationship as well as a marital relationship can file a complaint under section 498 A, IPC. She can also seek relief through protection orders, compensation and interim orders citing sections 18 to 23 of the Domestic Violence Act.

Law in other Countries:

Australia

In Australia, The Family Law Act states that a "de facto relationship" can exist between two people of different or the same sex and that a person can be in a de-facto relationship even if legally married to another person or in a de - facto relationship with someone else.

France

In France, there is the provision of "Civil Solidarity Pacts" known as "pacte civil de solidarite" or PaCS, passed by the French National Assembly in October 1999 that allows couples to enter into a union by signing before a court clerk. The contract binds "two adults of different sexes or of the same sex, in order to organize their common life" and allows them to enjoy the rights accorded to married couples in the areas of income tax, housing and social welfare[14]. The contract can be revoked unilaterally or bilaterally after giving the partner, three months' notice in writing.

Philippines

[14] Gopal Swathy, Live-In Relationships, June 13, 2010 also available on http://legalservicesindia.com/article/article/live-in-relationships-211.

In Philippines, live in relationship couple's right to each other's property is governed by co-ownership rule. Article 147, of the Family Code, Philippines provides that when a man and a woman who are capacitated to marry each other, live exclusively with each other as husband and wife without the benefit of marriage or under a void marriage, their wages and salaries shall be owned by them in equal shares and the property acquired by both of them through their work or industry shall be governed by the rules on co-ownership.

Scotland

In Scotland, The live in relation were conferred legal sanctity in the year 2006 by Family Law (Scotland) Act. Section 25 (2) of the Act postulates that a court of law can consider a person as a co-habitant of another by checking on three factors; the length of the period during which they lived together, the nature of the relationship during that period and the nature and extent of any financial arrangements, in case of breakdown of such relationship, Section 28 of the Act gives a cohabitant the right to apply in court for financial support. This is in case of separation and not death of either partner. If a partner dies intestate, the survivor can move the court for financial support from his estate within 6 months[15].

United Kingdome

In the UK, live in couples does not enjoy legal sanction and status as granted to married couple. There is no obligation on the partners to maintain each other. Partners do not have inheritance right over each other's property unless named in their partner's will. As per a 2010 note from the Home Affairs Section to the House of Commons, unmarried couples have no guaranteed rights to ownership of each other's property on breakdown of relationship. However, the law seeks to protect the right of child born under such relationship. Both parents have the onus of bringing up their children irrespective of the fact that whether they are married or cohabiting.

In UK child born out of such relationship has right to maintain himself/herself. At the end of a relationship, both partners will be responsible for supporting children financially, regardless of which one of you the children live with. The court can make order about who the children should live with. The order will usually allow contact between the child and the parent with whom the child is not living unless there are exceptional circumstances.

Judicial Approach on Live in Relationship

Position of women out of live-in relationships[16]

In *S. Khushboo Vs. Kanniammal & Anr*[17]. the Supreme Court of India, placing reliance upon its earlier decision in *Lata Singh v. State of U.P. & Anr.* held that live-in-relationship is permissible only in unmarried major persons of heterogeneous sex.

The court held that:

[15] *Supra note 14.*
[16] Caesar Roy Emerging trend of live in relationship in India a Critical Analysis, Vol-118, CLJ p-37-144, (2012).
[17] (2010)10 SCC 49.

"Entering into live in relationship cannot be an offence. A three-judge bench comprising Chief Justice K.G. Balakrishnan, Deepak Verma and B.S. Chauhan said that "when two adult people want to live together, what is the offence. Does it amount to an offence? Living together is not an offence; it cannot be an offence. Living together is a fundamental right under Article 21, Constitution of India".

The Supreme Court on 13 August 2010 in the case of Madan Mohan Singh & Ors v. Rajni Kant & Anr[18]. has once again entered the debate on legality of the Live-in Relationship as well as legitimacy of Child born out of such relationship. The Court while dismissing the appeal in the property dispute held that there is a presumption of marriage between those who are in live-in relationship for a long time and this cannot be termed as 'walking-in and walking-out' relationship.

In the case of *Bharata Matha & Ors v. R. Vijaya Renganathan & Ors*[19]. dealing with the legitimacy of child born out of a live-in relationship and his succession of property rights, the Supreme Court held that child born out of a live-in relationship may be allowed to succeed inheritance in the property of the parents, if any, but doesn't have any claim as against Hindu ancestral coparcenary property.

In *Payal Katara v/s Superintendent of Nari Niketan, Agra*[20], the Allahabad High Court on 4th March 2002 came up with a bold judgment by stating that anyone, man or woman, could live together even without getting married if they wished[21]. A similar step was taken by the Apex Court on 15th January, 2008 when a Bench comprising Justices Arijit Pasayat and P.Sathasivam leaned in favour of legitimising a live-in couple as they had lived together for 30 years.

The Privy Council in *A Dinohamy v. W L Blahamy*[22] laid down the principle that "Where a man and a woman are proved to have lived together as a man and wife, the law will presume, unless the contrary be clearly proved, that they were living together in consequence of a valid marriage and not in a state of concubinage". Furthermore, the Supreme Court granted legality and validity to a marriage in which the couple cohabited together for a period of 50 years. The Supreme Court held that in such a case marriage is presumed due to a long cohabitation.

The Hon'ble Allahabad High Court stated that a live-in relationship is not illegal. Katju J. and Mishra J. stated that, "In our opinion, a man and a woman, even without getting married, can live together if they wish to. This may be regarded as immoral by society, but is not illegal. There is a difference between law and morality."

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[18] (2010)5 SCC 600.
[19] Manu/SC/0596/2010.
[20] Manu/SC/0400/2010.
[21] AIR 2001 ALL 254.
[22] AIR1927PC185.

relationship makes it equivalent to a valid marital relationship. The Supreme Court also held that live in relationships cannot be considered as an offence as there is no law stating the same. Hence the High Courts and the Hon'ble Supreme Court in a number of decisions delivered until recently have showed the positive signs of recognizing the legitimacy of the live-in relationships and have also shown the inclination for a legislation to be enacted with the objective of protecting the rights of couples in a live-in relationship.

In *Payal Katara v. Superintendent Nari Niketan Kandri Vihar Agra and Others* AIR 2002, the Allahabad High Court ruled out that "a lady of about 21 years of age being a major, has right to go anywhere and that anyone –man and woman even without getting married can live together if they wish[23]".

In Patel and others[24]case the apex court observed that live- in –relation between two adults without formal marriage cannot be construed as an offence[25].

In *Radhika v. State of M.P.*[26] the SC observed that a man and woman are involved in live in relationship for a long period, they will treat as a married couple and their child would be called legitimate.

In *Abhijit Bhikaseth Auti v. State of Maharashtra* and Others on 16.09.2009, the SC also observed that it is not necessary for woman to strictly establish the marriage to claim maintenance under sec.125 of Cr.P.C.. A woman living in relationship may also claim maintenance under Sec.125 CrPC.

Position Of Children Born Out of Live-In Relationships

Legitimacy of child in Live in Relationship:

The Hindu Marriage Act, 1955 gives the status of a legitimate child to every child whether result of void, voidable or valid marriage. So, there is not any requirement of a legal provision to grant legitimacy to the child, but to grant property and maintenance rights. The Supreme Court on an earlier occasion, while deciding a case involving the legitimacy of a child born out of wedlock has ruled that if a man and a woman are involved in a live-in relationship for a long period, they will be treated as a married couple and their child would be legitimate. In *Radhika v. State of M. P.*[27]. AIR 2008, the SC observed that a man and woman are involved in live in relationship for a long period, they will treat as a married couple and their child would be called legitimate. but the decision of apex court in another case creates the state of confusion about the legitimacy of child. A Supreme Court Bench headed by Justice Arijit Pasayat declared that children born out of such a relationship will no more be called

[23] Anisha sheikh, Need of Special Legislation on Live-In Relationship, January 27, 2012 also available on http://legalservicesindia.com/article/article/need-of-special-legislation-on-live-in-relationship-1000-1.
[24] (2006) 8 SCC 726.
[25] *Supra note* 11.
[26] AIR 2008.
[27] AIR 2008 SC.

illegitimate. *"Law inclines in the interest of legitimacy and thumbs down 'whoreson' or 'fruit of adultery'."*

But this problem can be solved down as after looking the effect of the two laws or we should wait for some more cases of this kind to appear before the court, then that would be like denying justice to those who came first and hence the Hindu Marriage Act can be preferred over the judgement.

Inheritance Rights of Such Child:
The Supreme Court held that a child born out of a live-in relationship is not entitled to claim inheritance in Hindu ancestral coparcenary's property (in the case of an undivided joint Hindu family) and can only claim a share in the parents' self-acquired property. The Bench set aside a Madras High Court judgment, which held that children born out of live-in relationships were entitled to a share in ancestral property as there was a presumption of marriage in view of the long relationship.

Reiterating an earlier ruling, a Vacation Bench of Justices B.S. Chauhan and Swatanter Kumar said, "In view of the legal fiction contained in Section 16 of the Hindu Marriage Act, 1955 (legitimacy of children of void and voidable marriages), the illegitimate children, for all practical purposes, including succession to the properties of their parents, have to be treated as legitimate. They cannot, however, succeed to the properties of any other relation on the basis of this rule, which in its operation, is limited to the properties of the parents."

A child can only make a claim on the person's self-acquired property, in case the child is illegitimate. It can also be interpreted in a way in which a child could lay a claim on the share of a parents' ancestral property as they can ask for that parents' share in such property, as Section 16 permits a share in the parents' property. Hence, it could be argued that the person is not only entitled to self-acquired property but also a share in the ancestral property.

The Apex Court also stated that while the marriage exists, a spouse cannot claim the live-in relationship with some other person and seek inheritance for the children from the property of that other person. The relationship with some other person, while the husband is living is not 'live-in-relationship' but 'adultery'. It is further clarified that 'live in relationship' is permissible in unmarried heterosexuals (in case, one of the said persons is married, the man may be guilty of adultery and it would amount to an offence under Section 497 of the Indian Penal Code.

Advantages and disadvantage of Live in Relationship:
Advantages:
a. A live-in relationship lets a person see what living with her/his partner can actually be like. It is a step one can take before getting into an institutionalised arraignment such as marriage.
b. A live-in relationship allows couples to spend more time with each other as now they are not bound by the constraints of time.

c. Live-in relationships expose the level of love and intimacy as they stand between couples. A couple living together will get to know how much they care for and love each other and what are the various impediments in this liaison of theirs. It also brings relationship problems to the forefront before the final step of marriage is taken.
d. Many couples believe that they should enter into a live-in relationship before taking the final plunge. Because in case some issues arise that absolutely cannot be sorted, the relationship can be ended without getting into a legal battle in most cases.
e. Another considered advantage of live-in relationships is that because they currently fall outside the ambit of societal structure, the adverse influence of society can be avoided in them. This means that live-in relationships do not follow the otherwise necessary diktats of society. The burdens of social relationship are less in a live-in relationship and it actually helps a relationship blossom further.

Disadvantages

a. In simple words a live-in relationship leaves nothing to be discovered by the couple post marriage. Routine already sets in between live-in relations and there is anxiety or expectancy left for to be realised after marriage.
b. Because there are no specific laws to deal with the intricacies of live-in relationships in most countries, the incidence of major problems in these cases are on the rise. Many people are duped of their assets in live-in relationships. Cases of verbal and physical abuse are also quite rampant in live-in relationship despite the fact that live-in relations are considered more 'modern'.
c. A potent disadvantage of live-in relationship is social censure. Because these relationships have not yet been awarded the stamp of social acceptance, they are looked at with scorn. Many couple in live-in relationships prefer to call themselves married fearing rejection. This primarily causes problems in relationships.
d. It is very difficult to move into another relationship after a live-in relationship. Live-in relationships require a lot of time, energy and devotion. The most important fact is that in a live-in relationship two people decide to share their lives. And if such a relationship comes to an end it takes a toll on the mental health of people.[28]

Live in Relationship: Challenge to Society

We trapped tendency of live in relationship from the west but still our strong social norms do not allow us to follow this move smoothly. A fragment of our society, especially some orthodox groups and social activists continuously oppose living together without marriage.

Social trends always do favor of marriage. Our law too provides many rights and privileges to married persons. There can be a number of reasons for why a couple decides to go in live in relationship rather going for marriage. A couple may want to check their compatibility before marriage, or they may wish to uphold their single status for any reasons. Sometimes partners see live in relationship as a way to lead a liberal life because it lacks dedication and responsibility that marriage demands. Walking out of a live in relationship is much easier than going out of a marriage. Today's metro life and modern lifestyle also support these

[28] Available on http://www.onlymyhealth.com/pros-cons-live-in-relationship

relationships. The individuals engaged in this kind of arrangements feel more freedom in their relationships. Living with a partner to whom you are not married in a live in relationship involves risk as the level of commitment is not at its full potential.

Live in relationship has always been the focus of debates and discussions as it is challenging our fundamental societal system. To encourage marriages, Government has reserved many rights for the married people. Although live in relationship is not considered as an offense but there is no law until the date that prohibits this kind of relationship. Courts often refused to make any kind of obligatory agreements between these unmarried couples as this could go against the public policy.

We are bounded by numerous traditional norms; however, our social assumption is somehow changing now. A judgment of Supreme Court depicts this. In *D Patchaiammal v. D Velusamy*[29], Supreme Court ruled out that if a man and woman are having a live in relationship for an extensive period, they will be taken as a married couple in the society. Moreover, the child born out of this relation would be called legitimate. Some recent changes in law also promise protection to the woman involved in live in relationship. But this doesn't mean that court is encouraging such a kind of relationships. This judgment is in favor of a woman not the live in relationship. Law never prescribes how one should live, in fact, our culture; ethics, teaches us the way we should live.

It should not be denied that our culture does need a legislature to regulate relationships which are likely to grow in number with changes in the ideology of people. The right time has come that efforts should be made to enact a law having clear provisions with regard to the time span required to give status to the relationship, registration and rights of parties and children born out of it.

In *Lata Singh v. State of U.P. and another*[30], the Court itself notices that what law sees as no crime may still be immoral. It has said that two consenting adults engaging in sex is not an offence in law "even though it may be perceived as immoral." Of course, such protective sanctions may potentially lead to complications that could otherwise be avoided. But simply raising the hammer may not be the best route to taming the bold and the brave. This is not the first-time live-in relationship is in the ambit of debates and discussions. There has been a long-standing controversy whether a relationship between a man and a woman living together without marriage can be recognised by law. With changing social hypothesis entering the society, in most places, it is legal for unmarried people to live together. Now even in a country like India bounded by innumerable cultural ethics and rites, the law finds legally nothing wrong in live-in relationships.

This, however, cannot be construed that law promotes such relationships. Law traditionally has been biased in favour of marriage. It reserves many rights and privileges to married

[29] AIR 2011 SC 479.
[30] AIR 2006 SC 2522.

persons to preserve and encourage the institution of marriage. Such stands, in particular cases of live-in relationship, it appears that, by and large, is based on the assumption that they are not between equals and therefore women must be protected by the courts from the patriarchal power that defines marriage, which covers these relationships too.

Need of legislation on Live in Relationship

The decisions by the Indian Court is discerning as in some cases the Courts have opined that the live-in relationship should have no bondage between the couples because the sole criteria for entering into such agreements is based on the fact that there lies no obligation to be followed by the couples whereas in some instances the Court has shown opposite views holding that if a relationship cum cohabitation continues for a sufficiently and reasonably long time, the couple should be construed as a married couple infusing all the rights and liabilities as guaranteed under a marital relationship.

It also appears strange if the concept of live-in is brought within the ambit of section 125 of the Cr.P.C., where the husband is bound to pay maintenance and succession as the ground of getting into live-in relationship is to escape all liabilities arising out of marital relations. If the rights of a wife and a live-in partner become equivalent it would promote bigamy and there would arise a conflict between the interests of the wife and the live-in partner. Apart from lacking legal sanction the social existence of such relationships is only confined to the metros, however, when we look at the masses that define India, there exists no co-relation between live-in relationships and its acceptance by the Indian society. It receives no legal assistance and at the same time the society also evicts such relationships. The Parliament should try and enact a separate branch rather than trying to bring live-in within the ambit of the existing laws as such futile approach would further adversely complicate the judicial mechanism.

The Indian Legal system should devise new strategies in order to counter the present existing problems of live-in relationships. The live-in relationships should be presumed as permanent after a specific period of time. Furthermore, the children born through such relationships irrespective of the parent's religion should be guaranteed the rights of inheritance, succession etc. The female partner's role to prove the burden of such relationship should be relaxed. Persons who enter into a live-in relationship with a living spouse should be convicted for bigamy. A separate legislation should only be competent enough to grant assistance to the female partners aggrieved by such relationships. At last, the sooner our society accepts live-in relationships, the better chances the Indian Judiciary has for passing judgments which are in the righteous spirit of law and in the interest of justice, equity and good conscience.

Conclusion and Suggestion

Marriage, as a concept, involves a deep bond and a sense of commitment and an emotional and economic support. It also teaches one to be tolerant and provides the stability one requires for a family life involving children. Whereas, in a live in relationship the option of walking out anytime impacts the psyche of a person negatively. The sense of insecurity, albeit unconscious to some people, prevails in the mind. This cannot be healthy for a couple, especially one who wants children.

Live-in-relation is very popular now a days in India. many young couples are living together without marriage. A long time ago it was a strong social prohibition on live in relationship but these days youth think as compared to marriage, the level of commitment in a live-in relationship is less. But society is framed with tradition and custom which are foundational pillars.

The existing marriage laws in India need to incorporate and provide for common law marriages or relationships in the nature of marriage. Wherever the need is felt to amend the law in order to provide rights and duties for such a relationship it should be done so. There is a need to revamp the legal system to accommodate the changes that take place in society, but at the same time there is no need to enact a new and separate legislation to deal with the same. The PWDV Act, is silent about the status of children resulting from such living arrangements. However, the Supreme Court has accorded a legitimate status for such children. The child born of an unmarried couple will be treated as legitimate.

So humble suggestion is that above mentioned disadvantages should be checked. Live in relationship is individualistic and human rightist approach. Although the live in relationship is quite prevalent in western countries, but reality in India is different. Marriage is an institution, which preferred over any form of union. Earlier through Domestic Violence Act, 2005 female of live in relationship were given protection, hence it was on the verse of acceptance by covering it under the ambit of legal term. Though live in was considered as disturbing the very social fabric but seeing the surmounting murder of such relationship, the judiciary's approach is a welcome step.

Marital Rape: Can Marriage Be Taken as a License to Rape?

"*Rape is rape irrespective of whether it is committed within or outside marriage*".

Manisha Batwal[1]

Abstract

In a country like India, where on one side, women are worshipped as Goddesses in temples and on the other side women are raped, humiliated in every corner of the society. Among all crimes against women, Rape is considered to be one of the heinous crimes. It is one of the most brutal forms of violation of women's privacy and integrity. With the alarming rate of increase in rape in the country, lawmakers have made more stringent laws to protect women. But still there is lot more to go. Few lacunas have been overlooked by the lawmakers. Marriage, one of the most pious relations in the world is losing its purity. Husbands are using it as a license to torture and commit rape on women. The number of women sexually assaulted by their husbands is 40 times the number of women attacked by men they don't know.[2] *Yet, Marital Rape is legal. It is high time that marital rape is to be criminalized as it a violation of Fundamental Rights. Positive legal change for women in general is happening in India, but further steps are necessary so that both legal and social change takes place, which would culminate in criminalizing marital rape and changing the attitude about women in marriage.*

Keywords: *Marriage, Rape, Institution, Husband, Wife, etc.*

Jaanki is physically and psychologically distraught. She was raped by her husband, not once but several times. She confides in her mother. To her utter shock, her mother confesses that she has been subjected to a similar fate in her married life. In disbelief, Jaanki snaps, "But dad loves you so much!" The mother justifies, "In the bedroom, he doesn't ask for opinions." And now it's been so long that she has surrendered herself to the unpleasant feeling.

This is a scene from Saitan Theatre's upcoming play 'Pinjra'. In the play, Jaanki is married to a man who derives lust from the pain, who bypasses the innocent consent that she thinks of being prevalent in their relationship. Her relationship with her husband is subjected to more of physicality and the bodily pleasures than being touched with the eternal bliss and bloom of the vows she took as the very steps of her life with him. Sadly, this may indeed be the reality for a considerable number of Indian marriages.

This brings us to the question if marriage in India is a contract for legal sex, among other things - where a man doesn't need to ask for permission and is free to impose himself on the wife?

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[1] ***LL.M. (One Year Course) (2021-22), Law School, Banaras Hindu University, Varanasi.***

[2]Monica Sarkar, *Marital rape: Why is it legal in India?* CNN, (May 17, 2022, 02.15 pm) http://edition.cnn.com/2015/03/05/asia/ marital-rape-india/.

While most of the developed world has penalized marital rape, surprisingly, there is no law to protect married women against marital rape in India. The Minister of Home Affairs Haribhai Chaudhary had said that marital rape can't be made a criminal offence in India because of high illiteracy rate, poverty, extreme religious beliefs and the very 'sanctity' of marriage. The best way that the law protects women subjected to marital rape is by charging the husband with a minor offence of cruelty, the punishment of which goes up to three years in jail or a fine. In worse cases, she can seek restraining order and protection under domestic violence legislation.

Rajneesh Gautam, Founder and Director, Saitan theatre group says, *"We chose this subject because it is happening around us and we are still showing ignorance. Few days ago, central government gave guidelines to high court that sexual intercourse between spouses cannot be accounted as rape. We are against this kind of approach and that is why we have conceptualized this play. We have a lot of wolves in the street but sometimes they live inside our house under sheep's skin."*

Anuja Shah, Online Senior Family Therapist at ePsyClinic explains, *"I once got a very disturbing case where the woman was so traumatized that the child born out of wedlock reminded her of the brutality of her bedroom."* She adds, *"Once married, men think that any sort of sex he indulges in with the wife is normal. He believes that even if he forces his wife to have sex, it cannot be called rape. And most often I have observed that in such cases, there is some sort of existing torture or physical abuse in the marriage."* Marital Rape simply means that husband doesn't have sensitivity towards his wife.

Priya Nanda, Group Director of Social and Economic Development at the ICRW (International Centre for Research on Women) had told a leading portal, *"The reason men don't want to criminalise marital rape is because they don't want to give the woman the power to say no."*

But can there be two yardsticks to define rape - rape of an unmarried woman and that of a married woman? Is it acceptable to discriminate a woman just because she is married to the man who raped her?

Marriage as an Institution vis-a-vis Marital Rape

Marriage is an anthropological, cultural, and legal institution that establishes socially sanctioned rights and obligations between individuals. The Institution of Marriage occupies a unique place in the realm of institutions and it is this institution which is instrumental in perpetuating human society through regulations of conjugal ties. The institution of marriage is as old as the creation of the world. As a social institution, it has taken different forms in different societies from time immemorial.[3] In many cultures, marriage forms the basis for acknowledgement of sexual relationships. However, it is not so true in real. It carries with it various crime like sexual assault, dowry, bride burning and other forms of brutality in the household.

[3] N.A. Wimalasena, *An Analytical Study of Definitions of the Term Marriage*, Vol. 6 IJHSS (2016).

The word ***'Rape'*** is derived from the Latin word ***'Rapio'*** meaning ***'to seize'***. It means forcible seizure. It means the ravishment of women against her will or without her consent or with her consent obtained by fear, force or fraud or the carnal knowledge of a women by force against her will.[4]

Marital Rape or Spousal Rape is the act of sexual intercourse with one's spouse without the consent of spouse or with the consent but without the will of spouse. It refers to unwanted sexual intercourse by a husband with his wife either by the use of force or threat to use force. It refers to non-consensual act of violent perversion by a husband against the wife where she is sexually exploited. Since time immemorial sexual intercourse within marriage is considered as a right of husband therefore it never was considered to be fit in the category of Rape.

The marital rape exemption is a vestige of English Common Law.[5] Sir Matthew Hale, a former Chief Justice of the Court of King's Bench in England and a seventeenth century jurist, during the 1600s. He wrote, *"The husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract, the wife hath given herself in kind unto the husband, whom she cannot retract."*

The Legislative Developments and the 'Age of Consent'

For thirty years, after the enactment of the Indian Penal Code, 1860 (hereinafter referred to as IPC), rape law remained the same. The later change was owing to a number of cases in Bengal in which the child wife died due to consummation of marriage. Out of these, the most notable was *Queen Empress* v. *Haree Mohan Mythee.*[6] This case tells the pathetic story of Phulmonee Dassee, who was eleven years and three months old when she died as a result of rape committed on her by her husband. The medical evidence showed that Phulmonee had died of bleeding caused by ruptured vagina. In this case, rape of child wife was severely condemned and it was held that the husband did not have the right to enjoy the person of his wife without regard to the question of safety to her.

In 1891, Sir Andrew Scoble introduced the Bill, which culminated into Indian Criminal Law (Amendment) Act, 1891.[7] This Act increased the age of consent to 12 years both in cases of marital and extra-marital rapes. The object of Act was humanitarian, *viz.*, *"to protect female children from immature prostitution and from pre-mature cohabitation"*.[8] Pre-mature cohabitation resulted in immense suffering and sometimes even death to the girl and generally resulted in injury to her health and that of her progeny.

Beginning of the 20th Century witnessed increased public attention towards the improvement in the physique of the nation and the reduction of causes leading to abnormal mortality of younger generation. In 1922, Rai Bahadur Bakshi Sohan Lal, MLA, moved for leave to

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[4] *Bhupinder Sharma v. State of Himachal Pradesh,* AIR 2003 SC 4684.
[5] Martin D. Schwartz, *The Spousal Exemption for Criminal Rape Prosecution*, 7 VT. L. Rev. 33, 33 (1982).
[6] *Queen Empress v. Haree Mohan Mythee,* ILR 1891 Cal 49.
[7] Act No. X of 1891, Published in Gazette of India, (1891), Pt.V.
[8] *Id.* Statement of Objects and Reasons.

introduce a Bill in the Assembly to amend Sec. 375, IPC, by increasing the age of consent in both marital and extra-marital cases.[9] This attempt to legislation proved futile, but with the passing years, agitation for a modification of law steadily grew owing to a better knowledge of the evil consequences of early marriage and early consummation.

In 1924, Hari Singh Gour introduced a Bill to amend Sec. 375, IPC, increasing the age to 14 years in both marital and extra-marital cases. The Bill was referred to a Select Committee, which made a material alteration by reducing the age from 14 to 13 years in the case of marital rape. On September 1, 1925 Sir Alexender Muddiman introduced the Bill fixing 14 years the age in extra-marital cases and 13 years in marital cases, which culminated into Amendment Act, 1925.[10] The amendment in 1925 for the first time introduced a distinction between marital and extra-marital rape cases by providing different age of consent in marital rape cases. The distinction was further emphasised in section 376 by incorporating the words - *"unless the woman raped is his own wife and is not under twelve years of age"*. In which case the punishment was diluted by prescribing a maximum of two years. Thus, the purpose aimed to be achieved by increasing the age of consent to 13 years, stood mitigated to a large extent by the diluted punishment provided by amended Sec. 376.

The question of age of consent was not considered as finally settled and Hari Singh Gour again introduced a Bill in 1927 to increase the age to 14 and 16 years in marital and extra-marital cases respectively. It was followed by the appointment of Age of Consent Committee, which reviewed the prevailing situation and suggested few amendments.

The committee was of the opinion that the amended law was ineffective due to the nature of the offence, particularly in case of marriage as consummation necessarily involves privacy. The prevalent view among the awakened sections of society was that prohibiting the marriage of a girl under a particular age would be a better measure than to increase the age of consent for sexual intercourse. The dissenting group among these classes felt that law was partly futile because it afforded no protection to the girls over 13 years, who need it on account of their tender age. The Committee recommended the use of term *'marital misbehavior'* instead of rape in marital cases. The offence of marital misbehavior would be committed by a husband in case of sexual intercourse with his wife below 15 years of age. The Committee recommended the inclusion of offence of marital misbehavior in Chapter XX of IPC and Secs. 375 and 376 of the IPC should be confined to rape outside the marital relation.

The Committee also recommended maximum punishment of either description for 10 years and fine where the wife was below 12 years of age and imprisonment, which may extend up to one year or fine or both, where wife was between 12-15 years.

Not surprisingly, thus, married women were never the subject of rape laws. Laws bestowed an absolute immunity on the husband in respect of his wife, solely on the basis of the marital

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[9] *Report of the Age of Consent Committee,* Calcutta, Government of India, 11 (1928-29).
[10] Act No. XXIX of 1925, Published in Gazette of India, (Oct 3, 1925), Pt. IV.

relation. The revolution started with women activists in America raising their voices in the 1970s for elimination of marital rape exemption clause and extension of guarantee of equal protection to women.

In 2013, a United Nations survey found that nearly a quarter of 10,000 men questioned in six Asia-Pacific countries, including India, admitted to having raped a female partner. The belief that they are entitled to sex even without their partner's consent is a common motivation, the study found. The majority of these men experienced no legal consequences.[5]

For the average Indian man, masculinity is about "acting tough, freely exercising his privilege to lay down the rules in personal relationships, and, above all, controlling women", found a 2014 study by the United Nations Population Fund and the International Center for Research on Women. The study found that 60% of men admitted to using violence - kicking, beating, slapping, choking, and burning - to establish dominance.

In the present day, studies indicate that between 10% and 14% of married women are raped by their husbands: the incidents of marital rape soar to 1/3rd to 1/2nd among clinical samples of battered women. Sexual assault by one's spouse accounts for approximately 25% of rapes committed. Women who became prime targets for marital rape are those who attempt to flee. Criminal charges of sexual assault may be triggered by other acts, which may include genital contact with the mouth or anus or the insertion of objects into the vagina or the anus, all without the consent of the victim. It is a conscious process of intimidation and assertion of the superiority of men over women.

Advancing well into the timeline, marital rape is not an offence in India. Despite several amendments, Law Commission's recommendations and new legislations, one of the most humiliating and debilitating acts is not an offence in India. A look at the options a woman has to protect herself in a marriage, tells us that the legislations have been either non-existent or obscure and everything has just depended on the interpretation by Courts.

The trouble is, it has been accepted that a marital relationship is practically sacrosanct. Rather than, making the wife worship the husband's every whim, especially sexual, it is supposed to thrive mutual respect and trust. It is much more traumatic being a victim of rape by someone known, a family member, and worse to have to cohabit with him. How can the law ignore such a huge violation of a fundamental right of freedom of any married woman, the right to her body, to protect her from any abuse?

Marriage does not thrive on sex and the fear of frivolous litigation should not stop protection from being offered to those caught in abusive traps, where they are denigrated to the status of chattel. Apart from judicial awakening; we primarily require generation of awareness. Men are the perpetrators of this crime. 'Educating boys and men to view women as valuable partners in life, in the development of society and the attainment of peace are just as important as taking legal steps protect women's human rights', says the UN. Men have the social, economic, moral, political, religious and social responsibility to combat all forms of gender discrimination. In a

country rife with misconceptions of rape, deeply ingrained cultural and religious stereotypes, and changing social values, globalization has to fast alter the letter of law.[11]

Legal Position of Marital Rape in other Countries:
Art. 2 of the Declaration of the Elimination of Violence against Women includes marital rape explicitly in the definition of violence against women. Emphasis on these provisions is not meant to tantalize, but to give the victim and not the criminal, the benefit of doubt.

Marital Rape is illegal in 18 American States, 3 Australian States, New Zealand, Maxico, Canada, Israel, France, Sweden, Denmark, Norway, Soviet Union, Poland and Czechoslovakia etc. Rape in any form is an act of utter humiliation, degradation and violation rather than an outdated concept of penile/vaginal penetration. Restricting an understanding of rape reaffirms the view that rapists treat rape as sex and not violence and hence, condone such behaviour.

In 1993, marital rape became a crime in all fifty States in US, under at least one section of the sexual offence codes.[7] However, it is remarkable that only a minority of the States have abolished the marital rape exemption in its entirety, and that it remains in some proportion or other in all the rest. In most American States, resistance requirements still apply.[8] In seventeen States and the District of Columbia, there are no exemptions from rape prosecution granted to husbands. However, in thirty-three States, there are still some exemptions given to husbands from rape prosecution.

In New Zealand, the marital rape exemption was abolished in 1985 when the present Sec. 128 to the Crimes Act, 1961 was enacted. Sub-section (4) now provides that a person can be convicted of sexual violence in respect of sexual connection with another person notwithstanding that they are married at the time the sexual connection occurred.[9]

In Mexico, the country's Congress ratified a bill that makes domestic violence punishable by law. If convicted, marital rapists could be imprisoned for 16 years. In Sri Lanka, recent amendments to the Penal Code recognize marital rape but only with regard to judicially separated partners, and there exists great reluctance to pass judgment on rape in the context of partners who are actually living together. However, some countries have begun to legislate against marital rape, refusing to accept the marital relationship as a cover for violence in the home.

Legal position of Marital Rape in India:
India marital rape exists *de facto* but not *de jure*. While in other countries either the legislature has criminalized marital rape or the judiciary has played an active role in recognizing it as an offence, in India however, the judiciary seems to be operating at cross-purposes. In *Bodhisattwa Gautam* v. *Subhra Chakraborty*[12], the Supreme Court said that *"rape is a crime against basic*

[11] Priyanka Rath, *Marital Rape and the Indian legal scenario*, India Law Journal, (May 15, 2022, 05:34 pm) *http://www.indialawjournal.org/archives/volume2/issue_2/article_by_priyanka.html*.
[12] Bodhisattwa Gautam v. Subhra Chakraborty, (1996) 1 SCC 490.

human rights and a violation of the victim's" most cherished of fundamental rights, namely, the right to life enshrined in Art. 21 of the Constitution. Yet it negates this very pronouncement by not recognizing marital rape.[13] Though there have been some advances in Indian legislation in relation to domestic violence, this has mainly been confined to physical rather than sexual abuse. Women who experience and wish to challenge sexual violence from their husbands are currently denied State protection as the Indian law in Section 375 of the Indian Penal Code, 1860 has a general marital rape exemption.

Sec. 375, the proviso of rape in the IPC, has echoing very archaic sentiments, mentioned as its exception clause: *"Sexual intercourse by man with his own wife, the wife not being under 15 years of age, is not rape."* Sec. 376 of IPC provides punishment for rape. According to the section, the rapist should be punished with rigorous imprisonment of either description for a term which shall not be less than 10 years but which may extend to life, and shall also be liable to fine unless the woman raped is his own wife, and is not under 12 years of age, in which case, he shall be punished with imprisonment of either description for a term which may extend to 2 years with fine or with both.

This section in dealing with sexual assault, in a very narrow purview lays down that, an offence of rape within marital bonds stands only if the wife be less than 12 years of age, if she be between 12 to 16 years, an offence is committed, however, less serious, attracting milder punishment. Once, the age crosses 16, there is no legal protection accorded to the wife, in direct contravention of human rights regulations.

In the 42nd Report by the Law Commission it was recommended that criminal liability should be attached to intercourse of man with his minor wife. However, the Committee refused the recommendation stating that husband cannot be guilty of raping his wife of whatever age since sex is a parcel of marriage. Further in 1983 with addition of Sec. 376A IPC, rape of judicially separated wife was criminalized.

How can the same law provide for the legal age of consent for marriage to be 18 while protecting form sexual abuse, only those up to the age of 16? Beyond the age of 16, there is no remedy the woman has.

The wife's role has traditionally been understood as submissive, docile and that of a homemaker. Sex has been treated as obligatory in a marriage and also taboo. At least the discussion openly of it, hence, the awareness remains dismal. Economic independence, a dream for many Indian women still is an undeniably important factor for being heard and respected. With the women being fed the bitter medicine of being "good wives", to quietly serve and not wash dirty linen in public, even counselling remains inaccessible.

Legislators use results of research studies as an excuse against making marital rape an offence, which indicates that many survivors of marital rape, report flash back, sexual dysfunction,

[13] N. Tandon & N. Oberoi, *Marital Rape - A Question of Redefinition,* Lawyer's Collective, 24, (March 2000).

emotional pain, even years out of the violence and worse, they sometimes continue living with the abuser. For these reasons, even the latest report of the Law Commission has preferred to adhere to its earlier opinion of non-recognition of "rape within the bounds of marriage" as such a provision may amount to excessive interference with the marital relationship.

But off late, the Justice J.S. Verma Committee Report recommended that exceptions allowing marital rape should be removed. It also included that marriage or an intimate relationship should not be mitigating factor in reducing sentences for rape. Till now, this has been the only major recommendation made by any of the committee on marital rape.[14] The Criminal Amendment Act, 2013 satisfies some of the requirements that were proposed in the Law Commission Report in 172nd Commission.[15] Even though there are many positive reforms brought by Criminal Amendment Act, 2013 yet it has a number of shortcomings. One of them being non-inclusion of marital rape. Various criminal law reports and recommendations given by Justice J.S. Verma Committee have fallen on deaf ears and it should be realized that punishment of marital rape is important to protect the woman.

The importance of consent for every individual decision cannot be over emphasized. A woman can protect her right to life and liberty, but not her body, within her marriage, which is just ironical. Women so far have had recourse only to Sec. 498-A of the IPC, dealing with cruelty, to protect themselves against "perverse sexual conduct by the husband". But, where is the standard of measure or interpretation for the courts, of 'perversion' or 'unnatural', the definitions within intimate spousal relations? Is excessive demand for sex perverse? Isn't consent a sine qua non? Is marriage a license to rape? There is no answer, because the judiciary and the legislature have been silent.

The 172nd Law Commission report had made the following recommendations for substantial change in the law with regard to rape:

1. 'Rape' should be replaced by the term 'sexual assault'.
2. 'Sexual intercourse as contained in Sec. 375 of IPC should include all forms of penetration such as penile/vaginal, penile/oral, finger/vaginal, finger/anal and object/vaginal.
3. In the light of *Sakshi v. Union of India and Others*[16], 'sexual assault on any part of the body should be construed as rape'.
4. Rape Laws should be made gender neutral as custodial rape of young boys has been neglected by law.
5. A new offence, namely section 376E with the title 'unlawful sexual conduct' should be created.
6. Sec. 509 of the IPC was also sought to be amended, providing higher punishment where the offence set out in the said section is committed with sexual intent.

[14] Report of the Committee on the Amendments to Criminal Law, (Jan 23, 2013), (May 4, 2022, 09:30 pm) http://www.prsindia.org/uploads// media/Justice20verma20committee/jsreport.pdf.
[15] Law Commission of India, *Review of Rape Laws*, 172nd Report, New Delhi (2000).
[16] *Sakshi v. Union of India and Others*, 2004 (5) SCC 518.

7. Marital Rape - Explanation (2) of Sec.375 of IPC should be deleted. Forced sexual intercourse by a husband with his wife should be treated equally as an offence just as any physical violence by a husband against the wife is treated as an offence. On the same reasoning, section 376 A was to be deleted.
8. Under Sec. Indian Evidence Act, 1872 (hereinafter referred to as IEA), when alleged that a victim consented to the sexual act and it is denied, the court shall presume it to be so.

The much-awaited Protection of Women from Domestic Violence Act, 2005 (hereinafter referred to as DVA) has also been a disappointment. It has provided civil remedies to what the provision of cruelty already gave criminal remedies, while keeping the status of the matter of marital rape in continuing disregard. Section 3 of the Domestic Violence Act, amongst other things in the definition of domestic violence, has included any act causing harm, injury, anything endangering health, life, etc., mental, physical, or sexual.

It condones sexual abuse in a domestic relationship of marriage or a live-in, only if it is life threatening or grievously hurtful. It is not about the freedom of decision of a woman's wants. It is about the fundamental design of the marital institution that despite being married, she retains and individual status, where she doesn't need to concede to every physical overture even though it is only be her husband. Honour and dignity remain with an individual, irrespective of marital status.

Sec. 122 of the IEA prevents communication during marriage from being disclosed in court except when one married partner is being persecuted for no offence against the other. Since, marital rape is not an offence, the evidence is inadmissible, although relevant, unless it is a prosecution for battery, or some related physical or mental abuse under the provision of cruelty. Setting out to prove the offence of marital rape in Court, combining the provisions of the DVA and IPC will be a nearly impossible task.

Arguments Against Criminalization of Marital Rape:

- Due to the near impossibility of proving marital rape, its criminalization would only serve as an increased burden to the already overburdened legal system.
- Dissatisfied, angry, vengeful wives might charge their innocent husbands with the offence of marital rape.
- There is an implied consent to have sexual intercourse when a woman marries a man.
- Marital Rape laws would destroy many marriages by preventing any possible reconciliation.

Recently while the issue of criminalizing marital rape was discussed in Rajya Sabha, the India's Minister of State for Home Affairs stated that the marriage is a sacrosanct institution. He argued that *`the concept of marital rape, as understood internationally, is not suitable in the Indian context, due to illiteracy, poverty, social customs and values, religious beliefs and the fact that Indian society treats marriage as a sacrament'*. The Minister, like many others, upholds the notion that a wife by the virtue of marriage is duty bound to submit silently to sexual whims and desire of her husband and therefore she must willingly subject her body to being ravaged without complain. According to this philosophy, men are officially licensed to rape their wives

with impunity. Such beliefs do not see marital rape as a widespread social problem. Rather, this view exploits social customs and religious beliefs as a shield to endorse retrogressive ideologies. It sanctions and legitimizes sexual abuse while censuring poor and illiterate for sexual violation while overlooking the fact that crimes against women are the misdeeds that occur in many upper- and middle-class households too.

The Committee argued that *"In India, for ages, the family system has evolved and it is moving forward. Family is able to resolve the problems and there is also a provision under the law for cruelty against women"*. The misogynistic view holds that women have ways of approaching the courts and it is not necessary to charge a man with rape. A 172nd Report by the Law Commission of India[17] also opined that criminalizing marital rape would amount to *"excessive interference with the marital relationship"*. These noxious assumptions presume that marriage implies lifelong blanket consent to sexual intercourse.

Others argue that sexual assault is already covered by the existing Domestic Violence Act. But the Domestic Violence Act is a Civil Law that gives relief to abused wives. Under it, she can seek protection or civil relief, not criminal prosecution. *"As a nation we need to recognize that rape by anyone is a crime,"*

Marital Rape: Violation of Fundamental Right:

The exception under Sec. 375 which permits a man to have sexual intercourse with his wife without her consent is the infringement of Arts. 14 & 21 of Constitution of India. Article 14 protects a person from discrimination. But the exemption under Section 375 of IPC, 1860 discriminates a wife when it comes to protection from rape. Art. 21 provides the fundamental right to live with human dignity.[18] The current law fails to look at consent of a woman as an elementary condition for sexual element; and taking away the element of consent from married woman when cohabiting is not only immoral but also unconstitutional.

The Constitution under Art. 51A(e) states that it is the fundamental duty of every citizen of India to denounce practices that are derogatory to the dignity of woman. Thus, the legislative framework should make amendment under Section 375 of IPC and save married woman who face evil of forceful sexual intrusion at the hands of their husband.

In the famous case of *Harvinder Kaur v. Harmender Singh*[19] while commenting to the applicability of right to equality under the Art. 14 and the right to life under Art. 21 of the Indian constitution within a family, the court upheld that, "introduction of Constitutional law in the home is most inappropriate. It is like introducing bull in China shop. It will be a ruthless destroyer of the marriage institution and all that it stands for. In the privacy of the home and married life, neither Art. 21 nor Art. 14 have any place.

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[17] Law Commission of India, *supra* note 14 at 7.

[18] Anjali Srivastava, Devanshu Jain and Ayan Hazra, *Marital Rape: A Legalized Sin, Indian Journal of Applied Research*, 3 (2), (Dec. 2013).

[19] *Harvinder Kaur v. Harmender Singh*, AIR 1984 Delhi 66.

In *State of Karnataka v. Krishnappa*[20] the Hon'ble Supreme Court held that, *"sexual violence apart from being a dehumanizing act is an unlawful intrusion of the right to privacy and sanctity of a female."* In the same judgment, it held that non-consensual sexual intercourse amounts to physical and sexual violence.

Later, in *Suchita Srivastava v. Chandigarh Administration*[21] the Hon'ble Supreme Court equated the right to make choices related to sexual activity with rights to personal liberty, privacy, dignity, and bodily integrity under Art. 21 of the Constitution.

In the case of *Independent Thought v. Union of India*[22] the Hon'ble Supreme Court of India held that, *"Constitutionally female have equal rights as of male and no statute or act can take away those rights from females and if such statute or an act is passed regarding the same, it should be declared as null and void."* The Court also held that *'even if a girl is married but if her age is below eighteen years of age sexual intercourse with such a girl will be considered as rape even if the girl gives her consent.'* However, the Hon'ble Supreme Court gave its consideration only to the married girls of age less than eighteen years but failed to decide anything with regard to the married girls of age eighteen years or more. It remained firm on the fact that if the girl is not under eighteen years of age, then in such kind of case any sexual act by a man with his wife will not amount to rape. The Gujarat High Court has mentioned in this regard, *"The total statutory abolition of the marital rape exemption is the first necessary step in teaching societies that dehumanised treatment of women will not be tolerated and that the marital rape is not a husband's privilege, but rather a violent act and an injustice that must be criminalised."*[23]

The Supreme Court has explicitly recognized in Art. 21 a right to make choices regarding intimate relations. In *Justice K.S. Puttuswamy (Retd.) v. Union of India*[24] the Hon'ble Supreme Court recognized the right to privacy as a fundamental right of all citizens and held that the right to privacy includes "decisional privacy reflected by an ability to make intimate decisions primarily consisting of one's sexual or procreative nature and decisions in respect of intimate relations." Forced sexual cohabitation is a violation of that fundamental right. The above rulings do not distinguish between the rights of married women and unmarried women and there is no contrary ruling stating that the individual's right to a privacy is lost by marital association. Thus, the Supreme Court has recognized the right to abstain from sexual activity for all women, irrespective of their marital status, as a fundamental right conferred by Art.21 of the Constitution.

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[20] *State of Karnataka v. Krishnappa,* (2000)4 SCC 75.
[21] *Suchita Srivastava v. Chandigarh Administration*, (2008)14 SCR 989.
[22] Independent Thought v. Union of India, (2017) 10 SCC 800: (2018) 1 SCC (Cri) 13: 2017 SCC Online SC 1222.
[23] *Marital rape an injustice, must be criminalised: Gujarat High Court*, The Indian Express (April 3, 2018) (May 4, 2022, 09:50 pm) https://indianexpress.com/article/india/marital-rapean-injustice-must-be-criminalised-gujarat-high-court-5121161/.
[24] *Justice K.S. Puttuswamy (Retd.) v. Union of India,* AIR 2017 (SC) 4161.

The Allahabad High Court in a case of *Ritu Gupta v. Sanjeev Gupta*[25] held that sodomy, unnatural sex is a marital wrong and is aground for divorce. It also held that forcible sex is an illegal intrusion in the privacy of wife and amounts to cruelty and is another ground for divorce.

In the recent case of *RIT Foundation v. Union of India*[26], two judges of the Delhi High Court on Wednesday giving a split verdict on the question of criminalising rape within marriage, leaving the law unchanged, the issue will now go to the Supreme Court. Justice Rajiv Shakdher, who headed the two-judge Bench, struck down as unconstitutional the exception to Section 375 of the Indian Penal Code (IPC) which says that sexual intercourse by a man with his wife aged 18 or above is not rape even if it is without her consent. However, Justice C. Hari Shankar rejected the plea to criminalise marital rape noting that any change in the law has to be carried out by the legislature since the issue requires consideration of various aspects, including social, cultural and legal.

"The right to withdraw consent at any given point in time forms the core of the woman's right to life and liberty which encompasses her right to protect her physical and mental being," Justice Shakdher said, calling for a change in the 162-year-old law. *"While marital rape leaves physical scars, it inflicts much deeper scars on the psyche of the victim which remain with her years after the offence has occurred,"* the judge added.

The two judges differed on key issues such as availability of evidence, the importance of consent, whether the court could adjudicate over the issue of marital rape or only the legislature could decide, whether the State's concerns about safeguarding the institution of marriage were valid or not, and whether remedies were available to women survivors of spousal violence in other laws such as the law on domestic violence. The Appeal against the judgment has been filed before the Hon'ble Supreme Court of India which is still to hear the matter.
The role of the state in a democratic egalitarian society is to protect and promote the rights of its citizens regardless of their sex or social status. The International instruments, the National Laws as well as the Constitutional Laws bind the state to promote the rights of women as citizens regardless of the fact that they are married or not. Marital Rape exemptions are unconstitutional. Yet, the state is evading its obligations to promote rights of women citizens on the flimsy ground of `saving the institution of marriage' for decades. The fundamental rights guaranteed by the constitution are not strictly scrutinized neither these are correctly applied.

Consequences of Marital Rape

Psychological Effects

Women who are raped by their partners are likely to suffer severe psychological consequences as well. Some of the short-term effects of marital rape include anxiety, shock, intense fear, depression, suicidal ideation, and post-traumatic stress. Long-term effects often include disordered eating, sleep problems, depression, problems in establishing trusting relationships,

[25] Allahabad High Court, Hon'ble Pradeep Kumar Srivastava and Hon'ble Shashi Kant Gupta (Judges) Judgement delivered on May 24, 2019.
[26] *RIT Foundation v. Union of India*, 2022 SCC OnLine Del 1404 (Decided on 11-5-2022).

and increased negative feelings about themselves. Psychological effects are likely to be long-lasting. Some marital rape survivors report flashbacks, sexual dysfunction, and emotional pain for years after the violence.

Marital Rape is much more brutal, emotionally painful and harmful because in such cases a woman is forced to live with the perpetrator day in and day out for a prolonged period and could not find refuge anywhere else.[27] In cases of marital rape, the vulnerability of a woman is not limited for a shorter period like walking alone on a lonely road at night. Rather, in case of marital rape she leads a vulnerable life over a longer period. The security provided within marriage is no longer available. This insecurity makes her helpless and powerless. Marital Rape implies continuous humiliation, indignity and shame and the woman has to cope with intense emotional trauma which is embodied by the culture of shame and silence maintained around the situation of marital rape where a woman is conditioned not to talk about it.

Physical Effects

Physical effects include injuries to vaginal areas, lacerations, bruising. Gynecological effects include miscarriage, stillbirths, bladder infections, STDs and infertility. Long drawn symptoms like insomnia, eating disorders, sexual dysfunction, and negative self-image. Women who have been battered and raped by their husbands may suffer other physical consequences including broken bones, black eyes, bloody noses, and knife wounds that occur during the sexual violence.

Suggestions for Reform

In light of the above discussion following suggestions are made:

- Marital rape should be recognized by Parliament as an offence under the Indian Penal Code.
- The punishment for marital rape should be the same as the one prescribed for rape under Section 376 of the Indian Penal Code.
- The fact that the parties are married should not make the sentence lighter.
- The wife should have an option of getting a decree of divorce if the charge of marital rape is proved against her husband. Though a case of marital rape may fall under *"cruelty"* or *"rape"* as a ground of divorce, it is advisable to have the legal position clarified.
- Demand for divorce may be an option for the wife, but if the wife does not want to resort to divorce and wants to continue with the marriage then the marriage should be allowed to continue.
- Corresponding changes in the matrimonial laws should be made.

Conclusion

We cannot deny the truth that Marital Rape exists in our society and there are many who suffer in silence, as there are no legal provisions and a serious lack of support for this heinous crime. Marriage should not be treated as a license by men to rape. We should try to maintain the sanctity of this pious relation. Societal stigmatization and the chauvinistic attitude of the people should change. Rape is rape and marriage cannot be an excuse for committing such a heinous

[27] *Marital Rape Victims Be Treated Equally with others: HC*, The Outlook (March 14), (May 17, 2022, 03:12 pm) http://www.outlookindia.com/news/article/marital-rape-victim-be-treated-equally-with-others-hc/831232.

offence. The opinion and notion that a woman is the property of the husband is lethal for the status of women in India. They are unable to take any action and are forced to endure the pain in silence due to lack of necessary legal provisions. Considering that the Indian society is burdened with discriminatory social norms and customs, the major change needed is in the outlook and perspective of citizens. The first step to stop such an offence is to empower and educate the women to stand up against such inhumane acts would abolish the existing marital rape exemption. It is time that women should start raising voice against such injustice.

It is essential to make home a safe place for women. It is essential to view marriage as an equal partnership. It is essential to embrace the concept of consent within marital relation. Acknowledging that fact that women have a right over their bodies is essential to promote the concept of consensual sex. The emerging sexual revolution therefore has to deal with emerging questions rather than dealing with superficial issues of misuse of law or preserving sanctity within the marriage. The slogan of *'making home safe'* needs to be broadly interpreted when situated in the context of rape within intimate relationship. Also, apart from judicial initiation; we primarily require generation of awareness. *'Educating boys and men to view women as valuable partners in life, in the development of society and the attainment of peace are just as important as taking legal steps protect women's human rights'*, says the UN.

According to the United Nations Declaration on the Elimination of Violence against Women, violence against women is defined as *"any act of gender-based violence that results in, or mental harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life."*[28] In light of the above, the old redundant laws related to rape in our country need urgent modification to prevent this violence behind closed doors. Rape is rape, irrespective of the victim-perpetrator relationship/intimacy as well as circumstances of the assault. Marriage cannot and will not serve as a license for the same. Marital rape is in no way less traumatic than other forms of sexual violence. Hence, it is high time we change the social narrative about marital rape by public education, advocacy, battling social myths, lived experience research, and finally a constructive dialogue with policymakers to make the necessary legislative changes.

[28] S. Mandal, The *impossibility of marital rape: contestations around marriage, sex, violence and the law in contemporary India*, 29(81) Aust Fem Stud., 255-272, (2014).

Nullity of Marriage under different Personal Laws

Therese Ukken[1]

Abstract

We live in a country where there are various religious groups and each religious groups have, their own customary practices, which are different from one and other. Marriage has different meaning for different religions. It unites two different people that are sanctioned and dissolvable only by law. Even though marriage is considered as a life time union certain situations do not allow it to do so. For declaring a marriage null or void there are certain restrictions and not everybody can declare their marriage null unless it is decided by the court. The methodology that was used was going through various articles and books that were related to the topic. Due to the different religions that exists in India there are different personal laws for each that is specially made for them keeping in mind they customs and religious practices. In India nullity of marriage is required as it makes it possible to dissolve a union where there are no grounds for divorce. Nullity of marriage is different from divorce because divorce is when the marriage between the two parties is valid compared to a marriage that is declared null where the status of the marriage is declared as invalid before the law.

Keywords: *Personal Laws, Nullity, Void, Marriage, Law.*

Marriage

Marriage is a union which is socially and legally sanctioned that is usually between a man and a woman. It is regulated by customs, rules, laws, and beliefs[2]. It is a commitment that encourages increased levels of closeness and emotional security by providing a partner with someone to rely on.

Nullity of Marriage

It is the judicial declaration that marriage never existed in the eyes of the law.[3] Nullity of marriage, on the other hand, means that the marriage is held null and void, that is the marriage is legally non-existent and a valid marriage did not take place at all. While divorce relates to sustainability of marriage, nullity refers to validity of the same. Although continuation of the marriage is impacted and a legitimate marriage ends through divorce, the validity of the marriage is not in doubt.

Nullity of Marriage under Hindu law

In accordance with Sections 11 and 12 of the Hindu Marriage Act of 1955, the court has the authority to declare a marriage void or voidable. When the court makes this decision, the marriage is referred to as being annulled. Section 11 of the Hindu Marriage Act, 1955 deals

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[2] Encyclopedia Britannica, Marriage https://www.britannica.com/topic/marriage (last visited 23,2022)

[3]Siva Nambi and Siddharth Sarkar, Mental Illness and Nullity Of Marriage: Indian perspective, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4649801/#:~:text=Nullity%20of%20marriage%2C%20on%20the,to%20validity%20of%20the%20same. (last visited Aug 23,2022)

with null and void marriages. It specifies that the marriage will be deemed null and void if any of the requirements listed in clause (i) (iv) and (v) of section 5 are not met. These conditions are

(i) [4]Neither party has a spouse living at the time of the marriage

(iv) The parties are not within the degrees of prohibited relationship, unless the custom or usage governing each of them permits of a marriage between the two

(v) the parties are not sapindas of each other, unless the custom or usage governing each of them permits of a marriage between the two.

In the case of *Yamunabai v. Anantrao,*[5] the appellant sought an order of maintenance to be made against the respondent under Section 125 of the Code of Criminal Procedure, 1973, of India which authorizes such an order for a wife who is unable to maintain herself. She had been married under Hindu rites to the respondent while a previous wife was still living. The Supreme Court upheld a lower court decision refusing to make the order. It held that, because the respondent already had a wife, his marriage to the appellant was void from the beginning, rather than voidable, and, thus, she had never been his "wife." It rejected an argument that the appellant should be considered a wife under the Civil Procedure Code because her marriage would have been recognized under Hindu law and custom in effect before the enactment of the Hindu Marriage Act, 1955. It also rejected an argument that the respondent should be stopped from claiming that the appellant was not his wife, because she was not informed of his earlier marriage.

In the above-mentioned case it can clearly be seen that at the time of marriage if either of the party has a living spouse then the marriage will be will null and void. Other such cases relating to section 11 is *Shankutala Devi vs. Amar Nath* the High Court held that two persons can marry within the prohibited relationship but there should be proof of established custom i.e., very old and beyond human memory.

Section 12 of the Hindu Marriage Act, 1955 states about voidable marriages. The marriage will be valid unless any petition is made for invalidating the marriage. The decision to carry on with the marriage or to have it legally dissolved is entirely up to the parties. Under section 12 a marriage is voidable if

a. [6]That the marriage has not been consummated owing to the impotence of the respondent
b. The incapacity to give a valid consent or forced consent of the parties or mental illness or unsuitable to have children

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[4] The Hindu Marriage Act, 1955 https://indiankanoon.org/doc/590166/ (last visited Aug 23,2022)

[5] Yamunabai v. Anantrao, 27 January 1988, National library of Medicine https://pubmed.ncbi.nlm.nih.gov/12289668/ (last visited Aug 23,2022)

[6] kiruthikadhanapal, Annulment of marriage under Hindu Law, Legal services India, http://www.legalservicesindia.com/article/1700/Annulment-of-Marriage-under-Hindu-Law.html (last visited Aug 23, 2022)

c. The respondent was at the time of marriage pregnant by some person other than the petitioner
d. If the consent of the parties was obtained by fraud
e. If the parties are underage

In the case of *Bennett v. Bennett,* the matter was of unsoundness of mind. The wife was admitted to hospital twice before marriage and once after the marriage. The husband filed a case. Nullity was granted. Other such cases are *Asha Qureshi v. Afaq Qureshi* where consent was obtained by fraud.

Nullity of Marriage under Muslim Law

A Muslim marriage is called a Nikah. It is regarded to be in the nature of civil contract. In a Muslim marriage the valid consent of both the parties are required. If a marriage by both the parties is without the consent then then the marriage is a void marriage. The other grounds in which the Muslim marriage is considered void are[7]

- The religious status of a woman's interreligious marriage is nonexistent. Additionally, a Muslim man is not permitted to wed a non-Islamite woman.
- Marriage to a non-Muslim or someone who has renounced Islam.
- marriage between closely related blood relatives, or "maharim."
- The conditions of marriage are against the principles of Islam
- marriage to a female during the iddat period.
- In Sunnis conditional or interim marriage is void

In *Sayad Mohiuddin Sayad Nasiruddin v. Khatijabi*[8] case the marriage was declared null and void because the marriage was taken against the consent and wishes of the defendant.
In *Tanjela Bibi v. Bajrul Sheikh* case the women were 3 months pregnant with a child at the time of marriage with the Bajrul Shiekh. The court declared the marriage to be declared null or void.

Nullity of marriage under Christian Law

It is difficult to grant nullity of marriage under Christian Law because in Christianity recognizes marriage as an unbreakable, holy union that should be celebrated in public and hence Christianity does not allow for separation. However, due to social progress and an effort to end discrimination against Indian Christians, distinct laws regarding marriage and divorce have been established. These laws include the Indian Christian Marriage Act of 1872 and the Indian Divorce act of 1869. Nullity can be granted on the grounds of [9]

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[7]Nullity of Marriage Under Personal Laws (2018) https://blog.ipleaders.in/nullity-of-marriage/#:~:text=Nullity%20of%20marriage%20under%20Muslim%20Personal%20law&text=Under%20Dissolution%20of%20Muslim%20Marriage,be%20declared%20null%20and%20void. (Last visited Aug 23,2022)
[8] (1939) 41 BOMLR 1020
[9]Christian Marriage And Divorce Act, 1957, India Code https://www.indiacode.nic.in/bitstream/123456789/3965/1/Christian_Marriage_and_Divorce_Act_1957.pdf (Last Aug 23, 2022)

1. that the respondent was impotent at the time of the marriage and at the time of the institution of the suit
2. that the parties are within the prohibited degrees of consanguinity (whether natural or legal) or affinity
3. that either party was a lunatic or idiot at the time of the marriage
4. that the former husband or wife of either party was living at the time of the marriage, and the marriage with such former husband or wife was than in force;
5. that the consent of either party was obtained by force or fraud:

Provided that in the case specified in clause (5) the Court shall not grant a decree if—
(a) Proceedings have not been instituted within one year after the coercion had ceased, or, the case may be, the fraud had been discovered; or
(b) the petitioner has with his/her or free consent lived with the other party to the marriage as husband and wife after the coercion had ceased, or as the case may be, the fraud had been discovered.

In *Lakshmi Sanyal v. Sachit Kumar Dhar* case the appellant and the respondent were first cousins who got sexually involved and the appellant got pregnant. They then converted to Christianity and had two kids. The appellant left home in 1965. The appellant claimed that the sexual relationship and conversion occurred under duress, that her father did not consent to their marriage, and that both of them were in a prohibited relationship, so the marriage was null and void.

In *Aykut v. Aykut* case the respondent married the petitioner by fraud saying that he was a Christian because the petitioner had earlier stated that she is a professing Roman Catholic and she would not marry anyone who is not a Roman Catholic. The respondent had informed the petitioner prior to their marriage that he was a roman Catholic but is actually a Mahomedan. The wife filed a petition in the to declare the marriage null and void as it was obtained by fraud.

Nullity of Marriage under Parsi Law
The religious ritual of "Ashirvad" is regarded as a necessary condition for establishing and upholding the validity of marriages in Parsi culture, despite the fact that Parsi marriages being regarded as a contract. Under the Parsi law, [10]nullity of marriage comes in section 30 of the Parsi marriage and divorce Act, 1936 which states that in any cases in which consummation of the marriage is from natural causes impossible, then such marriage may, at the instance of either party thereto, be declared to be null and void.

Nullity of Marriage under Special Marriage Act, 1954
Under section 24 of the special Marriage act, 1954 the marriage can be declared null and void on the following grounds [11]section 4 has not been fulfilled that is that is:

[10] The Parsi Marriage and Divorce Act, 1939: Marriages Between Parsis, https://www.toppr.com/guides/legal-aptitude/family-Law-I/parsi-marriage-and-divorce-act/ (last visited Aug 23,2022)
[11] The Special Marriages Act, 1954, https://indiankanoon.org/doc/4234/ (last visited Aug 23, 2022).

(a) neither party has a spouse living;
(b) neither party—
(i) is incapable of giving a valid consent to it in consequence of unsoundness of mind; or
(ii) though capable of giving a valid consent, has been suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage and the procreation of children; or
(iii) has been subject to recurrent attacks of insanity
(c) the parties are not within the degrees of prohibited relationship

Provided that where a custom governing at least one of the parties permits a marriage between them, such marriage may be solemnized, notwithstanding that they are within the degrees of prohibited relationship

- the respondent was impotent at the time of the marriage and at the time of the institution of the suit.
- That no marriage deemed to be solemnized by this act within the meaning of section 18 shall be subject to the provisions of this section. However, the registrations of any such marriage under chapter III may be declared null and void if it violated any of the requirements outlined in section 15 as long as an appeal has been filed under section 17 and the district court's ruling has become binding precedent, no such declaration may be made.

A voidable marriage may be declared null if [12]

(i) the marriage has not been consummated owing to the willful refusal of the respondent to consummate the marriage; or
(ii) the respondent was at the time of the marriage pregnant by some person other than the petitioner; or
(iii) the consent of either party to the marriage was obtained by coercion or fraud, as defined in the Indian Contract Act, 1872 (9 of 1872)

Conclusion

India is a diverse country with a various religious practice, due to which the amount of different personal laws. It is very difficult to get a marriage declared null or void due to the various different beliefs of the people living here, as they consider marriage to be a sacrament. We must change this mind set of the people as marriage should not be done by force or by family pressure but by the choice of the people because by declaring a marriage null the person will be free from the burden of marriage over them.

[12] *Ibid.*

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The Special Marriage Act, 1954: An Insightful Analysis

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Abstract

The Special Marriage Act, 1954 accommodates a common marriage of two Indians, without the need of denying their separate religion. The Act accommodate common marriage that would empower people to get hitched outside of their individual group commands, numerous group-based laws did not accommodate entomb – group or bury – position relational unions. Numerous a period marriage outside of one's own rank or religion brings about social exclusion. The Act gives authenticity to such relational unions. It precluded station or religious boundaries to marriage and gave an absolutely common and non – formal stately marriage. The Act wins not just in instances of bury – religious or entomb – standing relational unions, or love relational unions but on the other hand is pertinent on same religion relational unions. The Act additionally offers a choice to enlist relational unions executed according to one's very own laws. This arrangement of consequent enrolment empowers gatherings to profit of common and uniform cures in spite of the solemnization of marriage through execution of religious services. This guides them in beating the requirements postured in their very own laws. On the premise of Research issue, the scientist presumes that Registration is a 1954 accommodates necessary enlistment as without the enrolment marriage won't be substantial. The one-of-a-kind element of the Special Marriage Act, 1954 is that any marriage solemnized in some other shape under some other law, Indian or nonnative, between any two people can be enlisted under the Act. The marriage under this Act is basically polite marriage and is required to finish the common conventions. Gatherings who plan to get hitched under the Special marriage Act might give a notice in writing in the predetermined shape to the Marriage Officer of the region in which no less than one of the gatherings to the marriage has lived for a time of at least thirty days instantly going before the date on which such notice is given.

Keywords: Registration, Social ostracism. Community, Non ritualistic, Legitimacy, Solemnization.

Introduction

The Special Marriage Act furnishes with the a few conditions for marriage under segment 4. The conditions said in the area 4 of Specific Marriage Act are to some degree like that of segment 5 of Hindu Marriage Act. Preceding the marriage, a notice of aim to wed must be given to the Registrar of Marriages. The marriage is contracted at the common registry within the sight of marriage officer designated by the state and three observers as said in the Act. No religious customs or services are required from the marriage to be finished. It's upon the gathering that they need to do marriage ceremonies or not. Then again, marriage ceremonies constitute the imperative component of the marriage under Hindu Marriage Act without which a marriage winds up turning into a void marriage i.e., void stomach muscle Inuit. The Special Marriage Act, 1954 requires certain preliminaries to the solemnization of marriage.

The marriage under this Act is basically polite marriage and is required to finish the common conventions. Gatherings that plan to get hitched under the Special marriage Act might give a notice in writing in the predetermined shape to the Marriage Officer of the region in which no

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less than one of the gatherings to the marriage has lived for a time of at least thirty days instantly going before the date on which such notice is given. The Marriage Officer is required to keep every one of the notifications with the record of his office and to enter a genuine duplicate of each such notice in Marriage Notice Book and the Book is available to just for inspection. The notice of marriage is additionally to be distributed by the Marriage Officer. Before the termination of thirty days from the date on which the notice was distributed any individual can protest the marriage that it would contradict any of the conditions specified in segment 4 of the act. After the expiry of thirty days from the date on which the notice was distributed the marriage might be solemnized. Prior to the marriage is solemnized the gatherings and three witnesses might sign a presentation in the frame give underneath, and the announcement should be counter marked by the Marriage Officer.

Thus, the marriage is solemnized in the wake of finishing every one of the means specified previously. 'Marriage' is viewed as a hallowed organization in our Indian subcontinent. It is a basic piece of our way of life. India is a differing nation and, in this way, has individuals from various religions and societies, living here. When it comes to relational unions in India, masterminded relational unions are viewed as the most ideal approach to get a kid and a young lady to tie the conjugal bunch. Indian guardians are the ones who appreciate it, ideal from the young lady or kid they need their kid to get hitched to, till the date and time of marriage.

The Special Marriage Act, 1954 wholly changes the situation in respect of prohibited degrees in marriage. One of the conditions for an intended civil marriage to be solemnized under this Act is that “the parties are not within the degrees of prohibited relationship” [Section 4 (d)]. The Act makes a provision for relaxation of the rule of prohibited degrees in marriage i.e. the parties can marry if custom governing one of the parties permits such a marriage between them.4 Relaxation of the net of prohibited degrees on the ground of custom is also permissible under Hindu Marriage Act, but it does not require a gazette notification by the State Government in this regard with is required under the Specific Marriage Act.

Marriage and Its Registration under Special Marriage Act

Under the Special Marriage Act, 1954 any 'two peoples can play out a marriage. The entomb – religious or bury – shared relational unions are conceivable in India just under the Special Marriage Act, 1954. Under the Act a marriage must be in a common marriage shape, however parties are allowed to play out some other extra custom or religious functions in the event that they need to. The Act furnishes with conditions identifying with solemnization of unique marriage under Section 4. Right off the bat, neither one of the parties ought to have a companion living at the season of the marriage. Secondly, the physical and mental limit of the both the gatherings ought to be according to the area requires. Thirdly, the age of the gatherings. Violation of any of the conditions said above will give void status to the marriage. The Special Marriage Act 1954 completely changes the circumstance in regard of denied degrees in marriage.

One of the conditions for an expected common marriage to be solemnized under this Act is that "the gatherings are not inside the degrees of precluded relationship". The articulation "degrees of disallowed relationship" is characterized in Section 2 (b) of the Act as "a man and any of the people specified in Part I of the First Schedule and a lady and any of the people specified in Part II of the said Schedule." Thus, the Act fuses its own rundown of denied degrees in marriage, isolate for people. Consequently, all first cousins– fatherly and maternal, parallel and cross – are put by the Special Marriage Act in the class of restricted conjugal relationship. The Act, in any case, does not put any second cousin in its two arrangements of precluded degrees in marriage.

The Act gives unwinding gave that custom representing one of the gatherings licenses marriages between them. For instance, under Muslim individual law marriage between the primary cousins is allowed. The Special Marriage Act, 1954 requires certain preliminaries to the solemnization of marriage. The marriage under this Act is basically polite marriage and is required to finish the common conventions. The notice of marriage is additionally to be distributed by the Marriage Officer. Before the lapse of thirty days from the date on which the notice was distributed any individual can protest the marriage that it would negate any of the conditions specified in segment 4 of the Act.

Personal Laws

The various personal laws have different procedure for their marriage and follow different rituals and religious ceremonies for the solemnization of the marriage.

Hindu Law

Under Hindu Marriage Act, 1955 conditions for the solemnization of marriage are provided under section 5. Conditions mentioned in Section 5(i), (ii), (iii) and (iv) is somewhat similar to that of conditions mentioned in section 4 of the Special Marriage Act, 1954 with subtle variance. Violation of condition mentioned in section 5(iii) 19 of Hindu Marriage act, 1955 will not make the marriage void while the violation of section 4(c) of the Special Marriage Act, 1954 will make the marriage void under Section 24(1) (i) 20 of the Special Marriage Act, 1954. Section 5(iv) and (v) of Hindu Marriage act, 1955 and section4(iv) of the Special Marriage Act, 1954 defines the degree of prohibited relationship but the Special Marriage Act, 1954 provides relaxation in the degree of prohibited relationship. Section 7 provides with ceremonies of the marriage and performance of the certain religious rituals and ceremonies is mandatory

Muslim Law

According to the Muslim notion of marriage, the nature of marriage is contractual. A system of private registration of marriages with the kazis has always prevailed among the Indian Muslims. Though in principle Islamic law does not require a ritual solemnisation of marriage, among the Muslims of India marriages are invariably solemnized by religious officials known as the “kazi”. The short ceremony performed by the kazi, known as “nikah”, begins with formally obtaining consent of the parties – first of the bride and then of the groom – and ends with recitation from the Holy Quran followed by prayers. In Muslim law all first cousins both on the paternal and maternal sides are outside the ambit of prohibited degrees in marriage. Before, or

immediately after, the ceremony the kazi prepares a nikahnama (marriage certificate) which gives full details of the parties and is signed by both of them, and by two witnesses. The kazi authenticates the *nikahnama* by putting his signatures and seal on it. Printed forms of standard *nikahnama* in Urdu and Hindi are stocked by all kazis who fill in it. Under Section 8 of the Hindu Marriage Act 1954, there exists a provision for registration of marriages.

Christian Law

The Indian Christian Marriage Act, 1872 provides that every marriage both parties to which are, or either party to which is, Christian shall be solemnized in accordance with its provisions. The Indian Christian Marriage Act 1872 is obsolete in so far as it makes a distinction between "Christians" .and "Indian Christians". It also makes separate provisions for followers of various Churches including Church of England. Church of Scotland and Church of Rome. The Act provides separate rules for the solemnisation and registration of marriages of Indian Christians and other Christians.

Punishment of Bigamy

Every person whose marriage is solemnized under this Act and who, during the lifetime of his or her wife or husband, contracts any other marriage shall be subject to the penalties provided in section 494 and section 495 of the Indian Penal Code, 1860 (45 of 1860), for the offence of marrying again during the lifetime of a husband or wife, and the marriage so contracted shall be void.

The Special Marriage Act, 1954

Scope of the Act

The Special Marriage Act deals with inter caste and inter-religion marriages. Inter caste marriage is a marriage between people belonging to two different castes. Gone are the days when people used to marry blindly wherever their parents decided them to. Now the youth have its own saying and choice and they prefer getting married to someone who has a better compatibility with them rather than marrying someone who belongs to their caste or their religion. It is them who have to live with their partner for the entire life and thus caste or religion is not a matter of utmost consideration at all now. Love is a beautiful emotion and it should not be weighed with something like caste or religion. All religions are equal and marriage amongst it should not be a big deal. Caste or religion is conferred on us by birth and not by choice, then why are people of lower castes seen with shame and disdain? India is a diverse country and things like this that happens here, is a thing of pity. Thus, the Special Marriage Act is a special legislation that was enacted to provide for a special form of marriage, by registration where the parties to the marriage are not required to renounce his/her religion.

Application of the Act

This information is the most important one for every Indian to know as it is through this that they can avail them. This Act covers marriages among Hindus, Muslims, Christians, Sikhs, Jains and Buddhists. This act applies to every state of India, except the state of Jammu & Kashmir. This Act extends not only to the Indian citizens belonging to different castes and

religions but also to the Indian nationals living abroad.

Requirements
As Indians believe in marriages with proper rituals, customs and ceremonies involving pomp and show & extravagant celebrations, the Special Marriage Act does not require any of them. The basic requirement for a valid marriage under this Act is the consent of both the parties to the marriage. If both the parties are ready to marry each other, that suffices it; here caste, religion, race, etc. cannot and do not act as a hindrance to their union. For marriage under this Act, the parties need to file a notice expressing their intention to marry each other, with the Marriage Registrar of the district in which at least one of the parties to the marriage has resided for at least 30 days preceding the date on which such notice is being filed. The marriage is then said to be solemnized after the expiry of 30 days from the date on which such notice has been published. But if any person related to the parties objects this marriage and the Registrar finds it to be a reasonable cause of objection, then he can cancel the marriage on such grounds. For a valid marriage, it is also required that the parties give their consent to the marriage in front of the Marriage officer and three witnesses. These are the basic requirements for a valid marriage under the Special Marriage Act, which every Indian must know.

Conditions
The conditions required to be followed for this special form of marriage is not very different from the requirements of other normal marriages, which happen within the caste. These are the conditions to be eligible for a marriage under this Act: –

- The bridegroom must be at least 21 and the bride must be at least 18 years of age at the time of marriage. This is the minimum age limit for a boy/girl to marry, respectively.
- Both the parties must be monogamous at the time of their marriage; i.e., they must be unmarried and should not have any living spouse at that time.
- The parties should be mentally fit in order to be able to decide for themselves e., they must be same at the time of marriage.
- They should not be related to themselves through blood relationships; i.e., they should not come under prohibited relationships, which will otherwise act as a ground to dissolve their marriage.
- Changes with the Emergence of Special Marriage Act in India.

Legitimacy of children
A marriage is said to be void, where the conditions mentioned in point no.4 are not met with, and the children from such marriages who would have been legitimate if the marriage had been valid, shall be legitimate, whether such child is born before or after the commencement of the Marriage Laws

Application on succession Rights
Another important point that every Indian should have knowledge about SMA is that, the succession to property of persons married under this act or any marriage registered under this

act and that of their children will be governed under the Indian Succession Act. But, if the parties to the marriage belong to Hindu, Buddhist, Sikh or Jain religions, then the succession to their property will be governed under the Hindu succession Act.

Restriction on Divorce during 1st year of Marriage

Any person married under the Special Marriage Act, must know about this important provision of the Act. The parties cannot petition for divorce to the District court unless and until one year has expired from the date of their marriage as registered in the marriage books. But, in cases where the court is of the opinion that the petitioner has suffered exceptional hardships or the respondent has shown exceptional depravity on their part, a petition for divorce would be maintained, but if any misrepresentation is found on the part of the petitioner to apply for divorce before the expiry of 1 year, the court may if any order has been passed, state the order to take effect only after the expiry of 1 year, as mentioned in sec. 29 of the Act.

Can they remarry?

Talking, about the option of remarriage available to marriages of persons registered under SMA, one important thing that has to be paid attention is that, where the marriage has been dissolved and there is no right of appeal available, or there is no petition made for it in the required period, or appeal if presented is dismissed, then the parties may remarry, as provided by the Act.

The general and legal Understanding

The general understanding is that only marriages in one's own caste is sacred and auspicious while the legal aspects of it as discussed above, doesn't make marriages under this act any less sacred or valid. Our Law under its provisions gives the right to every citizen to marry any person of their choice and have a happy life. But this opinion is supported as well as criticized by many. Some consider it to be valid, some not. The influence of arranged marriages over the love marriage has brought about this situation, which even after judgments and laws being passed more often in this respect, hasn't brought about a major change in the mindsets of people who are in support and opinion of marriages within the religion and caste.

Conclusion

Inter-standing marriage segment of marriage with regards to the Special Marriage Act. Marriage is viewed as a holy organization in India. It is a fundamental piece of our way of life. India is a various nation and subsequently has individuals from various religions and societies, dwelling here. We know about the degree of impact that rank and religion have in our country.is still thought about an unthinkable in numerous spots in our nation. India takes after an exceptionally unbending structure of the position framework. Individuals are required to wed inside their position and whoever weds out of their station and challenge the customary hindrances are avoided in the general public. There are various respect killings revealed ordinary and tragically, they demonstrate pride in doing as such.

Accordingly, there came a grave requirement for a law to defend the interests of those individuals who transcended these station and religious partitions, to wed for affection. So, the parliament authorize the Special Marriage Act, 1954 individuals of India and every single Indian national in outside nations, regardless of the rank and religion. On the premise of Research issue, the analyst infers that Registration is a 1954 accommodates obligatory enlistment as without the enrollment marriage won't be legitimate.

The one-of-a-kind component of the Special Marriage Act, 1954 is that any marriage solemnized in some other shape under some other law, Indian or nonnative, between any two people can be enlisted under the Act. Enlistment of marriage is obligatory under the Indian Christian Marriages Act, 1872. Parsi Marriage and Divorce Act, 1936 makes important Registration of Marriages yet without enrollment the marriage does not wind up invalid. In Muslim law, a marriage is viewed as a common contract and the Qazi, or administering cleric, likewise records the terms of the marriage in a *nikahnama,* which is given over to the wedded couple i.e., arrangement of private enlistment of marriage. Under Section 8 of the Hindu Marriage Act there is a 1954, there exists an arrangement for enrollment of relational unions. Be that as it may, it's left to the contracting gatherings to either solemnize the marriage before the sub-recorder or enlist it subsequent to playing out the function in congruity with Hindu convictions.

The Special Marriage Act, 1954: An Analysis

Rucha Sunil Mhaske[1]

Abstract

In modern times, families continue to 'fix' marriages based on religion, caste, gotra, astrological alignment, skin colour, family background, and social standing. Marriages must take place not only within the same faith, but also within the same caste, according to endogamy rules. The Special Marriage Act was passed in 1954 to help people who were in interfaith relationships or just wanted a secular marriage. The main idea behind special marriage act is to reduce barriers to inter-faith and inter-caste marriages, promoting secularism and equality as a result. In this research paper we are discussing how public notice of 30 days in the act is violating the privacy rights of couples, threat to their life and the lacking behind the main purpose of special marriage act. The Special Marriage Act is a central legislation made to validate and register interreligious and inter-caste marriages in India. It allows two individuals to solemnise their marriage through a civil contract. No religious formalities are needed to be carried out under the Act.

Keywords: *Certificate of marriage, Hindu Marriage Act, Marriage Registration, Parliament of India, Special Marriage Act.*

Introduction

The special Marriage Act, 1954 is an Act of the Parliament of India with provision for civil marriage (or "registered marriage") for people of India and all Indian nationals in overseas international locations, inappropriate of the faith or faith accompanied by either celebration. All marriages in India may be registered beneath the respective nonpublic regulation Hindu Marriage Act, 1955, Muslim Marriage Act, 1954, or under the special Marriage Act, 1954.

It is the obligation of the judiciary to make sure that the rights of each the husband and spouse are covered. The special Marriage Act, 1954 is an Act of the Parliament of India with provision for civil marriage for human beings of India and all Indian nationals in foreign international locations, regardless of faith or faith observed by using either birthday party.

Background

Henry Sumner Maine first introduced Act III of 1872, which could allow any dissenters to marry whomever they chose underneath a new civil marriage regulation. It could follow in inter-caste and inter - religion marriages. The invoice confronted competition from neighborhood governments and administrators, who believed that it might encourage marriages based totally on lust which might necessarily lead to immorality.[2]

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[2] Agarwal, Atishay and Khandelwal, Abhishek, Special Marriage Act: The Intercepted Marriage (April 11, 2022). Supremo Amicus, 29, 1-6. https://doi-ds.org/doilink/04.2022-48812249/supremoamicus/v29/2022/20.

The unique Marriage Act, 1954 replaced the old Act III, 1872. The new enactment had 3 primary goals:

1. To provide a unique form of marriage in certain cases,
2. To provide for registration of certain marriages and,
3. To provide for divorce.

The Act originated from a piece of regulation proposed for the duration of the past due 19th century. It extends to the entire of India except the kingdom of Jammu and Kashmir and applies also to residents of India domiciled within the territories to which this Act extends who are in the state of Jammu and Kashmir.

Objection to Marriage

1. Any man or woman can also, earlier than the expiration of thirty days from the date on which such a be aware has been published beneath sub-section (2) of section 6, object to the wedding on the floor that it might contravene one or extra of the conditions specified in section four.
2. After the expiration of thirty days from the date on which is aware of a supposed marriage has been posted under sub-section (2) of section 6, the wedding can be solemnized, until it has been previously objected to underneath sub-segment (1).
3. The nature of the objection will be recorded in writing by using the wedding Officer within the Marriage be aware e-book, be examine over and explained if vital, to the character making the objection and will be signed through him or on his behalf.

Applicability

1. Any character, regardless of faith.
2. Hindus, Muslims, Buddhists, Sikhs, Christians, Parsis, or Jews also can perform marriage underneath the Special Marriage Act, 1954.
3. Inter-faith marriages are achieved below this Act.
4. This Act is applicable to the complete territory of India and extends to proceeding spouses who each Indian national are dwelling overseas.
5. Indian national residing abroad.

Necessities

1. The marriage carried out underneath the special Marriage Act, 1954 is a civil settlement and thus, there need be no rites or ceremonial necessities.
2. The events have to document a observe of meant Marriage in the specific form to the marriage Registrar of the district in which as a minimum one of the events to the wedding has resided for a period of no longer much less than thirty days right away previous the date on which such observe is given.
3. After the expiration of thirty days from the date on which be aware of a meant marriage has been posted, the marriage may be solemnised, unless it has been objected to by any person.

4. Themarriage may be solemnised at the desired Marriage workplace.
5. Marriage isn't always binding on the parties except each birthday party states "I, (A), take thee (B), to be my lawful spouse (or husband)," inside the presence of the marriage Officer and three witnesses.

Conditions for Marriage

1. Every celebration involved should have any other subsisting valid marriage. In other phrases, the ensuing marriages have to be monogamous for both parties.
2. The groom ought to be as a minimum 21 years vintage; the brides need to be at least 18 years old.
3. The parties have to be in a position in regard to their mental capacity to the extent that they're able to provide valid consent for the marriage.
4. The parties have to no longer fall within the degree of prohibited relationship.

Registration Process Special Marriage Act

1. Both parties are required to be present after the submission of documents for issuance of public notice inviting objections.
2. One copy of the notice is posted on the notice board of the office and a copy of the notice and is sent by registered post to both parties as per the given address.
3. Registration is done 30 days after the date of notice after deciding any objection that may have been received during that period by the SDM.
4. Both parties along with three witnesses are required to be present on the date of registration.

Place and form of Solemnization[3]

1. The marriage may be solemnized at the office of the Marriage Officer, or at such other place within a reasonable distance therefrom as the parties may desire, and upon such conditions and the payment of such additional fees as may be prescribed.
2. The marriage may be solemnized in any form which the parties may choose to adopt: Provided that it shall not be complete and binding on the parties unless each party says to the other in the presence of the Marriage Officer and the three witnesses and in any language understood by the parties, “I, (A), take the (B), to be my lawful wife (or husband)”.

Certificate of Marriage[4]

1. When the marriage has been solemnized, the Marriage Officer shall enter a certificate thereof in the form specified in the Fourth Schedule in a book to be kept by him for that purpose and to be called the Marriage Certificate Book and such certificate shall be signed by the parties to the marriage and the three witnesses.

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[3] Agarwal, Atishay and Khandelwal, Abhishek, Special Marriage Act: The Intercepted Marriage (April 11, 2022). Supremo Amicus, 29, 1-6. https://doi-ds.org/doilink/04.2022-48812249/supremoamicus/v29/2022/20.
[4] Available on https://en.wikipedia.org/wiki/Special_Marriage_Act,_1954

2. On a certificate being entered in the Marriage Certificate Book by the Marriage Officer, the Certificate shall be deemed to be conclusive evidence of the fact that a marriage under this Act has been solemnized and that all formalities respecting the signatures of witnesses have been complied with.

Major Differences between Hindu Marriage Act & Special Marriage Act[5]

One of the key differences between the two acts is that the Hindu Marriage Act was established in 1955, while the Special Marriage Act was ordered only a year prior, i.e., 1954. The Hindu Marriage Act is relevant just to the Indian Hindus. The Special Marriage Act is material to every one of the residents of India regardless of standing, race, religion, identity, and so forth. It implies both the men and women of two distinct religions could marry under the extraordinary marriage at any point 1954's Act.

Aside from this, an Indian can get hitched to a resident of a different nation with the arrangements of the Special Marriage Act. In the event that two people of various religions get hitched, nobody will undoubtedly change their creed or religion even after the wedding. Be that as it may, if one powers their accomplice to change their religion after the wedding, then it's a crime.

The Hindu Marriage Act gives an open door to enlistment to currently solemnised marriage. It implies the residents can get hitched first, and later, they can opt for wedding enlistment within a time span. However, HMA doesn't accommodate the solemnisation of a wedding by the marriage registrar. Then again, the Special Marriage Act offers solemnisation for the wedding as well with respect to enlistment by a marriage official.

Conclusion

A marriage under the Special Marriage Act, 1954 permits people from two one of a kind non secular backgrounds to come back collectively in the bond of marriage. The unique Marriage Act, 1954 lays down the technique for each solemnization and registration of marriage, where either of the husband or spouse or both aren't Hindus, Buddhists, Jains, or Sikhs.

According to this Act, the couples ought to serve a note with the relevant documents to the wedding Officer 30 days before the meant date of the wedding. The best court of India, in 2006, made it required to enroll all relational unions. In India, a wedding can both be enlisted under the Hindu Marriage Act, 1955 or under the special Marriage Act, 1954.

[5] Available on http://www.legalservicesindia.com/article/1626/Inconsistencies-In-Special-Marriage-Act,-1954.html

Human Trafficking: Still A Long Way to Go

Apoorva Bhardwaj[1]

'Human trafficking crosses cultures and continents..…
All of us have a responsibility to bring this practice to an end..…
Through partnerships, we can confront it head-on and lift its victims from slavery to freedom.'
- Hillary Clinton, US Secretary of State, 2010

Abstract

Human Trafficking is a complex and multidimensional phenomenon and requires multidisciplinary approach. Any analysis of the root causes of human trafficking must take into account factors that are specific to India, its socio-economic conditions and its poverty levels. Human trafficking is a violation of human rights and any strategy to eliminate trafficking should be framed within a human-rights perspective by placing the victim at the centre. A focus that is primarily directed to the prosecution of traffickers has the potential to ignore or minimize the human rights of those who have been trafficked by failing to adequately protect the trafficked women. Human trafficking is a booming international trade, making billions of dollars at the expense of millions of victims; many of them are young girls and children, who are robbed of their dignity and freedom. Although most of us have never witnessed this crime, it happens every day all around the world. Criminals profit while satisfying consumer demand. Victims are coerced to do what others would never freely do and they are paid virtually nothing for their pains. In a perverse commercialization of humanity, they are used like products and then thrown away. Gender discrimination further aggravates human trafficking.[2]

Keywords: Human Trafficking, Laws, UNODC, Victim, Labour, Slavery, etc.

Incident 1: When Rani *(name changed)* went missing, she was 12 years old. She had gone to collect water from a hand-pump near her house, as she did every evening. That day, her kidnapper came up behind her and held a rag to her face, making her pass out. She came back to her senses only to find herself hundreds of miles away from home in a small village in Uttar Pradesh. She came to know that she was going to be sold for prostitution. However, she did not know where she was. Her parents searched desperately for her and lost the hope that they would ever see their dearest child again.

Guria, an anti-trafficking organization in Varanasi which monitors cases of missing children, started an investigation and discovered the identity of the kidnapper and where Rani was being held. They helped her parents rescue their daughter with the help of the police. When police found Rani, she broke into tears seeing her father. She ran to him and started crying as she could not believe that she finally got saved after what turned out to be a long traumatic period for her. She then returned home with the hope to start afresh.

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[2] Biswajit Ghosh, *Trafficking in Women and Children in India: Nature, Dimensions and Strategies for Prevention*, 13(5), The International Journal of Human Rights, Routledge Publication, Landon (2009).

Incident 2: Chandni *(name changed)* was 12 when she was taken from her village in Khunti district, Jharkhand and brought to Delhi to do domestic work. Sindur Tola Gramoday Vikas Vidyalaya (SGVV), an ally of ActionAid India and Shakti Vahini, a social organization, intervened and managed to rescue Chandni with the help of the police. Chandni is now back to her family and attending school.

Incident 3: Monali *(name changed)*, however, was not as lucky as Rani and Chandni. She was 13 years old, studying in Class VI when someone kidnapped her from her home in Medinipur district of West Bengal and trafficked her to the Kalahandi district of Odisha. She was tortured and abused, raped by her trafficker and was going to be sold as a child bride. Her courage, however, did not let her give up; it finally paid off as she managed to escape one day. A car driver found her terrified in a local market and took her to the police station. Suchetana Mohila Mondali, an anti-trafficking organization and ally of ActionAid India, linked up with her and took her to her family. But they refused to accept her. Monali now lives in a government shelter home.

Rani, Chandni, and Monali, these are just few examples, similar to them countless number of children and adults become victims of trafficking every year. While some are fortunate enough to get back to their families, there are several others whose families cannot find them or who are no longer accepted by their families when they manage to get back home.

Human Trafficking

Human Trafficking is the third most registered international crime worldwide after drug and weapon trafficking. Human Trafficking is a booming international trade, making billions of dollars at the expense of millions of victims; who are robbed of their dignity and freedom. The key concept of human trafficking is exploitation of people against their free will.

With the transnational operation called human trafficking, slavery remains alive and thriving. Trafficking in persons is a global issue. No country can claim that its borders are not affected in some way by trafficking. Trafficking in persons is the equivalent of modern-day slavery. Slavery is illegal throughout the world, it is a violation of human rights, and it is a crime.

Reaching an idea of what exactly Human Trafficking is demands a lot of perception. This is because every case and circumstances of human trafficking is exceptional in its own course. To substantiate this, in a general case of human trafficking it is seen that a person (who later on becomes the victim) is taken from their village or town or city to another place, based on false promises of employment in a promising sector (commonly domestic help or labourer) with a handsome pay. Now this pay is made to look more than what this person gets in his/her own region. Such lucrative deals are the base or the main reasons for trafficking to start off in a region in the first place. Nevertheless, when they arrive at the destination, what welcomes them is a shock of reality. They either never get the job that they were promised in the first place. The pay that they were promised is below their imagination. And from thereon, the situation starts deteriorating. In many cases it is unacceptable. They are handed over to placement agencies where they are further sent to different houses as domestic help and to different

industries for different kind of small-scale labour jobs. Primarily if we see these circumstances is that of human smuggling. But since the recruiter makes misleading promises, this case is moulded into the shape of human trafficking. In transnational trafficking, it is commonly seen that those people who are taken away from their home country in the pretext of being given good jobs, their passports are taken away from them. And other such related personal documents are confiscated. There is no escape for these victims.

They are held as hostages are drowned in huge debts which can cost them their lives, if they ever tried to escape. Therefore, whilst giving a global perspective to Human Trafficking calls for understanding the concept of it as well as educating civilians as to how they must recognize and respond and tackle the traffickers and trafficking happening in their communities and periphery. Tracking down these intricate details of the dynamics of human trafficking is much more important than just haphazardly going forward with new laws and policies or whatsoever.

Human Trafficking which is for the purposes of sexual exploitation as well as labour exploitation is becoming an increasingly prevalent issue around the world. Trafficking is a huge industry which has been identified as the fastest growing criminal industry in the world. Statistics state that more than *thirty million people are victims of slavery and human trafficking today*.[3] Every year thousands of men, woman, and children fall into the hands of traffickers. This can even happen even in their own country, considering every country in the world is affected by human trafficking.

Human Trafficking can include several different components which can include sex trafficking, labour trafficking, and organ trafficking. Sex trafficking is human trafficking into prostitution. Labour trafficking is when someone is trafficked into work that is non-sexual. Examples can include a man trafficked into farm work, or a woman trafficked into a servant. Lastly, organ trafficking is when people are trafficked so that their organs can be sold to be used into transplants. People can be forced into this trafficking by many means such as physical force being used upon them, or false promises made by traffickers. Examples of promises may include false job opportunities, or marriages in foreign countries. To prove that human trafficking is still happening around the world, It's hard to imagine that a world which talks about love, peace and brotherhood amongst fellow human beings has a dark secret staring and mocking at its true reality. India is listed in the Tier II list of the UN which includes countries which have failed to combat human trafficking. The concept of trafficking denotes a trade in something that should not be traded in.[4]

Definition of Human Trafficking

Trafficking includes the recruitment, abduction, transport, harbouring, transfer, sale, or receipt of persons within national or across international borders, through the use of fraud, coercion, force, or kidnapping, for the purposes of placing persons in situations of slavery-like conditions,

[3] *Global Estimate of Forced Labour (2012)*. International Labour Organisation (ILO), (June 18, 2022, 09:15 pm) http://www.ilo.org/wcmsp5/groups/public/-ed_norm/-declaration/documentspublicationwcms_182004.pdf.
[4] *Ibid.*

forced labour, or services, domestic servitude, bonded sweatshop labour or other debt bondage. The term *"force"* as used in this definition of sex trafficking, signifies *"coercion, drugging, kidnapping, violence, threats, intimidation, or other situation where there is lack of consent."* The element of *"force"* and the related concept of *"consent"* are key components in the definition of trafficking.

According to the United Nations Trafficking Protocol popularly known as *"Palermo Protocol"*, *"Trafficking in persons can be defined as the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation should include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organ."*[5]

Until recently, Indian Law did not contain a comprehensive definition of Human Trafficking. The Constitution of India prohibits trafficking of human beings and forced labour, but it does not define either term[6]. India penalizes many forms of forced labour under *the Bonded Labour System (Abolition) Act*[7], as well as the *Child Labour (Prohibition and Regulation) Act*[8], and the *Juvenile Justice (Care and Protection of Children) Act, The Immoral Traffic (Prevention) Act (hereafter referred to as the ITPA)*[9], etc., criminalizes most forms of sex trafficking. The ITPA, however, also criminalizes some transactional aspects of voluntary sex work (e.g., solicitation). It thus ends up punishing both sex workers who solicit sex work voluntarily and sex trafficking victims who are coerced into doing so.

In March 2013, India passed *the Criminal Law (Amendment) Act of 2013*, which *amended Sec. 370* of the Indian Penal Code and included *India's first definition of human trafficking*
Sec. 370, as amended, now defines exploitation as including *"any act of physical exploitation or any form of sexual exploitation, slavery or practices similar to slavery, servitude, or the forced removal of organs."*

The new Amendment Act expanded the types of offenses criminalized as a trafficking violation and instituted heightened sentences for perpetrators. It is a significant step towards bringing India in line with the international law obligations it assumed on ratifying the UN Trafficking Protocol. However, there are several areas in which India's laws and realities do not comply with the UN Trafficking Protocol's requirements and recommendations, including: 1) labour trafficking, 2) safety, compensation and rehabilitation, 3) prevention, and 4) migration,

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[5] *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children - Supplementing the United Nations Convention against Transnational organized Crime,* United Nations (2000).
[6] INDIA CONST. art.23(1)
[7] The Bonded Labour System (Abolition) Act, No. 19 of 1976.
[8] The Child Labour (Prohibition and Regulation) Act, No. 61 of 1986.
[9] The Immoral Traffic (Prevention) Act, No. 104 of 1956.

decriminalization and repatriation. The following sections measure India's domestic laws against the UN Trafficking Protocol on a subject-by-subject basis.

Human Trafficking in India: Prevalence & Root Causes

Human Trafficking is considered as the second largest organised crime in India. Human Trafficking is still a major issue in India, despite the fact that it is banned under Indian Law. People are routinely trafficked illegally through India for commercial sexual exploitation and forced/bonded labour.[10] The majority of trafficked persons in India, including men, women, boys and girls, are trafficked for purposes of forced labour. *Labour Trafficking* is the trafficking of a person by means of fraud, coercion or duress for the purpose of exploiting him or her for forced labour or services or slavery or practices similar to slavery, including involuntary servitude, peonage and debt bondage. *Sex Trafficking* is also prevalent within India and predominantly affects women and girls. Sex Trafficking is the trafficking of a person by means of fraud, coercion or duress for the purpose of exploiting him or her for involuntary commercial sex acts, prostitution of that person or other forms of sexual exploitation.

India is a source, destination and transit country for labour and sex trafficking. In India, 90% of trafficking occurs domestically (intra-state or inter-state), and 10% occurs across national borders. The country serves as a destination for persons trafficked from neighbouring countries such as Nepal and Bangladesh, and as a transit country for individuals being trafficked to the Middle East and other parts of the world. In addition, India is a source country for individuals trafficked to Europe, the Middle East and North America.[11]

According to the NCRB data, about 1,714 cases of human trafficking were registered by the government's anti-human trafficking units in 2020 with sexual exploitation for prostitution, forced labour and domestic servitude being the top reasons behind it. Among states, Maharashtra and Telangana recorded the highest number of such cases at 184 each, followed by Andhra Pradesh at 171, Kerala at 166, Jharkhand at 140 and Rajasthan at 128. The conviction for cases of human trafficking was recorded at 0 in seven states, while the highest conviction rate of such cases was reported from Tamil Nadu at 66 per cent followed by Delhi at 40%. The NCRB, in its report, said it started collecting data on human trafficking cases from these Anti-Human Trafficking Units (AHTU) across the country since As per data provided by States/UTs, 1,714 cases of human trafficking have been registered by AHTUs during 2020.[12] According to the report, 2,278 human trafficking cases were registered in 2018 and 2,260 in 2019,

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[10] J.L. Najar, *Human tracking in India: How the colonial legacy of the anti-human tracking regime undermines migrant and worker* agency, (2021) (June 18, 2022, 09:30 pm) https://blogs.lse.ac.uk/humanrights/2021/02/11/human-trafficking-in-indiahow-the-colonial-legacy-of-the-anti-human-trafficking-regime-undermines-migrant-and-worker-agency/.

[11] Sadika Hameed ET AL, *Human Trafficking In India: Dynamics, Current Efforts And Intervention Opportunities For The Asia Foundation* vi (2010), *available at* http://asiafoundation.org/resources/pdfs/StanfordHumanTraffickingIndiaFinalReport.pdf.

[12] Financial Express, *About 1,714 human trafficking cases registered in 2020*, India News (2021) (June 20, 2022, 08:45 pm) https://www.financialexpress.com/india-news/about-1714-human-trafficking-cases-registered-in-2020/2332907/.

respectively. The report further said that 4,709 victims, including 2,222 below 18 years, were trafficked across the country in 2020.[13]

In 2019, the government reported identifying 5,145 trafficking victims and 2,505 potential trafficking victims, an increase compared with 3,946 trafficking victims and 1,625 potential victims identified in 2018. In 2019, authorities identified 3,133 victims in labor trafficking, including 1,549 in bonded labor, 2,012 in sex trafficking, and did not report the type of trafficking of the 2,505 potential victims identified. 94% of trafficking victims identified were Indian, approximately 57% were adults, and 62% were female. Despite some estimates of eight million Indians in bonded labour, the Ministry of Labor and Employment reported to Parliament in 2019 that the government had only identified and released 313,687 since 1976.

Moreover, due to lack of law enforcement efforts against traffickers, one NGO working in 10 States reported that more than 60 percent of released victims were subjected to bonded labor again following their release. Karnataka, Tamil Nadu, and Uttar Pradesh states, where some authorities may engage more actively against bonded labor, accounted for the majority of bonded labor victims identified, with 130,249, and 964 victims identified respectively, overall accounting for 87% of the country's total identification of bonded labor victims. The Ministry of Home Affairs created standard procedures for trafficking victim identification in 2009, but it was not clear how many states had adopted them. State revenue officers had the responsibility for identifying bonded labor victims, yet NGOs identified most cases. Poor inter-state coordination between state government agencies impeded trafficking investigations and victims' ability to obtain services, including participation in civil and criminal cases in their home states.[14]

The estimated number of victims of severe forms of trafficking is very significant or is significantly increasing and the country is not taking proportional concrete actions. There is a failure to provide evidence of increasing efforts to combat severe forms of trafficking in persons from the previous year. In spite of many laws present in India human trafficking remains an unspoken problem in the country.

The factors of trafficking in women and children can be divided into two categories: *push and pull factors*. The common *push factor* that has been identified as the main driving force behind human trafficking is the abject poverty. However, caste-based discrimination, lack of resources, lack of human and social capital, social insecurity, gender discrimination, commodification of women, social exclusion, marginalisation, inadequate and outdated state policies, lack of governanace, nexus of police and traffickers, unemployment, breaking down of community support system, cheap child labour, child marriage and priority to marriage, attraction of city life, corruption, employment, etc.

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[13] Habibullah, *Explained: Why Human Trafficking Remains One Of The Top Organised Crimes In India*, (2021) (June, 20, 2022, 08:20 pm) https://www.indiatimes.com/explainers/news/human-trafficking-in-india-552763.html.
[14] *Ibid.*

It appears from the case studies that extreme poverty and other causes of deprivation not only push people to fall in the tripod the traffickers, they also create for some an incentive for trafficking. Often the prostitutes, who have no option to come out of the exploitative environment, gradually develop intimate connections with the traffickers and follow in their footsteps. Trade, migration policies conflict and lack of awareness among the victims are also some the factors leading to human-trafficking. Globalization has also become one of the emerging push factor leading to human-trafficking. Further, the report of the International Organization for Migration, says that 90 percent of the victims trafficked as sex slaves experienced domestic violence before they were trafficked.[15]

While the common *pull factors are*: lucrative employment propositions in big cities, easy money, promise of better pay and a comfortable life by the trafficking touts and agents, demand of young girls for marriage in other regions, demand for low-paid and underage sweat shop labour, growing demand of young kids for adoption, rise in demand for women in the rapidly expanding sex industry. The decreasing sex ratio and the increasing demand of women in women starve areas would also been considered as a factor behind bride trafficking in India and countries like china. The rampant practice of female feticide in the northern states of Haryana and Punjab has also fuelled internal trafficking. Since there is a shortage of women in these states having a low female to male ratio, they have become fertile ground for the operation of traffickers. Traffickers procure girls from faraway states like Assam and Orissa; trick their families into believing they are to be married, only to later push them into prostitution.

There are many reasons for human trafficking in India. They are determined by political, economic and cultural factors. Trafficking in persons is according to the doctrine of supply and demand. Firstly, there are certain factors in the country such as need of employment, poverty, social conditions, instances of armed or war conflicts lack of political and economic stability, lack of proper access to education and information etc. Secondly, there is demand for inexpensive products, cheap labour and low-priced services. The organized crime groups have found an opportunity for making huge profits by connecting the supply and demand that by clubbing the first and the second instances.[16]

Also, one of the major causes is because of the fact that we so far have made inadequate progress in addressing the issue. Thus, *weak enforcement machinery and inordinate delay in justice delivery helps the traffickers to recruit or re-traffic women and children from the districts and send them to distant destinations with relative ease*. Rare conviction of the real traffickers encourages the operators of the trade to continue the lucrative trade and earn huge margins without any investment. Moreover, unwillingness of the victims to seek legal redress due to absence of support from the police and the community members is also contributing to the

[15] Biswajit Ghosh, ed., *Trafficking in Women & Children, Child Marriage and Dowry: A Study for Action Plan in West Bengal*, (Kolkata: UNICEF and Govt. of West Bengal, (2007).
[16] J.L. Najar, *Human tracking in India: How the colonial legacy of the anti-human tracking regime undermines migrant and worker* agency, (2021) (June 18, 2022, 09:30 pm) https://blogs.lse.ac.uk/humanrights/2021/02/11/human-trafficking-in-indiahow-the-colonial-legacy-of-the-anti-human-trafficking-regime-undermines-migrant-and-worker-agency/.

spread of this crime. Trends in migration also influence trafficking and of late mobility across borders has increased to a great extent due to the onset of the process of integration of economies around the world.

In recent years, the demand for cheap, flexible, uncritical labour has risen everywhere in orders to survive in the age of competition and irregular migrants fit those demands the most. At the same time traditional economic activities including agriculture, caste occupations, age-old handicrafts and cottage industries are affected by the introduction of new technology, cheap imports, loss of established jobs, demands for new types of consumer goods and consequent change in our cultural practices.

All these factors have contributed to migration and mobility of large numbers of people from one place to another in search of jobs/facilities in recent times. Traffickers have taken this opportunity and lured poor people. Often placement agencies, STD booths, and truck drivers apart from sex workers serve as conduits to collect and transport people for illegal activities.

International Laws Prohibiting Trafficking

There are various International Instruments which deal which deal with the problem of human trafficking for prostitution of women and children as violative of human rights. They deal with the rights and state obligations to ensure the protection of these rights. The International community has repeatedly condemned slavery and involuntary servitude, violence against women, and other elements of human trafficking. These condemnations are in the form of declarations, treaties, and United Nations resolutions and reports. These include:

i. Universal Declaration of Human Rights (UDHR)

This contains different Articles to deal with this problem:

- Article 1. All Human beings are born free and equal in dignity and rights.
- Article 2. That everyone (which includes fallen women and their children,) is entitled to all the rights and freedoms set forth in the Declaration without any distinction of any kind such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.
- Article 3. Right to life, liberty and security of person.
- Article 4. That no one shall be held in slavery or servitude: slavery and the slave trade shall be prohibited in all their forms. (The fallen victims in the flesh trade is no less than a slave trade)
- Article 5. No one shall be subject to torture or to cruel, inhuman or degrading treatment or punishment. (The fallen/trapped victims of flesh trade are subjected to cruel, inhuman and degrading treatment which are obnoxious, abominable and an affront to article 5 of the said declaration and also article 21 of Indian constitution.)
- Article 6. Declares that everyone has the right to recognition everywhere as a person before the law.
- Article 7. That all are equal before that law and are entitled without discrimination, to equal protection of the law.

ii. International Covenant on Civil and Political Rights (ICCPR)

Article 8 of the International Covenant on Civil and Political Rights provides that:

1. No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited.
2. No one shall be held in servitude.
3. *(a)*. No one shall be required to perform forced or compulsory labour;
   (b). Paragraph 3 (a) shall not be held to preclude, in countries where imprisonment with hard labour may be imposed as a punishment for a crime, the performance of hard labour in pursuance of a sentence to such punishment by a competent court.

Article 24 outlines rights of child to a just and free childhood

Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.

iii. International Covenant on Economic, Social and Cultural Rights (ICESCR)

Article 10(3) of the International Covenant on Economic, Social and Cultural Rights states that: The States parties to the present Covenant recognize that:

Special measures of protection and assistance should be taken on behalf of all children and young persons without any discrimination for reasons of parentage or other conditions. Children and young persons should be protected from economic and social exploitation. Their employment in work harmful to their morals or health or dangerous to life or likely to hamper their normal development should be punishable by law. States should also set age limits below which the paid employment of child labour should be prohibited and punishable by law.

iv. Convention on The Rights of The Child, 1989

Article 11 requires state parties to take measure to combat the illicit transfer and nonreturn of children abroad. Under articles 34 and 35, state parties must take appropriate national, bilateral and multilateral steps to protect children from all forms of sexual exploitation and abuse and also prevent the abduction, sale and trafficking of children.

v. Convention on The Protection of The Rights of Migrant Workers, 1990

This convention seeks to put an end to the illegal or clandestine recruitment and trafficking of migrant workers and lays down binding international standards for their treatment, welfare and human rights.

vi. The ILO Convention on The Worst Forms of Child Labour, 1999

Article 3 of this convention defines the worst forms of child labour as compromising of all manifestations of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and servitude and forced or compulsory labour etc.

vii. Optional Protocol to The Convention on The Rights of The Child on The Sale of Children, Child Prostitution and Child Pornography, 2002 (The Sex Trafficking Protocol)

This protocol adopted in May 2002, seeks to raise the standards for protecting children from all forms of sexual exploitation and abuse.

viii. Recommended Principles and Children Guidelines on Human Rights and Human Trafficking, 2002

These standards were developed by the UN High Commission for Human Rights in 2002, so as to strengthen the human Rights principles and perspective of the Trafficking Protocol. The document recommends 17 principles and 11 guidelines, which are meant to facilitate the effective implementation of the key provisions.

ix. Convention on Elimination of All Forms of Discrimination against Women

The United Nations Conventions, such as the Convention on the Rights of the Child, which has not been adopted by the United States, and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) was adopted by the U.N. General Assembly in December l979. These conventions prohibit the sexual exploitation of children and the discrimination against women in political activities.11 Nevertheless, these two conventions play an important role in setting international norms for the elimination of sex trafficking.

x. Anti-Trafficking Protocol, 2000

At the International Level, the 2000 Anti-Trafficking Protocol is attached to the U.N.'s Organized Crime Convention, which means that the emphasis is on prosecution of those involved in one "branch" of organized crime, namely human trafficking. While there is nothing inherently wrong with this, and while the Protocol is in fact quite impressive in its sweep, it means that sex trafficking is not presented as a direct human rights violation in which the state is complicit.

Legal framework against Human Trafficking in India:

At present the legal regime of trafficking in humans is explicitly and implicitly governed by the following statutes towards curbing the menace through the following provisions:

i. The Constitution of India, 1950:

Art. 23 - It specifically prohibits *"traffic in human beings and begar and other similar forms of forced labour"*.

Art. 39 - It states that men and women should have the right to an adequate means of livelihood and equal pay for equal work; that men, women and children should not be forced by economic necessity to enter unsuitable avocations; and that children and youth should be protected against exploitation. It is enshrined in the Constitution in the form of a directive to be followed while formulating policies for the State.

Art. 39A - It directs that the legal system should ensure that opportunities for securing justice are not denied to any citizen because of economic or other disabilities.

ii. Immoral Traffic (Prevention) Act, 1956

Sec. 3 - It provides for punishment to a person for keeping a brothel or allowing premises to be used as a brothel or who is in charge of any such premises either by himself or through a tenant, occupier, etc.

Sec. 4 - It provides for punishment to any person over 18 years of age, living on the earnings of prostitution of another person.

Sec. 5 - It provides for punishment to any person who is involved in procuring, inducing or taking another person for the sake of prostitution.

Sec. 6 - It provides for punishment to a person who detains another person with or without his consent in any brothel or any premises for prostitution with an intent that such detained person may have sexual intercourse with any person who is not the spouse of such detained person.

Sec. 7 - Any person who carries on prostitution and the person with whom such prostitution is carried on in any premises which is within close proximity to a public place, including a hospital, nursing home, place of religious worship, hostel, educational institution, or in an area notified under the provisions of the Act, can be punished with imprisonment for a term of three months.

Sec. 8 - Seducing or soliciting for the purpose of prostitution is also an offence and punishable with imprisonment up to six months or a fine up to Rs 500, in the case of a first conviction. In case of a subsequent conviction, the prison sentence can be extended up to one year including a fine of Rs 500. However, if the person soliciting is a man, the statute provides that he shall be punishable with not less than seven days imprisonment which may be extended to three months.

Sec. 18 - A Magistrate can order the immediate closure of a place that is being used as a brothel or as a place for prostitution and is within 200 meters of any “public place” as referred to in Section 7 above, and direct the eviction from the premises from where any person is ostensibly carrying out prostitution on receipt of information from the police or otherwise. The occupier is given only seven days notice for eviction from such premises.

Sec. 20 - It empowers a Magistrate, on receiving information that any person residing in or frequenting any place within the local limits of his jurisdiction is a prostitute, to issue notice to such person requiring him to appear before the Magistrate and show cause why he should not be removed from the place and be prohibited from re-entering it, and an order to be passed by the Magistrate effecting the same on merits, non-compliance of which will attract punishment in accordance with this section.

Sec. 21 - The State Government may in its discretion establish as many protective homes and corrective institutions under this Act as it thinks fit and such homes and institutions when established shall be maintained in such manner as may be prescribed. Whoever establishes or maintains a protective home or corrective institution except in accordance with the provisions given shall be punishable under this section.

Sec. 22A - If the State Government is satisfied that it is necessary for the purpose of providing for speedy trial of offences under this Act in any district or metropolitan area, it may, by notification in the Official Gazette and after consultation with the High Court, establish one or more Courts of Judicial Magistrates of the First Class, or, as the case may be, Metropolitan Magistrate, in such district or metropolitan area.

Sec. 22B - Notwithstanding anything contained in the Code of Criminal Procedure, 1973, the State Government may, if it considers it necessary so to do, direct that offences under this Act shall be tried in a summary way by a Magistrate [including the presiding officer of a court established under sub-section (1) of Section 22A] and the provisions of Sections 262 to 265 (both inclusive) of the said Code, shall, as far as may be, apply to such trial

iii. The Indian Penal Code, 1860

The Indian Penal Code, 1860 specifically deals with two kinds of kidnapping:

(a) Sec. 360 - Kidnapping from India.

(b) Sec. 361 - Kidnapping from lawful guardianship.

- Sec. 362 - A trafficked person can also be subjected to an act of abduction covered under this section which involves using of deceitful means by another and thereby forcefully compelling this person to go from any place.

- Sec. 363A - Provides for the specific punishment to any person who kidnaps or maims a minor for purposes of begging.

- Sec. 365 - Provides for the punishment to any person who kidnaps or abducts another person with intent to secretly and wrongfully confine him/her.

- Sec. 366 - Provides for the punishment to any person who kidnaps, abducts or induces woman to compel her marriage against her will, or be forced/seduced to have illicit intercourse.

- Sec. 366A - Provides for the punishment to any person who by any means whatsoever induces any minor girl under the age of 18 years to go from any place or to do any act that such girl may be forced or seduced to have illicit intercourse with another person.

- Sec. 370 - By the Criminal Law (Amendment) Act, 2013, this section punishes all acts of trafficking in human beings and their exploitation.

- Sec. 372 - If any person sells, lets to hire or disposes of any other person who is a minor i.e. under the age of 18 years for purposes of prostitution, etc. shall be punished with imprisonment of either description for a term which may extend to 10 years and shall also be liable to fine.

- Sec. 373 - If any person buys, hires or obtains possession of any other person who is a minor i.e. under the age of 18 years for purposes of prostitution, etc. shall be punished with imprisonment of either description for a term which may extend to 10 years and shall also be liable to fine.

- Secs. 354, 354-A , 354-B , 354-C, and 354-D - These sections punish any person who assaults or uses criminal force on a woman intending to outrage modesty, disrobe her, or to commit an offence of voyeurism or stalking. Sections 354, 354-A, 354-B, 354-C, and 354-D were added by the Criminal Law (Amendment) Act, 2013.

- Sec. 366B - Any girl under age of 21 years being imported from a foreign country by a person with an intent that she will be forced or seduced to illicit intercourse with another person, the person so importing shall be punishable with imprisonment which may extend to ten years, and shall also be liable to fine.

- Secs. 375 and 376 - These sections were added to make the justice-delivery system more responsive to the sexual offences against women. It explicitly deals with the definitions of rape, gang rape, repeatedly raped which is a major consequence of trafficking and also lays down punishments for such acts under the said sections.

- Sec. 374 - The section defines that any person who compels another person to labour against his will shall be punished with imprisonment up to 1 year or fine or both. This section punishes those people who are involved in trafficking in humans with an intention to forced labour and grave exploitation.

iv. Bonded Labour System (Abolition) Act, 1976

An Act to provide for the abolition of bonded labour system with a view to preventing the economic and physical exploitation of the weaker sections of the people. The Act prohibits anyone from making any advance or compelling any person to render any bonded labour and states further that any agreement or custom requiring any person to do work as a bonded labour is void and provides for punishment for anyone who compels any person to render bonded labour or advance any bonded debt. Punishment in both cases is imprisonment up to 3 years and fine up to 2000 rupees. The bonded laborers are to be treated as victims and not as offenders.

v. Child and Adolescent Labour (Prohibition and Regulation) Act, 1986

An Act to prohibit the engagement of children in all occupations and to prohibit the engagement of adolescents in hazardous occupations and processes. It prohibits employment of children in hazardous industries and lays down safety measures and other requirements which shall be met irrespective of what is stated in other labour legislations.

vi. Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989

An Act to prevent the commission of offences related to atrocities against the members of the Scheduled Castes and the Scheduled Tribes, to provide for Special Courts and exclusive Special Courts for the trial of such offences and for the relief and rehabilitation of the victims of such offences. Many victims are from marginalised groups because traffickers are targeting on vulnerable people in socially and economically backward areas. This Act provides an additional tool to safeguard women and young girls belonging to SC/ST and also creates greater burden on the trafficker to prove his lack of complicity in the crime. This can be effective if the offender knows the status of victim. It specifically covers certain forms of trafficking, forced or bonded labour and sexual exploitation of women. A minimum punishment of 6 months is provided that could extend up to 5 years in any offence covered under the Act regarding trafficking in humans.

vii. Transplantation of Human Organs and Tissues Act, 1994

This Act deals with criminal responsibility in cases of harvesting of organs and trafficking of persons for this purpose. The perpetrator includes traffickers, procurers, brokers, intermediaries, hospital or nursing staff and medical laboratories and their technicians involved in the illegal transplant procedure. Section 11 declares prohibition of removal or transplantation of human organs for any purpose other than therapeutic purposes and Section 19 deals with commercial dealing in human organs and clarifies that it punishes those who seek willing people or offer to supply organs and such traffickers and alike shall be punished with imprisonment for a term which shall not be less than five years but which may extend to ten years and shall be liable to fine which shall not be less than twenty lakh rupees but may extend to one crore rupees.

viii. Protection of Children from Sexual Offences Act, 2012

It has been drafted to strengthen the legal provisions for the protection of children from sexual abuse and exploitation. For the first time, a special law has been passed to address the issue of sexual offences against children. Sexual offences are currently covered under different sections in Penal Code. However, Indian Penal Code, 1860 does not provide for all types of sexual offences against children and, more importantly, does not distinguish between adult and child victims.

ix. Criminal Procedure Code, 1973

Responsibility for providing compensation to trafficking victims is fragmented between the Central Government and individual States. This is largely the result of Sec. 357 and Sec. 357-A, the Code of Criminal Procedure, 1973 (hereinafter referred to as the CrPC). When the punishment itself contemplates sentence or fine Sec. 357, the CrPC provides that the fine can be passed on to the victim. Even if that is not so, Sec. 357-A, the CrPC have the fund - a State fund, which can be extended to the victims of any crime (not limited to trafficking) who have suffered loss or injury. However, it fails to note the form or degree of such compensation.

Although the above laws fails to provide a comprehensive mechanism to address the issues relating to the Human Trafficking in India and thus there was a need of comprehensive single legislation that will cover all forms of trafficking. Hence, *the Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill, 2018* was introduced in Lok Sabha by the Minister of Women and Child Development, Ms. Maneka Gandhi on July 18, 2018 and passed in that House on July 26, 2018 which eventually lapsed later due to dissolution of the 16th Lok Sabha.

The Bill provided for the prevention, rescue, and rehabilitation of trafficked persons. The present legislation/well-intentioned but lapsed Bill ignored the factors that drive people to risky situations and failed to integrate the lessons learned by anti-trafficking stakeholders since the adoption of the United Nations Trafficking Protocol popularly known as *"Palermo Protocol"*. It adopted a belief that trafficking can be stopped through harsh punishments, rather than addressing root causes, and this indeed may have undermined, rather than protected, the human rights of trafficked persons. Implementing a rights-based approach that facilitates, and does not criminalise migration and one that promotes decent work is the most constructive approach to prevent human trafficking. This bill was criticized for not doing what it set out to do, that of being *"clear and comprehensive"*. It was criticized for being too criminal-centric and not victim-centric enough. The aspect of how the bill would fit into the current legislative framework was again raised.

Later on, again *the Trafficking in Persons (Prevention, Care and Rehabilitation) Bill, 2021* was published in June 2021 by the Ministry of Women and Child Development. The Bill was introduced as a comprehensive law to fight human trafficking for exploitation; sexual or physical. It improved upon the 2018 Bill by widening the scope of *'victims'* to include transgenders and other persons while also extending its reach to cover offences with cross border implications. It also put forth specific mechanisms for prevention and rehabilitation. The new Bill expanded the range of offenders by bringing public servants, armed force personnel or others in a position of authority under it.

The Bill followed the trend of the 2018 Bill in recommending severe penalties for aggravated offences. Aggravated trafficking is set to be punished with rigorous imprisonment of 10 years to life imprisonment along with a fine of up to Rs.10 lakh. In case of the victim's death, the penalty is life imprisonment and fine of Rs.30 lakh. A second conviction, in case the victim is a child, may invite death sentence or rigorous imprisonment for the remainder of the accused's natural life and fine of up to Rs.30 lakh or such other fine as is provided for that offence under any other law, for the time being in force, whichever is higher.

The Bill also makes the National Investigation Agency (NIA), the lead investigating agency on such matters. It further specifies that the investigation should be completed within 90 days of the arrest of the accused. However, it was pointed out that the bill did not elucidate rescue protocols.

But, sadly the Bill was again allowed to be lapsed. While the lapsed Bill was a well-timed and well-intentioned attempt by the Indian Government to enact a comprehensive legislation which will tackle human trafficking and its fundamental problems. However, the Government was supposed to adopt a broader perspective towards trafficking and take such serious issues on the priority basis so that such legislative lapses could be avoided.

Human Trafficking - Judicial Pronouncements

Hon'ble Supreme Court in the case of *Raj Bahadur v. State of W.B.,*[17] laid down that traffic in human beings mean to deal in men and women like goods, such as to sell or let or otherwise dispose of. It would include traffic in women and children for immoral or other purposes.

In *Upendra Baxi & Lotika Sarkar v. State of Uttar Pradesh,*[18] concerned the deplorable conditions found in a Protective Home established and working under Secs. 17, 19 and 21 of the Suppression of Immoral Traffic in women and Girls Act (SITA) in Agra, India. The case, which spanned a period of 16 years, beginning under SITA and continuing until 1997, eleven years after the implementation of Immoral Traffic Prevention Act (ITPA), began after a letter was written by Upendra Baxi and Lotika Sarkar, both at the time professors at Delhi University, to a justice of the Supreme Court of India, Justice P.N. Bhagwati. The letter was a Letter to the Editor, published in a daily newspaper called the Indian Express and that revealed a shocking picture of the Agra Protective Home. *The Supreme Court converted the letter into a writ petition and ordered the superintendent of the Home to furnish explanations regarding the allegations presented in the writ petition. From 1981 to 1997, the Supreme Court monitored this case and found serious abuses and omissions in the functioning of the protective home, but never implemented a concrete decision to punish the responsible persons.*

In the case of *Vishal Jeet v. Union of India,*[19] the Court observed that, *"The causes and evil effects of prostitution maligning the society are so notorious and frightful that none can gainsay it. It is highly deplorable and heartrending to note that many poverty-stricken children and girls in the prime of youth are taken to 'flesh market' and forcibly pushed into the 'flesh trade' which is being carried on in utter violation of all cannons of morality, decency and dignity of humankind. There cannot be two opinions - indeed there is none - that this obnoxious and abominable crime committed with all kinds of unthinkable vulgarity should be eradicated at all levels by drastic steps."*

The Court further laid down following directions in this regard:

i. All the State Governments and the Governments of Union Territories should direct their law enforcing authorities concerned to take appropriate and speedy action in eradicating child prostitution.

ii. The State Governments and the Governments of Union Territories should set up a separate Advisory Committee within their respective zones to make suggestions regarding the

[17] *Raj Bahadur v. State of W.B.,* 1953 SCC OnLine Cal 129.
[18] *Upendra Baxi & Lotika Sarkar v. State of Uttar Pradesh,* (1983) 2 SCC 308 and 1998 (8) SCC 622.
[19] *Vishal Jeet v. Union of India,* (1990) 3 SCC 318.

measures to be taken and the social welfare programmes to be implemented for the children and girls rescued from the vices of prostitution.

iii. All the State Governments and the Governments of Union Territories should take steps in providing adequate and rehabilitative homes manned by well-qualified trained social workers, psychiatrists and doctors.

iv. The Union Government should set up a committee of its own to evolve welfare programmes on the national level for the care, protection, rehabilitation, etc. of the young fallen victims and to make suggestions of amendments to the existing laws for the prevention of sexual exploitation of children.

v. The Central Government and the Governments of States and Union Territories should devise a machinery of its own for ensuring the proper implementation of the suggestions that would be made by the respective committees.

vi. The Advisory Committee can also delve deep into Devadasi System and Jogin Tradition and give their valuable advice and suggestions as to what best the Government could do in that regard.

In *Bandhua Mukti Morcha v. Union of India*,[20] the Supreme Court has elucidated the rehabilitation of bonded labour and directed the Government to award compensation to released/rescued bonded labour under the provisions of Bonded Labour System (Abolition) Act, 1976 after taking note of serious violation of fundamental and human rights:

"The rehabilitation of the released bonded labourers is a question of great importance, because if the bonded labourers who are identified and freed, are not rehabilitated, their condition would be much worse than what it was before during the period of their serfdom and they would become more exposed to exploitation and slide back once again into serfdom even in the absence of any coercion. The bonded labourer who is released would prefer slavery to hunger, a world of 'bondage and illusory security' as against a world of freedom and starvation."

It may be pointed out that the concept of rehabilitation has the following four main features as addressed by the Secretary, Ministry of Labour, and Government of India to the various States Governments:

- Psychological rehabilitation must go side by side with physical and economic rehabilitation.
- The physical and economic rehabilitation has 15 major components, namely, allotment of house sites and agricultural land, land development, provision of low-cost dwelling units, agriculture, provision of credit, health medical care and sanitation, supply of essential commodities, education of children of bonded labourers and protection of civil rights, etc.
- There is scope for bringing about integration among the various Central and State sponsored schemes for a more qualitative rehabilitation and to avoid duplication.
- While drawing up any scheme/programme of rehabilitation of freed bonded labour, the latter must necessarily be given the choice between the various alternatives for their rehabilitation and such programme should be finally selected for execution as would meet the total requirements of the family of freed bonded labourers to enable them to cross the

[20] *Bandhua Mukti Morcha v. Union of India*, (1984) 3 SCC 161.

poverty line on the one hand and to prevent them from sliding back to debt bondage on the other.

The Supreme Court in *PUCL v. State of T.N.*,[21] directed the District Magistrates to effectively implement Secs. 10, 11 and 12 of the Bonded Labour System (Abolition) Act, 1976 and expected them to discharge their functions with due diligence, empathy and sensitivity, taking note of the fact that the Act is a welfare legislation.

In *Lakshmi Kant Pandey v. Union of India*,[22] Hon'ble P.N. Bhagwati, J., observed:

"6. It is obvious that in a civilised society the importance of child welfare cannot be over-emphasised, because the welfare of the entire community, its growth and development, depend on the health and well-being of its children. Children are a 'supremely important national asset' and the future well-being of the nation depends on how its children grow and develop."

The Supreme Court in *M.C. Mehta v. State of T.N.*,[23] in light of the severe violation of fundamental rights in cases of child labour observed:

"… if there is at all a blueprint for tackling the problem of child labour, it is education. Even if it were to be so, the child of a poor parent would not receive education, if per force it has to earn to make the family meet both the ends. Therefore, unless the family is assured of income aliunde, problem of child labour would hardly get solved; and it is this vital question which has remained almost unattended.

… if employment of child below the age of 14 is a constitutional indiction insofar as work in any factory or mine is concerned, it has to be seen that all children are given education till the age of 14 years in view of this being a fundamental right now, and if the wish embodied in Article 39(e) that the tender age of children is not abused and citizens are not forced by economic necessity to enter avocation unsuited to their age, and if children are to be given opportunities and facilities to develop in a healthy manner and childhood is to be protected against exploitation as visualised by Article 39(f), it seems to us that the least we ought to do is see to the fulfilment of legislative intendment behind enactment of the Child and Adolescent Labour (Prohibition and Regulation) Act, 1986."

In view of the Child and Adolescent Labour (Prohibition and Regulation) Act, 1986 the offending employer must be asked to pay compensation for every child employed in contravention of the provisions of the Act a sum of Rs 20,000 which is to be deposited in Child Labour Rehabilitation-cum-Welfare Fund.

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[21] *PUCL v. State of T.N.*, (2013) 1 SCC 585.
[22] *Lakshmi Kant Pandey v. Union of India*, (1984) 2 SCC 244.
[23] *M.C. Mehta v. State of T.N.*, (1996) 6 SCC 756.

In *Gaurav Jain v. Union of India*,[24] the Supreme Court passed an order directing, inter alia, the constitution of a committee to make an in-depth study of the problems of prostitution, child prostitution, and children of prostitutes, to help evolve suitable schemes for their rescue and rehabilitation.

The Supreme Court observed:
"27. … The ground realities should be tapped with meaningful action imperatives, apart from the administrative action which aims at arresting immoral traffic of women under the Immoral Traffic (Prevention) Act through inter-State or Interpol arrangements and the nodal agency like the CBI is charged to investigate and prevent such crimes."

The Central Government pursuant to the directions issued by the Supreme Court in Gaurav Jain case constituted a *"Committee on the Prostitution, Child Prostitutes and Plan of Action to Combat Trafficking and Commercial and Sexual Exploitation of Women and Children"*.

In *Prajwala v. Union of India*,[25] Prajwala, an anti-trafficking organization, files a PIL in the Supreme Court petitioning the Government to create a 'victim protection protocol' so as to protect the rights of victims of trafficking. Existing laws do not protect the welfare of women and children who have been rescued from trafficking and sexual exploitation. Thus, Prajwala invoked Art. 32 of the Constitution to file a Public Interest Litigation to force the Government to create a protocol for the rehabilitation of women and children who have been the victims of trafficking. The court has held that there should be complete protection provided to the victim, her family and witnesses in accordance with the Law Commission's Recommendations with respect to victim, witness protection protocol.

The Supreme Court in *Budhadev Karmaskar v. State of West Bengal*,[26] had issued notice to all States while noting down the concern on the pathetic conditions of sex workers:

"…we strongly feel that the Central and the State Governments through Social Welfare Boards should prepare schemes for rehabilitation all over the country for physically and sexually abused women commonly known as prostitutes as we are of the view that the prostitutes also have a right to live with dignity under Art. 21 of the Constitution of India since they are also human beings and their problems also need to be addressed.

A woman is compelled to indulge in prostitution not for pleasure but because of abject poverty. If such a woman is granted opportunity to avail some technical or vocational training, she would be able to earn her livelihood by such vocational training and skill instead of by selling her body. Hence, we direct the Central and the State Governments to prepare schemes for giving technical/vocational training to sex workers and sexually abused women in all cities in India.
The Court in the case of *Sampurna Behura v. Union of India*,[27] passed several orders for constitution of Juvenile Justice Boards under Sec. 4 of the Act and Child Welfare Committees

[24] *Gaurav Jain v. Union of India*, (1997) 8 SCC 114.
[25] *Prajwala v. Union of India*, 2005(12) SCC 135.
[26] *Budhadev Karmaskar v. State of W.B.*, (2011) 11 SCC 538.
[27] *Sampurna Behura v. Union of India*, (2011) 9 SCC 801.

under Sec. 29 of the Act in different States and Union Territories and most of the States and Union Territories have taken steps to constitute the Juvenile Justice Boards and the Child Welfare Committees. As there were complaints that in many districts Child Welfare Committees were not operational or functional and even Juvenile Justice Boards had not been constituted in the manner provided in the Act. The Court in its order requested the State Legal Services Authorities to coordinate with the respective Child Welfare Departments of the States to ensure that the Juvenile Justice Boards and Child Welfare Committees are established and are functional with the required facilities. On the official laxity of non-implementation of the Special Juvenile Police Unit Supreme Court in its order stated that the court will monitor the implementation of the provisions of the Act relating to Special Juvenile Police Unit under Sec. 63 of the Act.

The Court ordered that

"the Home Departments and the Directors General of Police of the States/Union Territories will ensure that at least one police officer with aptitude in every police station is given appropriate training and orientation and designated as Juvenile or Child Welfare Officer, who will handle the juveniles or children in coordination with the police as provided under Sec. 63(2) of the Act. The required training will be provided by the District Legal Services Authorities under the guidance of the State Legal Services Authorities and Secretary, National Legal Services Authority will issue appropriate guidelines to the State Legal Services Authorities for training and orientation of police officers, who are designated as the Juvenile or Child Welfare Officers. The training and orientation may be done in phases over a period of six months to one year in every State and Union Territory. The Home Departments and the Directors General of Police of the States/Union Territories will also ensure that Special Juvenile Police Unit comprising of all police officers designated as Juvenile or Child Welfare Officers be created in every district and city to coordinate and to upgrade the police treatment to juveniles and the children as provided in the Sec. 63(3) of the Juvenile Justice (Care and Protection of Children) Act 2000."

Steps towards curbing the Menace of Human Trafficking - The Four p's - (*Prevention, Protection, Prosecution and Partnerships*):

The comprehensive enhanced approach to counter human trafficking is to be guided by a framework of prevention, protection, prosecution, and partnership - based initiatives that are adaptable to address the changing environment in which this crime occurs.

I. ***Prevention: Empowering Communities to Address Human Trafficking***

Prevention activities, through awareness generation and education, play a key role in protecting individuals who are potentially at risk of being trafficked. Prevention also constitutes research activities, in order to understand both the scope as well as the nature of trafficking in the affected areas. This involves the development of social and economic interventions which offer support to those potentially at risk of being trafficked. Some of the activities include job skill training programs to promote local employment opportunities; empowerment programs to develop self-confidence, especially in children and assist them in developing their careers; community enrichment programs to discourage out-migration; and crisis intervention programs to provide

support for women and children in abusive homes or facing other crises that might otherwise push them to migrate.[28]

II. *Protection: Rehabilitation and Support for Survivors of Human Trafficking*

Recovery of trafficked persons is a long and complex process. A core element of United Nations Office on Drugs and Crime (UNODC's) mandate under the UN Trafficking Protocol is to increase the level of protection and assistance provided to survivors of human trafficking. After a trafficked person is rescued, the man, woman or child should be protected, during their stay in shelter /vigilance homes, before reintegrating them into the society.

Police and Criminal Justice staff needs standard working procedures to guarantee the physical safety of victims, protect their privacy and make it safe for them to testify against their abusers. Protection also involves ensuring that the shelter homes are safe and meet the needs of trafficked persons - that they have access to primary health care and counselling, along with legal and other assistance, and that they are effectively protected from harm, threats or intimidation, and so on.

In India, UNODC provides livelihood and psycho-social support to survivors of trafficking in shelter homes, especially women and children. It also strives to ensure quality care and support services to victims of human trafficking, in close collaboration with state governments and NGOs.

As part of its interventions with women living in shelter homes, UNODC in collaboration with the National Institute of Mental Health and Neuro Sciences (NIMHANS), a premier mental health institute in India, supported trainings for over seven hundred caregivers from government-run shelter homes for women in the states of Andhra Pradesh, Kerala, Karnataka, Tamil Nadu and Uttar Pradesh, on minimum standards for care and protection and psycho-social support. The caregivers were trained on issues of self-esteem and emotional intelligence while dealing with women and children, addressing inter-personal relationships in the shelter home and even dealing with their own feelings as caregivers.[29]

As part of its efforts to strengthen victim/witness protection, UNODC collaborated with one of its partners in the state of Andhra Pradesh, to support nearly four hundred witnesses/victims with the aim of protecting them from being coerced into withdrawing her/ his evidence, and with the following envisaged outcomes: increased conviction of traffickers, increased number of witnesses attending court, increase in charge sheets filed, reduction in instances of re-trafficking, reduced adjournments and speedy disposal of cases. In addition to that, the NGO was supported to provide training to the judiciary to ensure speedy disposal of cases, thereby

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[28] *India: Strengthening safety nets to counter Human Trafficking*, UNODC, (June 18, 2022, 09:45 pm) https://www.hurights.or.jp /archives/asia pacific/section1/10%20UN%20Office%20on%20Drugs%20and%20Crime.pdf .
[29] *Ibid.*

reducing the chances of traffickers going free without punishment. As a result, the conviction rate of traffickers and brothel keepers in the state has increased[30].

III. ***Prosecution: Strengthening Law Enforcement for the Prevention of Human Trafficking***

The UNODC, in collaboration with the Ministry of Home Affairs, Government of India implemented a project that aimed to strengthen the technical capacities of law enforcement agencies and officers in India to prevent trafficking in human beings. More than 13,490 police officers and prosecutors were trained through three hundred ninety training programs in the five project states - Bihar, West Bengal, Andhra Pradesh, Maharashtra and Goa. Eight Nodal Training Centres (NTCs) were established in all the project states. The NTCs started imparting training to law enforcement officials on a regular basis and have also been assisting NGOs who conduct trainings on human trafficking.[31]

A highlight of the project was the establishment of nine Anti-Human Trafficking Units (AHTUs) in the four project states of Andhra Pradesh, Bihar, Goa and West Bengal. The AHTU is a special Task Force, constituted within the Police department with the partnership of several stakeholders, including officials from the departments of prosecution, welfare and health, agencies that run shelter, protective and children's homes, as well as from civil society partners and the media. The combination of AHTUs and trained law enforcement officials has contributed to an increased awareness and knowledge of the issue, skill enhancement, inter-agency coordination, and better victim/witness protection.

Considering the rationale and efficacy of the AHTU as the appropriate model to address human trafficking in a holistic and comprehensive manner, the Government of India issued an advisory to all the states in India to institutionalize the gains made by the project in two important areas:

- Training of trainers on anti-human trafficking and
- Setting up Anti Human Trafficking Units (AHTUs). Work to this end has already begun, with over 50 AHTUs being functional across the country to date.

IV. ***Partnerships: Building and improving National and International Coordination and Cooperation to address Human Trafficking***

In India, till now this fourth *'P'* did not find place in the actual sense as the country is still awaiting any comprehensive policy implementation on the subject. The Indian Government recognises that human trafficking is a complex problem that can affect anyone, takes place both in India and abroad, and requires action from multiple actors, including the Central Government, State Governments, Civil Society and the Private Stakeholders. There needs to be some comprehensive policy framework between national and international stakeholders, which will ensure that collective efforts to combat human trafficking are responsive and coordinated.

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[30] Dr. Shaikh Ahmad, *Analysis of the various kinds of Human Trafficking in India*, (June 19, 2022, 02:50 pm) https://papers.ssrn.c om/sol3/ papers.cfm?abstract_id=3563138.

[31] *Human Trafficking*, Ministry of External Affairs, (June 17, 2022, 03:15 pm) https://www.mea.gov.in/human-trafficking.htm

Conclusion

In the words of 8th UN Secretary General - *Ban Ki Moon "...let us reaffirm the inherent dignity of all men, women and children. And let us redouble our efforts to build societies in which slavery truly is a term for the history books..."*

Human Trafficking has a history coterminous with that of society and has existed in various forms in almost all civilizations and cultures. It is a trade that exploits the vulnerability of human beings, especially women and children, in complete violation of their human rights. It makes human beings objects of financial transactions through the use of force, duress or deception, for various purposes, chief among them for commercial sexual exploitation and for exploitative labour.

Even today in the 21st century, when we look at the issue of human trafficking, we are not in a position to place this social phenomenon in history. Human Trafficking is the trade in human lives, a vile and heinous crime; it is the scourge of the mankind and a gross abuse of human rights. Human beings are not to be treated as commodities and they should not be offered for sale. Human Trafficking reduces the significance of human life and harms the society by violation of our belief in the human ability for a change. There is a need for stringent monitoring and implementation measures to break the networks of traffickers and strict disciplinary action against people involved in such crimes. To combat the problem of trafficking it is necessary to address the poor infrastructure and economic opportunities that create vulnerability in India.

Also, it not only the responsibility of the government to check this menace rather we as an individuals must also participate by being aware and attentive towards these activities and must respond whenever we feel something weird or unconventional in our surroundings, specially at the public places.

In our country many people like *Rajendra Dhondu Bhosle,* (Asst. Sub-Inspector, D.N. Nagar Police Station, Mumbai) who tracked down 165 girls during his service in the department. Although he retired in 2015 but his search for the last targeted 166th victim continued until he found her in 2022. Another name is of a well-known social reformer, *Kailash Satyarthy,* who with his team liberated around 86000 children from child labour, slavery and trafficking. These efforts and dedication give a ray of hope to continue our persistent effort towards the fight against human trafficking.

Thus, it may be concluded using the words of *Justice V.R. Krishna Iyer*, without prejudice to any one gender:

"...No nation, with all its boasts, and all its hopes, can ever morally be clean till all its women are really free - free to live without sale of their young flesh to lascivious wealth or commercializing their luscious figures..."

Case Commentary on *Lakshmikant Pandey v. UOI*

Sneha Bhargava[1]

Abstract

Inter-country adoptions have not always been a topic of controversy or debate, especially in India. Lakshmi Kant Pandey v UOI[2] *was a landmark case, decided on 6th February 1984, which generated this debate nationwide for the first time. It even had global organizations as a part of the hearings as well as contributors to the guidelines it established through the landmark judgement. It was no secret that there were a significant number of Indian children who had been adopted by foreign couples and lived abroad. However, it was also not news many of them had been mistreated, trafficked, and exploited. Lakshmi Kant Pandey's complaint of the same was treated as a PIL by the Supreme Court of India, and they established guidelines in their judgement to protect the children from abuse. Nonetheless, on scrutinizing the guidelines closely, it can be discerned that they have some insufficiencies and limitations. This commentary delves into the origin of transnational adoptions, particularly in India, and the maltreatment and exploitation of adopted Indian children in foreign lands. The commentary shines light on the malpractices such as trafficking, prostitution, and slave labour which Indian children faced abroad after being adopted by foreign couples. It will argue that there were a few requirements that the Court did not account for in its judgement, loopholes and limitations which created obstacles in protecting children after being adopted transnationally.*

Keywords: *Inter-country adoption, Lakshmi Kant Pandey guidelines, exploited children, practical implementation, rights of transnationally adopted children.*

Brief Facts of the Case

An advocate, Lakshmi Kant Pandey, wrote a letter to the Supreme Court criticizing the malpractices of social welfare organizations and agencies engaged in inter-country adoptions, to give Indian children to foreign parents. His complaint was based on the empirical evidence in an article of a reputed foreign magazine, *The Mail*. The findings were that the 'adopted' Indian children were made to endure long journeys to foreign nations, only to be kept in Shelter and Relief homes, and going to become prostitutes and beggars.

The Apex Court treated this as a writ petition for a PIL and recognised the dearth of regulation of inter-country adoptions in India which led to the maltreatment, sexual exploitation, and trafficking of Indian children abroad. The Court issued a notice to the Government, Indian Council of Social Welfare, and Indian Council of Child Welfare to appear in Court in response to the petition as well as to assist in laying down the principles and procedures to be followed to ensure the maximum welfare of Indian children adopted by foreign parents. Many welfare organisations like S.O.S Children's Villages of India and Barnen Framfoer Allt Adoptioner (a Swedish institution) voluntarily conveyed their desire to be a part of the hearings and

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[2] *Lakshmi Kant Pandey v. UOI* [1984] A.I.R. 469.

recommendations, which the Court subsequently permitted. They laid down a regulated framework of principles and procedures to be followed for adoption, relying on several laws and policies such as Articles 15(3), 24 and 39 of the Indian constitution[3], as well as the U.N. Declaration on the Rights of the Child (1959)[4], which would protect Indian children from maltreatment and exploitation, ensuring a healthy and decent family life abroad.

The Origin of Transnational Adoptions

The concept of inter-country adoptions gained momentum worldwide after the second world war, as a humanitarian response to the plight of children orphaned by war.[5] Indians were not very keen on adopting unrelated children with unknown parentage before the 1970s, particularly due to the social stigma associated with it. Transnational adoptions, therefore, gaining momentum in the country during the 1960s were a result of this stigma in the Indian culture.[6]

The first-time inter-country adoptions were discussed and permitted in the country was in *Rasiklal Chhaganlal Mehta v State*[7]. The Court held that they were valid under S.9(4) of Hindu Adoption and Maintenance Act, 1956.[8] Adoption agencies in India found the greater financial affordability of foreign parents extremely appealing and the lack of laws in the country made inter-country adoptions far more attractive than domestic adoptions. Consequently, there was a huge rise in transnational adoptions in India from the 1960s to mid-1980s, which were not documented reliably[9], and this non-regulation gave rise to huge problems. There were numerous cases of Indian children who were adopted by foreign parents being ill-treated and exploited. Social organizations and private agencies were all involved in the same and as a result, these children became victims of malnourishment, sexual assault, and exploitation/prostitution, neglect by parents, trafficking, and slave labour. There were illegal trades of babies and children were taken out of India by people who forged false documents to 'adopt' and then sold/ exploited them overseas.[10]

The cases of children being subjected to such misery were increasing day by day, till the Lakshmi Kant Pandey guidelines were formed to regulate inter-country adoptions. The Court's judgement stated that every child had a right to grow up in an atmosphere of love, affection, and security, possible only if he grows up surrounded by a family. The best suited environment

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[3] The Constitution of India Art 15(3), 24 & 39.

[4] Declaration of the Rights of the Child (1959), OHCHR, https://www.ohchr.org/EN/Issues/Education/Training/Compilation/Pages/1DeclarationoftheRightsoftheChild(195).aspx (last visited Jul 8, 2022).

[5] Sukanya Narain, *Inter-country adoption: A legal perspective*, SSRN Electronic Journal (2010), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2072515 (last visited Jul 8, 2022).

[6] Saras Bhaskar & ors., Adoption in India - the Past, Present and the Future Trends ResearchGate (2012), https://www.researchgate.net/publication/236005514_Adoption_in_India_the_PastPresent_and_the_Future_Trends (last visited Jul 8, 2022).

[7] *Rasiklal Chhaganlal Mehta v State [*1982] A.I.R. (Guj.) 193.

[8] The Hindu Adoption and Maintenance Act, 1956.

[9] *Supra Note* 6.

[10] Vilas, Inter Country Adoption academic (2019), https://www.lawctopus.com/academike/inter-country-adoption/ (last visited Jul 8, 2022).

would be the family of the child's biological parents, but if for any reason that is not possible, the next best alternative would be to find adoptive parents for the child within the country. Only if intra-country rehabilitation is not possible, should 'inter country adoption' be acceptable.[11]

Critical Analysis of the Judgement

Lakshmi Kant Pandey v UOI[12] was a landmark judgement that transformed inter-country adoption in India – a good judgement that left the people desiring for more.

Issues with practical implementation

The Court gave many elaborate guidelines in the case, addressing multiple issues in inter-country adoption, but numerous problems still arose because the Court did not oversee their practical application. One of the guidelines issued by the Court was that inter-country adoptions only take place through government and recognized agencies, but they never set a criterion necessary to become a recognized agency nor a committee to oversee them. Even the Central Adoption Resource Authority (CARA)[13] was established only in 1990.

The formation of a committee with any honourable/retired member of the judiciary or someone with experience in the field of child welfare, who's not from the government and not involved in children getting adopted could have overseen the practical application of these guidelines, submitting reports to the Court. But the dearth of said committee has contributed to issues such as multiple states not having statutory houses and juvenile boards not functioning properly. Some agencies which do not even have childcare facilities have been approved as recognised agencies for inter-country adoptions.

The Apex Court opined those children, especially orphaned and abandoned, should be transferred for placement since the main purpose of adoption is placement. But, in situations where recognised agencies do not even have the facility of childcare, to transfer a child from statutory houses is extremely harmful to the child.[14] Moreover, the Court failed to address a guideline to prevent the illegal trade of babies, cases of which increased post the issuance of their judgement.[15]

Absence of uniform law dealing with Inter-Country Adoptions

There was and is no explicit law for transnational adoption in India. The Adoption of Children Bill, 1972 was rejected due to Muslim opposition and the Adoption of Children Bill, 1980 has not been enacted as an act till date.[16] There were multiple procedural concerns which the Court did not address in their Guidelines in the absence of such laws. For instance, if a couple from a

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[11] *Supra Note* 3.
[12] *Ibid.*
[13] Central Adoption Resource Authority right to information act ... - CARA, http://cara.nic.in/PDF/RTI/RTI%20Manual%20of%20CARA.pdf (last visited Jul 8, 2022).
[14] Manjeet Sahu, Inter-Country Adoption and Its Judge-Centric Approach in Indian Legal System SSRN (2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2757448 (last visited Jul 8, 2022).
[15] *Supra Note* 5.
[16] *Ibid.*

country with no domestic laws for transnational adoptions, wants to adopt a child from another nation, how would the law be applicable:

1) Where the country of adoption does not have domestic laws for transnational adoptions.
2) Where the country of adoption does have domestic laws for transnational adoptions.

Additionally, if authorities in their own country consider a couple to be unfit for adoptions, shall they be permitted to adopt if another nation deems them suitable.[17]

The only religion which recognizes complete adoption is Hinduism, their codified law in Hindu Adoptions and Maintenance Act, 1956.[18] Muslims, Jews, Parsis and Christians do not recognise complete adoption, those who want to adopt a child can only take him/her under their 'guardianship' through Guardians and Wards Act,1890.[19] This act, however, has no references to nationality, domicile, residence etc. being a clause to their pertinency.[20] Since there were no distinctions made in the Lakshmi Kant Pandey case, this discriminatory condition as a loophole was not addressed, and many times, the parents changed their religion[21] just for adoption.

Concerns with respect to citizenship rights of Adopted Children

There were also issues of migration and citizenship – The Supreme Court allowed children to be adopted transnationally but did not address their citizenship rights. This contention was raised in 1991, and the Supreme Court denied the children citizenship rights. They said that "allowing citizenship till the attainment of majority may create hurdle in early cementing of the adopted child into the adoptive family"[22]. But they did not clarify the types of hurdles that may be created by permitting citizenship. They should have elaborated on the consequences and prospects of the adopted children being exploited, along with a meticulous reasoning of not allowing citizenship rights. The major issue with this concept was that neither was there no legal provision available nor non-compliance with the prevailing laws. The existence of a comprehensive legal framework for specific performance of the contract was of the utmost need yet missing from the judgement. As a result, children were treated as saleable goods.[23]

Progress reports of Adopted Children

Another guideline the Court gave was that post the inter-country adoption, progress reports of the child should be furnished quarterly for the first two and then half-yearly for the next three years.[24] But, suppose a child of age 3 (the Court held that preferably, the child should be given for adoption before he/she completes the age of three, though no hard and fast rule could be laid down in this respect) is adopted by a foreign couple, then his reports would only be produced

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[17] *Ibid.*
[18] The Hindu Adoption and Maintenance Act, 1956.
[19] The Guardians and Wards Act, 1890.
[20] Satya Ranjan Swain, *Conflict of laws in legitimacy, legitimation and adoption*, SSRN Electronic Journal (2012), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2046239 (last visited Jul 8, 2022).
[21] *Supra Note* 7.
[22] *Supra Note* 14.
[23] *Ibid.*
[24] *Supra Note* 2.

till he turns 8. There would be no way of knowing if he was neglected, trafficked and/or sexually exploited after that. The Court should have mandated at least yearly reports post 5 years of adoption, till the child turns 18 years of age, to make sure he is well till he at least attains maturity.

Further clauses the court did not take into account

Another problem which arose was that agencies assumed that abandoned children were legally free for adoption since no clause prohibited the same. The clause to produce these children before a Juvenile Court for further enquiries was introduced much later.[25] The Court also did not account for the lengthy procedural delays and expenses in the guidelines, a hassle which discouraged many couples from adopting.[26] Lastly, the guidelines did not even have any penalties for those who violated them. These were introduced subsequently through the Hague Adoption Convention[27] and the Juvenile Justice Act[28].

Conclusion

Inter-country adoptions are great ways to give a good life to orphaned and abandoned children, but in the absence of a proper framework for the same, children's rights will continue to be violated. There was not still does not exist a concrete uniform law dealing with inter-country adoptions in India. *Lakshmi Kant Pandey v UOI* although established good guidelines dealing with inter-country adoptions in India but had several issues such as relating to the practical application of those guidelines, the citizenship rights of the adopted children as well as the lack of guidelines addressing the punishments of the violators. Many such clauses were necessary to ensure the security of children in the nation, as well as when they went abroad after being adopted.

The case was a landmark case, a great example of the judicial activism on part of the Apex Court. They issued elaborate regulations with huge social implications, all for the protection of adopted Indian children from exploitation abroad. But they failed to take into account a few loopholes, the avoidance of which could have made these guidelines more comprehensive and offered better safeguards to the transnationally adopted Indian children.

[25] *Supra Note* 5.
[26] *Ibid.*
[27] The Netherlands e-Vision.nl, Adoption Section HCCH, https://www.hcch.net/en/instruments/conventions/specialised-sections/intercountry-adoption (last visited Jul 8, 2022).
[28] The Juvenile Justice (Care and Protection of Children) Act, 2015.