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Research Papers

Pragyaan: Journal of Law

From the Chief Editor

It's a matter of pleasure that we are releasing the Vol. 12 issue 2 of Pragyaan: Journal of Law which speak itself of the huge efforts put in. Legal research demands a lot of understanding about various disciplines and the best part is that the issue is successful in consolidating the research from the scholars, in a presentable shape.

In the post-covid environment when the world is resettling with new learnings and new methods, research contributions are also towards new heights. Covid has taught us new ways of life and learning and the researchers have also learnt new tools and have adopted new methods and processes. Consequently, the quality and coverage of research have also enhanced significantly.

We are observant and we acknowledge that with every next issue, the quality of research contributions is increasing; and we are hopeful that present issue is liked by the readers for its impactful research.

We acknowledge the support of our advisors, reviewers, contributors, and the faculty colleagues in making possible this present issue in this form.

We extend gratitude to all those who have contributed directly or indirectly.

We look forward to a continued and meaningful association.

Prof (Dr.) Ashish Verma

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CONTENTS

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Research Articles

Digitalization of Dispute Resolution Process in India

Dr. Faizanur Rahman*
Dr. Mohammad Haroon**

ABSTRACT

Access to justice is the basis of a civilized nation and a right of every citizen. The Constitution of India provides for access to speedy justice for all. To achieve this goal, India has a dedicated strong judicial system, but due to the case backlog, it is facing several challenges and becoming less effective. The case backlog is one such problem that ailing the judiciary for a long time and constantly caused a loss of the reputation of the Judiciary. The Covid-19 outbreak made the situation more complicated and resulted in a large section of society being unable to receive timely access to justice. This outbreak further enhanced the list of case backlogs which is one of the highly challenging issues before the Indian Judicial System. Along with some other emerging initiatives like ADR, the inception of special courts etc. the digitalization of disputes resolution process is enabling the Judiciary to reduce the case backlog. The technology can achieve the goal of speedy access to justice. This paper is aimed to examine the use of information technology applied in the resolution of disputes i.e. online dispute resolution (ODR) in India with special reference to recent happenings and the future potential.

Keywords: ADR, Dizitalization of Courts, ICT, Judicial Processes, Online Disputes Resolution (ODR), Pandemic

1. Introduction

We wonder how the availability of information and advances in computer technology have affected our lives (ICT). The proliferation of information technology has led to improvements in efficiencies, effectiveness, and the utilisation of available resources to their fullest potential.[1] The proliferation of information and communication technologies is causing a sea change across all spheres of human endeavour. Courtrooms were closed because of the global health emergency, which was a major setback for those waiting in line for justice.[2] Everyone was quarantined during this time. In the midst of the pandemic, it was the advancements in information technology that made life easier.[3] Technology allowed the courts to continue operating virtually throughout the pandemic, which improved access to justice and decreased the number of pending cases. The courts were open, and their proceedings are still being streamed live online. The enormous challenges that are being faced by the judicial system as a result of arrears, backlogs, and delays can be partially resolved if the courts have operational efficiency, coordination, accessibility, and speed, all of which are indeed possible with the use of information technology. However, the current rate of development of courts with information and communications technology is too slow, particularly at the subordinate court level, and it is unlikely to have the desired impact any time soon.

2. Digitalization of Courts

Information and Computer Technology, also known as ICT, refers to the use of computers and other electronic communication devices and software, such as facsimile machines, electronic mail, and video conferencing. These technologies allow for the processing of large amounts of data in a timely and accurate manner, as well as the exchange of helpful information between different locations. ICT also helps the judicial system reach decisions that are of a higher quality. Utilizing modern information and computer technology will result in significant enhancements to the case management, file management, and docket management processes.[4] In particular, the following are areas where the use of ICT will result in enhanced productivity and reduction of delays.

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1 K.Pandurangan, E- Justice, Practical Guide to the Bench & the Bar, Universal Law Publishing Co, New Delhi, 2015.

2 Nidhi Sengar, Pratyush Raj & Rahul Kumar, The Plight of Indian Judiciary and How ICT can be its Savior", 2 (1) International Journal of Research in Engineering, Science and Management 459-462 (2019)

3 Rishi Prakash, T. Mohanty, Ramji Gupta & Vinay Jain, ICT in "Indian Court-Challenges & Solution", 1(2) International Journal of Internet Computing 21-25 (2011)

4 Use of Technology in Judicial Process and Alternative Dispute Resolution Available at: https://www.lawctopus.com/academike/use-technology-judicial-process-alternative-dispute-resolution/ (last visited on 01/11/2022)

(i) Legal Information Data Bases

(ii) Online query system for precedents, citations, codes, statutes etc.

(iii) Generation of Cause List and online statistical reports.

(iv) Online Caveat matching.

(v) Online updating of data, monitoring and "flagging" of events.

(vi) Pooling of orders and judgments.

(vii) Daily List generation with historical data of each case.

(viii) Word processing with standard templates including generation of

(ix) notices/processes.

(x) Access to international databases.

(xi) Feedback reports for use of various levels.

After appropriate planning, information and communications technology can be implemented in all of these different areas. In particular, keeping better track of cases would result in improved monitoring and control of cases by the judges, rather than by the lawyers.[5]

3. Scope of Technology in Judicial Processes in Different Jurisdictions

The widespread adoption of information and communication technology (ICT) in today's courts is one factor that is revolutionising the entire judicial system. Lawyers can now make their written submissions in real time with the assistance of a smartphone. Both inside and outside of the judicial system, video conferencing is an increasingly common practise. The 'Lawnet Service Bureau' is currently establishing networking relationships with other law firms, the judiciary, and various databases. Their Differentiated Case Management (DCM) system places cases in subordinate courts on one of several different management tracks depending on the nature and complexity of each case. People from the general public who come to the courthouse have access to a touch screen that provides information on the current status of various cases. This practise encourages openness of communication and helps to strengthen accountability. [6]

Since quite a few years ago, numerous nations have been making extensive use of information technology. The judicial systems of the following countries all make use of various forms of technology, as shown in the following examples:[7]

(i) The USA and UK: The judicial system in the United States of America has been heavily reliant on technological advancements for a number of years. A significant amount of progress has been made in the area of software development for computers in subordinate courts throughout the United Kingdom. For example, the Local County Court Management System (LOCCS) used in England has a database system which is part of a package called CASEMAN and supports the following judicial applications:

(i) Creates initial court records for registering a case

(ii) Issues summons and monitor the service of the summons

(iii) Stores electronic copies of evidence

(iv) Generates Cause List

(v) Updates records

(vi) Maintains Court Dairy

(vii) Automatically generates other relevant documents and records

(ii) Australia: The term "Cyber Courts" refers to a system of courts in Australia that make extensive use of technology in the legal system at all stages. As a result, these courts have demonstrated a significant reduction in the amount of time spent waiting for decisions.

(iii) Singapore: A process that is active, efficient, and effective in case management is maintained by Singapore's courts through careful management of their time and resources. The application of information and communication technology (ICT) in Singapore's judicial system is not limited to the use of computers. The use of closed-circuit television (CCTV) in jails and court premises drastically reduces the number of instances in which criminal cases require transporting accused parties or witnesses within the country or from outside the country. The experience of using information and communications technology in these countries, particularly the United Kingdom, could provide very helpful pointers as well as specific tools and software in the process of developing systems that are suitable for India.

(iv) India: There has been a sufficient amount of penetration of the information technology sector into both private and public organisations in India. E-justice is regarded as an organ of e-governance in the country, and its services are provided in that capacity. There are 15,000 courts spread across 2500 court complexes that make up the Indian judicial system. Since the year 1990, people have been working toward the goal of computerization. It

[5] Ibid

[6] Available at: https://blog.ipleaders.in/digitalization-impact-indian-legal-system/ (last visited on October 31, 2022)

[7] Haitham A. Haloush & Bashar H. Malkawi, "Internet Characteristics and Online Alternative Dispute Resolution", 13(327) Harvard Negotiation Law Review 327-348 (2008)

has been proposed to implement ICT in three phases spread out over a period of five years as part of the National e-Governance Plan, which has designated the computerization of courts as a Mission Mode Project (MMP). The purpose of this project is to design, produce, deliver, and set up automated decision-making and decision-support systems in the legal system.[8] The main objectives of the MMP are as follows:

(i) To help the judicial administration of courts in streamlining their day-to-day activities.

(ii) To assist judicial administration in reducing the pendency of cases.

(iii) To provide transparency of information to litigants.

(iv) To provide access to legal and judicial databases to the judges.

As soon as the project is completely put into action, it will be able to provide the services of electronic case filing, online availability of judgments and cause lists, as well as the delivery of notices to clients provided that their email IDs are available.[9]

In December 2004, work on putting the project into action got underway, and at the same time, an electronic committee was established to monitor the project's progress. The e-Committee was responsible for developing both a national policy and an action plan. Up to this point, 700 courts in metro cities and 900 courts in capital cities have been covered, with the exception of the courts in the North East, Ahmedabad, and Patna. The Cabinet's approval has been secured for the execution of the project in 2100 court complexes, and a sum of Rs. 442 crores has been allocated for the implementation of the project in a span of 2 years. Under the direction of the e-Committee as a whole, the National Informatics Centre (NIC) is the organisation responsible for carrying out the work.[10]

The e-Courts project will ensure that the status of pending cases from every court will be available online, including the cause list as well as the case details. This information will be accessible 24 hours a day. Additionally, it will assist the judicial system in issuing digitally certified copies in an instant. In each and every courthouse, assistance counters for the filing of cases, the distribution of certified copies, and the retrieval of case information will be established. Citizens will have an easier time reporting crimes and obtaining information if this is implemented.[11]

The production of victims and witnesses will be accomplished through the use of video conferencing during the second phase of this project. Notifications and summonses from a superior court will be delivered to the parties via electronic means. Court orders and judgments that have been digitally signed will be made available on the internet.

In addition to that, the project will assist in the creation of a database of pending cases and the electronic calculation of fees, both of which are important steps toward eliminating corruption. It will use technology to assign cases to the appropriate judges. Cases that are very similar to one another will be grouped together, which will aid in the closure of very similar cases all at once. In addition to that, the system will save digital transcripts of the evidence, which will render them unchangeable. In addition to that, the monitoring of process service levels will be made easier with the help of this system.[12]

4. Establishment of E-Courts in India

Over the course of the past one decade, the National Informatics Centre (NIC) has maintained a close working relationship with the Indian Judiciary. As early as 1990, when the COURTIS (Court Information System) Project was conceptualised and commissioned for the purpose of streamlining registries of various courts, NIC began playing a role in serving the legal community through the utilisation of information technology. COURTIS was developed by NIC with the intention of catering to the needs of all parties involved in the legal system, including litigants, advocates, judges, law firms, legal institutions, the government, researchers, and the general public.

Through the National Information Commission's (NIC) satellite-based computer-communication network known as NICNET, all of the High Courts have been computerised and interconnected. The COURTIS project, which is based on NICNET, has successfully interconnected the Supreme Court and all High Courts in India, and it is currently working to computerise and integrate all District Courts in the country. The primary features of COURTIS include the case status, the Judgment Information System (JUDIS), cause lists, and daily orders that are accessible via the internet. There are many other online databases in

[8] Available at: http://onefuturecollective.org/law-and-justice-in-the-digital-age/ (last visited on October 31, 2022)

[9] Rishi Prakash, T. Mohanty, Ramji Gupta & Vinay Jain, ICT in "Indian Court-Challenges & Solution", 1(2) International Journal of Internet Computing 21-25 (2011)

[10] Available at: https://vidhilegalpolicy.in/wp-content/uploads/2019/05/eCourtsinIndia_Vidhi.pdf (last visited on October 31, 2022)

[11] Available at: https://kjablr.kar.nic.in/assets/articles/StrengtheningJusticeDeliverySystemSomeChallengesandSolutions.pdf (last visited on October 31, 2022)

[12] Available at: https://www.livemint.com/companies/news/cyril-amarchand-mangaldas-to-set-up-india-s-first-legal-tech-incubation-centre-1550602978148.html (last visited on October 31, 2022)

addition to JUDIS that make the quick reference of cases a lot easier. These include the likes of Manupatra, Westlaw, and Indian Kanoon, amongst others.[13]

Following in the footsteps of the Supreme Court's computerization, the NIC began the process of computerising all High Courts and benches. In addition to this, the List of Business Information (LOBIS) has been implemented across all High Court Courts by NIC. It has to do with the scheduling of cases that are going to be heard by the courts the day after tomorrow. It made it possible for the Registries of the Supreme Court and High Courts to get rid of the manual process of generating cause lists and, as a result, eliminate the possibility of manipulation by vested interests.

These databases include information regarding fresh cases, cases that have been resolved, and cases that are still pending. The majority of the High Courts have opened query counters alongside the Filing Counters in order to provide litigants and advocates with information regarding the current status of their cases. New cases can only be submitted to the Supreme Court of India and the country's High Courts through the use of the computerised Filing Counters. While the attorneys wait in line to file their cases in front of the counters, the data entry operator enters the preliminary details that are required for registration. These details include party names, advocate information, and other relevant information.

The computer terminal located at the query counter is utilised in order to respond immediately to the inquiries posed by the litigants. The flaws, if there are any, are listed out and then given to the litigants or advocates to be fixed. In addition, the system will automatically verify that the time limit has not been exceeded.

In addition, the NIC began the process of computerising all 430 district courts in the country, following in the footsteps of the High Courts Computerization Project. This was done in order to supply the district judges with judicial and legal databases. This project has the potential to be expanded even further so that technology courts can be established across the country.

5. Significance of Tele-Justice

In its most basic form, telejustice refers to the application of information technology (IT) services to the process of judicial administration. It can be as easy as making a phone call, as complex as utilising satellite technology to communicate between people in different countries, or as high-tech as utilising video-conferencing equipment or the internet. Today, a significant number of judicial officers participate in daily video conferences, and these conferences can even be connected to prisons. In a similar vein, the technology of the intranet can be found in many courts today.[14]

In a system known as tale justice, the accused person can now be present in a court through the use of a video link that is established on ISDN lines between the prison and the court. Several states in India, including Maharashtra, Andhra Pradesh, Tamil Nadu, Gujarat, and Bihar, have already implemented tale justice. In the Indian state of Maharashtra, for example, more than 40 jails in and around the city of Mumbai are linked to district-level courts through the use of video conferencing.

Transporting inmates from the correctional facility to the courthouse is not without its inherent dangers. The deployment of policemen, additional fees for security, and the cost of transportation are all additional costs that must be accounted for. The use of tele-justice can result in significant cost savings in these areas.

Tele-justice involves two different kinds of technology:[15]

(i) Store and Forward: Used for moving digital images from one location to another. A shared digital camera is used to capture an image in digital format, which is then uploaded to the computer and transferred to the destination of the sender's choice. In most cases, this phrase refers to circumstances that do not constitute an emergency. Valuable but contested documents that could not be sent by any other means of communication without running the risk of being intercepted could be digitally imaged and thus stored and forwarded to be analysed and reported on.

(ii) Two-way Interactive Television (IATV): When an in-person consultation is required, this phrase is used. A consultation can take place in 'real time' if both locations have the necessary equipment for video conferencing.

It is becoming increasingly recognised all over the world as a reliable method for carrying out legal procedures. By installing a video conferencing system not only in the courtroom but also in the correctional institution, defendants will be able to participate in all legal proceedings without subjecting law enforcement to the risks that are normally associated with transporting prisoners from the prison to the courthouse..

During the course of a trial, video conferencing not only helps connect multiple courtrooms but also makes it

[13] Available at: https://www.theleaflet.in/challenges-in-setting-up-virtual-and-online-courts-in-india/ (last visited on October 31, 2022)

[14] Rishi Prakash, T. Mohanty, Ramji Gupta & Vinay Jain, ICT in "Indian Court-Challenges & Solution", 1(2) International Journal of Internet Computing 21-25 (2011)

[15] Nidhi Sengar, Pratyush Raj & Rahul Kumar, The Plight of Indian Judiciary and How ICT can be its Savior", 2 (1) International Journal of Research in Engineering, Science and Management 459-462 (2019)

possible to use multiple applications simultaneously. A straightforward user interface is provided by the system, making it possible for non-technical users such as judges and court staff to operate and maintain the judicial video conferencing system with relative ease.[16]

The video conferencing equipment is mobile, which allows it to be moved from room to room, and it connects to the data infrastructure that is already present in the court. During a proceeding, decisions and actions can be carried out in a timely manner if they are conducted via video conferencing. [17]

Other advantages include making specialisation more accessible to rural as well as urban areas, easing prohibitive travel and costs associated with it for litigants, opening up new possibilities for continuing education for isolated or rural legal practitioners, and reducing the costs of legal aid for those who live in rural areas. However, there are a number of obstacles that can prevent the traditional justice system from reaching its full potential. In many countries, foreign lawyers are not permitted to practise unless they first obtain a licence to do so in that country. There are a lot of private insurers that won't reimburse. Another factor is that there is an inadequate supply of suitable communication technology, which is particularly prevalent in rural areas. The traditional justice system requires extremely high bandwidth, which standard telephone lines are unable to provide for it. The computerization of the judicial system has made it possible to handle all matters, including those relating to security, in an efficient manner.

6. Role of Technology and Alternative Dispute Resolution

The term 'Alternative Dispute Resolution' (ADR) refers to a mechanism that aims to settle legal disagreements of various kinds outside of the context of conventional courts. This is the primary goal of the ADR mechanism. There is a broad spectrum ranging from the purely consensual mode of resolution of disputes to an executive procedure such as arbitration, conciliation, or negotiation, through the use of a combination of some of the techniques such as negotiation, conciliation, mediation, and arbitration may also be used to resolve certain disagreements.[18]

The practise of shopping online is becoming increasingly important and unavoidable. As a result, it is absolutely necessary to take into consideration the legal repercussions that may result from the expansion and development of electronic commerce. However, the absence of appropriate mechanisms for the resolution of disputes in cyberspace will constitute a significant barrier to the expansion of electronic commerce in the future. It is possible to make the case that the form of ADR known as Online Alternative Dispute Resolution (OADR) has the potential to maximise the expansion of online business when ADR moves into the digital realm, particularly when it comes to arbitration and mediation as the two primary types of ADR.[19]

ODR stands for 'online dispute resolution', which is a subfield of dispute resolution that makes use of technology to make it easier for parties to settle their disagreements with one another. It primarily entails negotiating, mediating, or arbitrating the dispute, or some combination of all three of these processes. When viewed in this light, it is frequently considered to be the online equivalent of ADR. On the other hand, ODR has the potential to supplement the effectiveness of these more conventional approaches to conflict resolution by incorporating cutting-edge strategies and online technologies into the process.

ODR requires the creation of a digital copy of the actual location where the dispute will be resolved, as well as the utilisation of a number of different channels for the transmission and reception of information, including e-mail, SMS, digitised documents, grid computing, as well as video and teleconferencing. ODR is advantageous for a number of reasons, including the fact that it is productive, cost-effective, and non-confrontational. Additionally, it calls for fewer in-person meetings and less in-person data storage.

The implementation of ODR in India has not been fruitful owing to the lack of knowledge and the absence of adequate willpower to use Information and Communication Technology for Dispute Resolution. Perhaps, it is a very bizarre idea for Indian Industry and Commercial Entities to use ODR for Dispute Resolution. ODR can become a very effective ADR Mechanism in India. The ADR in India is governed by the outdated and problematic Arbitration and Conciliation Act, of 1996. Unless sufficient provisions are made to support the incorporation of technology into the field of ADR in India, online dispute resolution cannot be fully implemented.[20]

One major factor for the lack of development in the field of ODR in India as well as worldwide is the absence of uniform laws in this regard. The United Nations

[16] K.Pandurangan, E- Justice, Practical Guide to the Bench & the Bar, Universal Law Publishing Co, New Delhi, 2015.
[17] Nidhi Sengar, Pratyush Raj & Rahul Kumar, The Plight of Indian Judiciary and How ICT can be its Savior", 2 (1) International Journal of Research in Engineering, Science and Management 459-462 (2019)
[18] Available at: https://www.thehinducentre.com/publications/policy-watch/article35229520.ece (last visited on October 31, 2022)
[19] K.Pandurangan, E- Justice, Practical Guide to the Bench & the Bar, Universal Law Publishing Co, New Delhi, 2015.

Commission on International Trade Law (UNCITRAL) has taken efforts in the direction of providing a uniform legal framework for the ODR. Once this is brought into force and is suitably incorporated into the laws of the country, ODR can become an effective means for dispute resolution in India.[21]

7. Impacts of Technology on Judicial Process

The most significant impact of technology concerning the judicial process has been in the domain of procedure. Investigative agencies have increasingly come to rely on forensic techniques such as analysis of fingerprints, voice, handwriting, blood samples, DNA and other bodily substances for evidence gathering. Software is also used for reconstructing the images of suspects and aiding the investigation.[22]

A new branch of investigation known as cyber forensics has gained a lot of attention in recent years.[23] As newer technologies are introduced to assist investigation agencies, it is important to not be blindly enthusiastic about their reliability. The use of scientific techniques holds immense promise in the criminal justice system, but before accepting each technique we must examine it critically in light of the constitutional rights granted to citizens and the requisite evidentiary standards.[24]

8. Conclusion

Since the initial step toward the computerization of courts in India was taken in the year 1990, the country has made significant progress. Its benefits have become apparent as a result of the simplification that it has brought to the legal process, which has benefited not only judges and attorneys but also litigants.[25] It has significantly cut down the amount of time it takes for the various aspects of the judicial process, which has resulted in a smaller backlog of cases.[26] The increased ability of citizens and public institutions to communicate that is made possible by technological advancements is beneficial to the accessibility of justice. The implementation of information and communication technology will allow the Judiciary to perform to the best of its abilities, but there are still many challenges that need to be conquered before this can happen. After the judicial system has achieved total success in integrating the use of contemporary technology, access to justice will be able to be provided in a manner that is both prompt and effective for all parties involved. The process of digitalizing courts is currently underway, which has the potential to be a game-changer in terms of enhancing both the functioning system and the future potential of the judicial system.[27]

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20 Setlur B. N. Prakash, "E Judiciary: a Step towards Modernization in Indian Legal System" 1(1) Journal of Education & Social Policy (2014).

21 Rishi Prakash, T. Mohanty, Ramji Gupta & Vinay Jain, ICT in "Indian Court-Challenges & Solution", 1(2) International Journal of Internet Computing 21-25 (2011)

22 Haitham A. Haloush & Bashar H. Malkawi, "Internet Characteristics and Online Alternative Dispute Resolution", 13(327) Harvard Negotiation Law Review 327-348 (2008)

23 B.B. Nanda and R.K. Tewari, "Cyber Crime - A challenge to Forensic Science", The Indian Police Journal 102-103 (2000).

24 Available at: https://www.niti.gov.in/sites/default/files/2021-11/odr-report-29-11-2021.pdf (last visited on October 31, 2022)

25 Available at: https://main.sci.gov.in/pdf/ecommittee/action-plan-ecourt.pdf (last visited on October 31, 2022)

26 K.Pandurangan, E- Justice, Practical Guide to the Bench & the Bar, Universal Law Publishing Co, New Delhi, 2015.

27 Nidhi Sengar, Pratyush Raj & Rahul Kumar, The Plight of Indian Judiciary and How ICT can be its Savior", 2 (1) International Journal of Research in Engineering, Science and Management 459-462 (2019)

Uniform Civil Code and Judicial Approach in India: A Study

Dr. Jageshwar Nath Singh*
Dr. Siddharth Thapliyal**

ABSTRACT

Article 44 of the Constitution of India reads as under:

"Uniform civil code for the citizens: The State shall endeavor to secure for the citizens a uniform civil code throughout the territory of India".

The term "civil" has been employed in a variety of contexts. In this context, it relates to what is known as civil law, which refers to the law dealing to citizens' private rights in respect to one another, as opposed to public law.[1] However this article is merely a directive principle of State Policy and not subject to challenge for enforcement in courts.[2] And due to this, the judiciary has failed to appreciate the dynamic character of the directive principles which define the constitutional goals.[3] Although Supreme Court has observed that DPSP are to supplement fundamental rights to effectively realize the constitutional mandate[4] and to make this country a welfare state,[5] and in number of cases judiciary has emphasized on the need of a Uniform Civil Code. In Mohd. Ahmed Khan v. Shah Bano Begum,[6] it was held that,

"It is a matter of regret that Article 44 of our Constitution has remained a dead letter. It provides that "The State shall endeavor to secure for the citizens a uniform civil code throughout the territory of India".[7]

Introduction

The mandate of Article 44 is directed towards the "State", Furthermore, the mandate stated that the state "must" seek to secure a Uniform Civil Code, not that it "shall" enact it immediately. A particular direction was not required for the enactment of a Uniform Civil Code; even without it, the legislature might have enacted such a Code in exercise of the powers conferred in it under List III, Entry 5 of Schedule VII to the Constitution. The phrases "endeavour" and "secure" were highlighted in Article 44's mandate. The word "enactment" was not even mentioned.

It is clear that the founders of the Constitution were well aware of the Himalayan challenges that could arise when creating a uniform Civil Code. As a result, they urged the state to "make every effort to ensure" the same.

Ever since our Constitution adopted the goal of a Uniform Civil Code under Article 44, a continuous, contentious and acrimonious debate has been going on regarding the utility of such a code and occasionally even going to the extent of questioning the very reason of this constitutional provision. It is unfortunate that we should have remained in the realm of law, has been transformed into a political issue by the short sightedness of our present day politicians causing an irreparable damage to this important cause. In spite of the pronouncement of Supreme Court directing the state to take necessary steps for implementing this constitutional provision, the Indian state has hardly been moved out of its stupor. On the other hand during the last general elections, a leading political functionary at the national level had the temerity to declare that of his party was voted to power, it would not take any steps to implement Article 44 of the Constitution, without realizing that a person of his stature could not have taken an anti-constitutional stance to garner votes.[8] Though substantive laws such as crime, commerce, and the economy are now regulated by various secular laws based on the principles of 'justice, equity, and good conscience,' personal laws still operate and the govern the mindset of people. according to their own religious beliefs. Many personal laws,

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1 DD Basu, "Commentary on Constitution of India", 8th Ed., Vol. 1, Lexis Nexis, Butterworths, Wadhwa, Nagpur, 2010
2 Article 37, Constitution of India.
3 P. Pameswara Rao , "The Directive Principles of State Policy", Comparative Constitutional Law: Festchrift, Mahendra P. Singh, Eastern Book Company 1989, pg. 367-374
4 State of Kerala v. MJ Thomas 1977 (1) SCR 273
5 Uniform Civil Code, "Handbook on Divorce", 5th Ed., Universal Law Publishing Co. Pvt. Ltd.
6 AIR 1985 SC 945
7 AIR 2000 SC 1650
8 K.C Jena, Uniform Civil Code, The Law Publications, First Ed., 2007

particularly those of Hindus, have been codified and implemented into statutes, along with certain amendments in light of modern-day compulsions and changing circumstances, on other hand, other individuals take part in their own traditions of their own religious communities.

Under the fear of antagonism, the British colonial government was of the belief that it is best to not interfere and indulge in the 'religious' sentiments of Indians and thus long established practices of personal law remained untouched by the government. However they brought about certain legislations to end some turbulent practices like sati. Later, successive Indian governments of Independent India tended to follow in the footsteps of British rulers, resulting in a very complex system of personal laws governing respective personal relationships in India, despite a clear Constitutional mandate to the Legislature to enact a uniform civil code applicable to all religious groups and governing all family relations.

Dr. Tahir Mahmood has made a very powerful plea in his book regarding framing a uniform Civil Code for all citizens of India. He says:

"In pursuance of the goal of secularism which is enshrined under the Constitution of India, the State needs to stop administering personal laws based on religion".[9]

He aspired for the majority community to take the lead, but one should keep in mind that, lead or no lead, the state must act. The adoption of an universal civil code is the only way to address issues like as conversion and bigamy by Hindu men. In another case of John Vallamattom v. Union of India,[10] it has been held that it is a matter of great regret that Article 44 of the Constitution has not been given effect yet. The legislature has yet to act in order to adopt a comprehensive civil code. A unified code will aid the cause of national unity by removing conflicts and dichotomies based on diverse philosophies. The main issue expressed against the adoption of the Uniform Civil Code is that it would result in tyranny of the minority community and faith. Dr. K.M. Munshi, an outstanding member of the Drafting Committee, rejected the foregoing objection before the Constituent Assembly, arguing that:

"A further argument which has been advanced is that the enactment of a Uniform Civil Code would be tyrannical to minority communities. The personal law of each minority has not been recognized in any advanced Muslim country as so sacrosanct as to prevent the enactment of a Uniform Civil Code."[11]

However, little progress has been made toward reaching the ideal of an unified civil code, which remains a distant dream for citizens but is critical to the creation of an equal society. The codification which has successfully happened is in the Hindu Law. To a large number of Muslims today, shari'a is the only and valid interpretation of Islamic law, and as such, it should triumph and have authority over any human-made rule or policy. Shari'at is in direct contrast with international human rights principles, because it is discriminatory against women and non-Muslims. Sharia's supposed divine character insulates it from difficult situations in which successful human rights criticism of discriminatory portions of the law is avoided. It is important to understand that, in India personal religious rules, however feared, it should not be allowed to infringe on the values enshrined in the Indian Constitution. India is not an Islamic country, but it has a secular criminal code that applies to everyone regardless of religion. If the Muslim community had embraced a non-shari'a code in one sector of criminal law, then logically speaking, it should be amenable to such a code in other domains other than criminal law as well.

It is imperative that legislation be isolated from religion in this day and age. The principle of secularism established in the Constitution would be enhanced and made evident with the codification and subsequent enactment of a uniform law. In addition, much of the current separation and animosity among the country's religious groups will begin to fade, and India will emerge as a more cohesive and united society, realising the aspirations contained in the Constitution's preamble. it is evident that substantial backing inside Parliament is required. The reason for the difficulty in obtaining adequate support is that most parties believe that reforming laws in the personal domain is better accomplished by increasing pressure for such change within communities. Furthermore, the need for and need for an unified civil code has taken on communal connotations, overshadowing the proposal's inherent benefits and qualities. To put the delay in perspective, Article 44 of the Constitution is the sole directive principle that has not been implemented since it was established more than half a century ago. The majority of the guiding principles in Part IV of the constitution remain pious ideas rather than laws of the land.[12]

JUDICIAL APPROACH

The leading judgment which relates to the need of uniform civil code is:

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[9] Dr. Tahir Mahmood , Muslim Personal Law, Universal Law Publishing Co. 1977 Edition, pages 200-202

[10] (2003) 6 SCC 611

[11] DD Basu, Commentary on Constitution of India, 8th Ed., Vol. 1, Lexis Nexis, Butterworths, Wadhwa, Nagpur, 2010

[12] Karan Bajaj, What's a Uniform Civil Code, The Economic Times, Jul 28, 2003, 12.36am IST http://articles.economictimes.indiatimes.com/2003-07-28/news/27541538_1_uniform-civil-code-personal-laws-sarla-mudgal

Mohd. Ahmad Khan v. Shah Bano Begum[13]

In 1932, the husband (appellant) married the wife (respondent). In 1975, the husband forcibly removed his wife from the marital home. In April 1978, the wife filed a petition against the husband in the court of the learned Judicial Magistrate (First Class), Indore, under Section 125 of the Criminal Procedure Code 1973 She requested a monthly maintenance payment of Rs. 500. On November 6, 1978, the husband divorced his wife by an triple talaq. His defence was that she was no longer his wife as a result of the divorce he had given. He stated that he was under no duty to pay her maintenance because he had already paid her maintenance at the rate of Rs. 200 per month for almost two years and had deposited a sum of Rs. 3000 in the court as dower during the period of iddat. In August of 1979, the learned Magistrate ordered appellant to pay the respondent a princely sum of Rs. 25 per month in maintenance. The defendant filed a revisional application in July 1980, and the High Court of Madhya Pradesh increased the amount to Rs. 179.20 per month.

The husband has filed this appeal by special leave before the Supreme Court.

• ISSUES

i) Whether the payment of mehar by the husband on divorce is sufficient to absolve him of any duty to pay maintenance to the wife.

• **Held:**

"there is no escape from the conclusion that a divorced Muslim wife is entitled to apply for maintenance under Section 125 and that, Mahr is not a sum which, under the Muslim Personal Law, is payable on divorce."

The Court reached the above conclusion in support of the ruling in Bai Tahira where Justice Krishna Iyer held that

"The payment of illusory amounts (referring to 'mehar') by way of customary or personal law requirement will be considered in the reduction of maintenance rate but cannot annihilate that rate unless it is a reasonable substitute."

ii) Whether there is any provision in the Muslim Personal Law under which a sum is payable to the wife 'on divorce'

Referring to the views put forth by the learned scholars (Mulla, Tyabji and Paras Diwan), the Court concluded that "These statements in the text book are inadequate to establish the proposition that the Muslim husband is not under an obligation to provide for the maintenance of his divorced wife, who is unable to maintain herself."

"The sum settled by way of Mahr is generally expected to take care of the ordinary requirements of the wife, during the marriage and after. But these provisions of the Muslim Personal Law do not countenance cases in which the wife is unable to maintain herself after the divorce. We consider it not only incorrect but unjust, to extend the scope of the statements extracted above to cases in which a divorced wife is unable to maintain herself. We are of the opinion that the application of those statements of law must be restricted to that class of cases, in which there is no possibility of vagrancy or destitution arising out of the indigence of the divorced wife"

"Since the Muslim Personal Law, which limits the husband's liability to provide for the maintenance of the divorced wife to the period of iddat, does not contemplate or countenance the situation envisaged by Section 125, it would be wrong to hold that the Muslim husband, according to his personal law, is not under an obligation to provide maintenance, beyond the period of iddat, to his divorced wife who is unable to maintain herself."

The Court concluded that the husband's obligation to pay maintenance to the wife extends beyond the iddat period if the wife lacks the resources to support herself.

iii) Whether or not Section 125 of the Code applies to Muslims.

Referring to Section 125 of the Code, the Court said: "The religion professed by a spouse or by the spouses has no place in the scheme of these provisions. Whether the spouses are Hindus or Muslims, Christians or Parsis, pagans or heathens are wholly irrelevant in the application of these provisions. The reason for this is axiomatic, in the sense that Section 125 is a part of the code of Criminal Procedure, not of the Civil Laws which define and govern the right and obligations of the parties belonging to particular religions, like the Hindu Adoptions and Maintenance Act, the Shariat, or the Parsi Matrimonial Act."

"Clause (b) of the Explanation to Section 125(1), which defines 'wife' as including a divorced wife, contains no words of limitation to justify the exclusion of Muslim women from its scope."

"'Wife' means a wife as defined, irrespective of the religion professed by her or by her husband. Therefore, a divorced Muslim woman, so long as she has not remarried, is a 'wife' for the purpose of Section 125. The statutory right available to her under that section is unaffected by the provisions of the personal law applicable to her."

v) Whether there is any conflict between Section 125's

[13] 1985 SCR (3) 844

provisions and those of the Muslim Personal Law regarding the Muslim husband's obligation to provide for the maintenance of his divorced wife.

"The true position is that, if the divorced wife is able to maintain herself, the husband's liability to provide maintenance for her ceases with the expiration of the period of iddat. If she is unable to maintain herself, she is entitled to take recourse to Section 125 of the Code. The outcome of this discussion is that there is no conflict between the provisions of Section 125 and those of the Muslim Personal Law on the question of the Muslim husband's obligation to provide maintenance for a divorced wife who is unable to maintain herself."

Conclusion

Dismissing the appeal, the Court held:

i) The payment of mehar by the husband upon divorce does not relieve him of the obligation to provide maintenance to the wife.

ii) The husband's obligation to pay maintenance to the wife extends beyond the iddat period if the wife lacks the resources to support herself.

iii) Section 125 of the Code applies to all citizens, regardless of religion.

iv) If there is a disagreement between the two, Section 125 takes precedence.

v) There is no conflict between Section 125 and Muslim Personal Law regulations regarding the Muslim husband's obligation to give maintenance for a divorced wife who is unable to support herself.

Sarla Mudgal v. Union of India:[14]

- **Facts:**

There were four petitioners in this case. It was a writ petition filed under Article 32 of the Indian Constitution. Petitioner 1 was the President of "KALYANI," a registered society that works for the welfare of needy-families and women in distress. Petitioner No,2, Meena Mathur, married Jitender Mathur in 1978. In 1988, she was surprised to find that her husband had married a second time to Sunita Narula alias Fathima. The marriage was solemnised when they converted to Islam and joined the Muslim religion. The petitioner claims that her spouse converted to Islam solely for the purpose of marrying Sunita and avoiding the prohibitions of Section 494 of the Indian Penal Code. Jitender Mathur claimed that now that he has converted to Islam, he can have four wives, despite the fact that his first wife is still Hindu. Sunita alias Fathima was another 1990 petitioner. She claimed that she and Jitender Mathur, who was previously married to Meena Mathur, converted to Islam and then married. Her contention was that she remained to be a Muslim despite the fact that she was not being supported by her husband and had no legal protection under either of the personal laws.

Issues involved:

I. Is it possible for a Hindu husband who is married under Hindu law to enter into a second marriage by converting to Islam?

It was held that since it is neither the object of Islam does not encourage Hindu husbands to convert to Islam solely for the purpose of evading their own personal law by marrying again, the courts can be persuaded to adopt a construction of the laws that denies the Hindu men that convert to Islam without having their exilic status annulled.

ii. Is it possible that such a marriage would be valid qua the first wife who remained a Hindu if the prior marriage had not been legally dissolved?

While answering this question, the Court construed the clauses of the Hindu Marriage Act of 1955. It held that a Hindu marriage cannot be dissolved under any circumstances unless by a divorce decision based on the grounds specified in the legislation. It further stated that the Act has precedence over any conventions or usage that existed prior to the Act's implementation.

iii. Whether the apostate husband is guilty of the offence of Section 494 of the IPC?

It was decided that any act that violates necessary legal provisions is per se void. The true explanation for the voidness of the second marriage is the existence of the previous marriage, which is not dissolved even by the husband's conversion. If the convert's second marriage is declared valid, it would be ignoring the content of the case and going against the spirit of the law.

Conclusion

The Supreme Court ruled that a Hindu husband's second marriage after converting to Islam would be null and void unless his first marriage was legally divorced. The second marriage would be declared null and unlawful under the provisions of Section 494 IPC, and the apostate-husband would be charged with the offence under Section 494 IPC. There were no costs awarded. In this decision, the court stressed the importance of a Uniform Civil Code and directed the government to reconsider Article 44.

Lily Thomas v. Union of India:[15]

FACTS

[14] (1995) 3 SCC 635

Smt. Shushmita Ghosh, G.C Ghosh's wife, filed a writ petition in the Supreme Court in 1992, claiming that she married Mr. G.C Ghosh pursuant to Hindu rites and rituals on May 10, 1984. On April 1, 1992, the petitioner was instructed by her spouse that she should divorce him by mutual consent because he had already converted to Islam and was married to Miss Vanita Gupta.

HELD

If a non-Muslim converts to the 'Muslim' faith without any actual change of belief and solely to prevent an earlier marriage, the marriage he enters into after conversion is void. If a Hindu wife submits a complaint under Section 494 alleging that her husband married a second wife under another religion after converting to that faith during the marriage, the offence of bigamy must be examined and tried in line with the provisions of the Hindu Marriage Act.

Gul Mohammad vs. Emperor[16]

The High Court ruled that converting a Hindu wife to Mahomedanism did not automatically end her marriage to her Hindu husband. It was also determined that she could not engage into a legitimate marriage contract with another person during his lifetime. Such a person having sexual relations with a Hindu wife who has converted to Islam would be guilty of adultery under Section 497 IPC because the woman was already married and her husband was alive before her conversion. From the foregoing, it is clear that mere conversion does not remove marital relations until a divorce decision is obtained from the court on that basis. The marriage will continue until a decree is issued. Any additional marriage during the subsistence of the first marriage would be a crime under Section 494 read with Section 17 of the Hindu Marriage Act, 1955, and the person would be prosecuted for bigamy regardless of his conversion to another religion. So long as such marriage exists, no other marriage can be performed, and if such marriage is performed, the person will be prosecuted for the offence under Section 494 IPC.

Secularism and Uniform Civil Code:

"The spine of controversy revolving around UCC has been secularism and the freedom of religion enumerated in the Constitution of India. The preamble of the Constitution states that India is a "secular democratic republic" This means that there is no State religion. A secular State shall not discriminate against anyone on the ground of religion. A State is only concerned with the relation between man and man. It is not concerned with the relation of man with God. It does not mean allowing all religions to be practiced. It means that religion should not interfere with the mundane life of an individual."

"In S.R. Bommai v. Union of India,[17] as per Justice Jeevan Reddy, it was held that religion is the matter of individual faith and cannot be mixed with secular activities. Secular activities can be regulated by the State by enacting a law."

"In India, there exist a concept of "positive secularism" as distinguished from doctrine of secularism accepted by America and some European states i.e. there is a wall of separation between religion and State. In India, positive secularism separates spiritualism with individual faith. The reason is that America and the European countries went through the stages of renaissance, reformation and enlightenment and thus they can enact a law stating that State shall not interfere with religion. On the contrary, India has not gone through these stages and thus the responsibility lies on the State to interfere in the matters of religion so as to remove the impediments in the governance of the State."

"Articles 25(9) and 26(10) guarantees right to freedom of religion. Article 25 guarantees to every person the freedom of conscience and the right to profess, practice and propagate religion. But this right is subject to public order, morality and health and to the other provisions of Part III of the Constitution. Article 25 also empowers the State to regulate or restrict any economic, financial, political or other secular activity, which may be associated with religious practice and also to provide for social welfare and reforms. The protection of Articles 25 and 26 is not limited to matters of doctrine of belief. It extends to acts done in pursuance of religion and, therefore, contains a guarantee for ritual and observations, ceremonies and modes of worship, which are the integral parts of religion.[18]"

"UCC is not opposed to secularism or will not violate Article 25 and 26. Article 44 is based on the concept that there is no necessary connection between religion and personal law in a civilized society. Marriage, succession and like matters are of secular nature and, therefore, law can regulate them. No religion permits deliberate distortion.[19] The UCC will not and shall not result in interference of one's religious beliefs relating, mainly to maintenance, succession and inheritance. This means that under the UCC a Hindu will not be compelled to perform a nikah or a Muslim be forced to carry out saptapadi. But in matters of inheritance, right to property, maintenance and succession, there will be a common law."

[15] AIR 2000 SC 1650
[16] AIR 1947 Nagpur 121
[17] (1994)3 SCC 1
[18] Acharya Jagdishwaranand Avadhut v. Commissioner of Police, Calcutta (1984)4 SCC 522
[19] Sarla Mudgal v. Union of India AIR 1995 SC 1531

"Justice Khare, in the recent case,[20] said, "It is no matter of doubt that marriage, succession and the like matters of secular character cannot be brought within the guarantee enshrined under Articles 25 and 26 of the Constitution."

"The Chief Justice also cautioned that any legislation which brought succession and like matters of secular character within the ambit of Articles 25 and 26 is a suspect legislation. Article 25 confers right to practice and profess religion, while Article 44 divests religion from social relations and personal law."

"The whole debate can be summed up by the judgment given by Justice R.M. Sahai. He said,"

"Ours is a secular democratic republic. Freedom of religion is the core of our culture. Even the slightest of deviation shakes the social fibre. But religious practices, violative of human rights and dignity and sacerdotal suffocation of essentially civil and material freedoms are not autonomy but oppression. Therefore, a unified code is imperative, both, for protection of the oppressed and for promotion of national unity and solidarity."[21]

Article 44 vis-a-vis Article 25:

There have been many arguments stating that any law made in line to Article 44 of the constitution would infringe Article 25 which guarantees freedom of religion. However this freedom is subject to public order, morality and health. It was held that the directive contained in Article 44[22]

It was held:

"Before I part with the case, I would like to state that Article 44 provides that the State shall endeavor to secure for the citizens a uniform civil code throughout the territory of India. The aforesaid provision is based on the premise that there is no necessary connection between religious and personal law in a civilized society. Article 25 of the Constitution confers freedom of conscience and free profession, practice and propagation of religion. The aforesaid two provisions viz. Articles 25 and 44 show that the former guarantees religious freedom whereas the latter divests religion from social relations and personal law. It is not matter of doubt that marriage, succession and the like matters of a secular character cannot be brought within the guarantee enshrined under Articles 25 and 26 of the Constitution. Any legislation which brings succession and the like matter of secular character within the ambit of Articles 25 and 26 is a suspect legislation."

CONCLUSION

Religion must be limited to areas that legitimately relate to religion, and the rest of life must be governed, unified, and adjusted in such a way that we can build a powerful and consolidated nation[23]as soon as feasible. Religion, in its pure and etymological sense, cannot be understood in the context of Article 25. Because it would be extremely difficult, if not impossible, to define the expression religion or matters of religion or religious belief or practise, the approach to construing the protection of religion or matters of religion or religious practises[24] guaranteed by Article 25 must be viewed with pragmatism. As a result, it is obvious from the verdict that the right to freedom of religious practise is subject to the State's right to adopt legislation for social welfare and reform.[25] Furthermore, any person exercising his or her freedom of conscience or freedom to profess, practise, and spread religion must abide by the norms of law relating to public order, morality, and health, and cannot violate them.[26] Article 25 of the Constitution guarantees freedom to those who do not infringe on the freedom of others in the same way. Every person has a fundamental right under the constitutional structure not only to entertain his or her own religious beliefs, but also to express those beliefs and views in a way that does not infringe on the religious rights and personal freedoms of others.[27] The belief that Article 44 requires a mechanical application of a single family law to the entire nation, or that this may be accomplished with a single legislative stroke, ignores the reality on the ground. The pragmatic response to Article 44 appears to be the essential codification and revision of the many personal laws, with the goal of making each of them internally uniform and per se failsafe against abuse and misinterpretation. Only through an evolutionary process can a consistent civil code arise from the nation's highly rich composite legal legacy.[28]

Later, the Supreme Court issued the following statement, which eminently depicts successive administrations' policies in regard to the aim of the Uniform Civil Code:

"In a pluralist society like India in which people have faith in their respective religions, beliefs or tenets propounded by different religions or their off- shoots, the founding fathers,

[20] John Vallamattom v. Union of India AIR 2003 SC 2902
[21] ibid
[22] John Vallamattom v. Union of India (2003) 6 SCC 611
[23] DD Basu, Commentary on Constitution of India, 8th Ed., Vol. 1, Lexis Nexis, Butterworths, Wadhwa, Nagpur, 2010
[24] A.S Narayana Deekshitulu v. State of Andhra Pradesh, AIR 1996 SC 1765
[25] Dr. Subhash C. Kashyap, Constitutional law of India, Vol. 1, Universal Law Publishing Co. Pvt. Ltd. Pg 871-874, 2008
[26] T.M.A Pai Foundation v. State of Karnataka AIR 2003 SC 355
[27] Lily Thomas v. Union of India AIR 2000 SC 1650
[28] T. Mahmood, Uniform Civil Code: Fictions and Facts (Delhi 1995)

while making the Constitution, were confronted with problems to unify and integrate people of India professing different religious faiths, born in different castes, sex or sub-sections in the society speaking different Languages and dialects in different regions and provided secular Constitution to integrate all sections of the society as a united Bharat. The directive principles of the Constitution themselves visualized diversity and attempted to foster uniformity among people of different faiths. A uniform law, though is highly desirable, enactment thereof in one go perhaps may be counter-productive to unity and integrity of the nation. In a democracy governed by rule of law, gradual progressive change and order should be brought about. Making law or amendment to a law is a slow process and the legislature attempts to remedy where the need is felt most acute. It would, therefore, be inexpedient and incorrect to think that all laws have to be made uniformly applicable to all people in one go. The mischief or defect which is most acute can be remedied by process of law at stages."[29]

[29] Pannalal Bansilal v State of Andhra Pradesh AIR 1996 SC 1023

Truth Identification via Forensic Science: A Legal Analysis of Admissibility of Deception Detection Tests

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ABSTRACT

Deception Detection techniques have long been at the center of the deliberations and legal controversies, despite being claimed as a product of, much regarded scientific and technological advancements. The scientific community has for long been split into two lobbies, one asserting the role of DDTs with a groundbreaking evidentiary value in the legal sphere, whereas, the other vehemently questioning the reliability and validity of the science involve. Courts in various countries, especially the United States have faced numerous incidents where the evidentiary the value of the DDTs has been examined. Frye Precedent in 1923 relied on the condition, whereby the technique to be able to produce evidence admissible in the court of law, should be accepted by the relevant scientific community. In 1993 Daubert ruling by the Supreme Court of the United States, expanded the limitations inherent in the Frye ruling. The present paper is an endeavor to inquire into the questions surrounding the admissibility of DDT evidence in the courts of law. It focuses on the issues relating to establishing the reliability and validity of these tests which are posed as the threshold for the admittance of such evidence.

Keywords: Deception Detection Techniques, Forensic science, Evidence, Admissibility, Reliability

1. Introduction

The essence of justice is truth, which strengthens the citadel of human rights discourse. During the course of an inquiry, revealing the truth about a crime's commission is a difficult process. Identifying a suspect and proving guilt beyond a reasonable doubt is the most difficult challenge in numerous crimes, especially in older cases. The study of the socio-technical history of the development of various forensic tools reveal, a common shared theme, i.e. scientifically enhancing the efficacy of criminal investigation and in turn the judicial system. Polygraph, Narco-analysis, and other technologies arose as "Truth machines" during the twentieth century to aid an investigator in "extracting" reality from a subject, particularly when traditional methods of investigation and other forensic inputs are rendered ineffectual. Surveillance of the brain's psycho-physiological response while retorting to a question or in a simulated setting is crucial to deception detectors.[1] The techniques of detecting deception, such as Brain-mapping, lie detection, Narco-analysis, find their epistemological justification in the potential to end torture and physical duress. However, during legal scrutiny in many jurisdictions, these deception detection systems (hereinafter referred as DDT) have received widespread criticism. Because the Narco-test is bodily intrusive, it has been phased out in developed countries.

In Selvi v. State of Karnataka[2], the Supreme Court of India found that DDT methods to be in violation of Article 20(3) of the Indian Constitution. It also declared that any expert opinion based on DDT had no evidential value. Despite these findings, the highest court has allowed these methods to be carried out only with the subject's consent. Even after a decade, this perplexing judicial posture has sparked legal debate, as Indian law enforcement officials have used these strategies in other heinous crimes, including the Nithari serial killings (2006)[3] and the Arushi-Hem Raj twin murders (2008)[4]. These strategies have also been utilised in high-profile scams such as the Stamp Paper Scam (2003) and the Vyapam Scam (2015). DDTs were reportedly employed in the recent Hathras gang rape and murder case to uncover the "truth" behind the heinous act, according to news reports. In general, the public trusts these computers to reveal the gospel truth, but in the real world, claims to detect dishonesty in oral utterances face enormous hurdles, with limited scope of evidentiary value, particularly in criminal cases. The legality and reliability of DDTs in the global legal landscape are discussed in depth in this article.

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1 Andrew Balmer, Lie Detection and the Law: Torture, Techology and Truth, Routledge, 24
2 (2010) 7 SCC 263.
3 *Surendra Koli* v. *State of U.P.*, (2011) 4 SCC 80.
4 *Rajesh Talwar* v. *CBI*, (2014) 1 SCC 628.

The wheels of justice's cart are the evidences. If justice is the goal, proof is the way to get there. Oral evidence (testimony), documentary evidence, and material (physical) evidence are all examples of evidence classifications. An ocular witness' testimony is regarded as reliable evidence; nonetheless, it is subject to a number of flaws, including personal vendetta, a person's perspective of a scenario, animosity due to duress, intimidation, personal benefit, and so on. As a result, secondary evidence such as forensic inputs, especially DDT inputs, serves as a kind of corroboration in the legal sphere. Cross-examination is frequently referred to as the "biggest legal challenge" in the courtroom. As a result, secondary evidence such as forensic inputs, especially DDT inputs, serves as a kind of corroboration. In the courtroom, cross-examination is frequently referred to as the "best legal engine ever developed for the discovery of truth,"[5] but Criminalistics has emerged as the "contemporary tech-engine" for truth discovery, transforming criminal trials. Many times, available evidence is muddled, necessitating measures to uncover the truth, which led to the development of several deception detectors for use during oral testimony. However, for any evidence to be admissible in a courtroom, it must be collected in a legal manner. A discussion of the global emergence of various truth machines is shown below.

1.1 Polygraph (Lie Detector)

Examining the human body to detect dishonesty is an old age phenomenon.[6] The twentieth century witnessed the elementary yet profound efforts of several scientists, policemen and physicians to produce a device that could record in visual form, the bodily changes triggered by interrogative questioning.[7] John A. Larson, an Australian policeman and psychologist, in 1921 devised one such machine that documented the physiological changes like blood pressure, respiration and galvanic skin responses, in the form of characteristic scribbles of multiple lines, to aid in the detection of dishonesty.[8] The inherent notion was to use technological inscriptions to visually document the fear for the outcome of the interrogation, manifested through the involuntary bodily responses.[9] Conceptually, the seemingly promising Polygraph aimed to replace the screams of torture with the chatter of the body in frequencies perceptible only by the machine.[10] However, in reality the Polygraph experts found the doors of the law, not too welcoming. The infamous trial and appeals of James Alfonse Frye established the Frye[11] test in 1923 in response to the admissibility of Polygraph reports, in which the US Supreme Court determined that scientific expertise should henceforth be 'generally accepted in the scientific community' before it found use in the courts. Thus, establishing the principle of "general acceptance" in the scientific community and rejected the Polygraph findings as evidence.[12] Leonarde Keeler is credited with developing the first polygraph test based on the relevant or irrelevant question approach. Comparative Question Test (CQT) or Concealed Information Test (CIT) protocols can be used to classify[13] Polygraphs. A pre-polygraph interview, chart recording, and diagnosis are the three stages of a Polygraph exam. A baseline physiological reaction is determined based on the answers to known questions, and divergence from the baseline while responding to a vital question is deemed dishonesty or a symptom of lying.

"There is no lie-detector, neither man nor machine," the US Committee on Government Operations observed in 1965. The idea that a metal box in the hands of an investigator can detect truth or lie has mislead people.[14] Based on a comprehensive evaluation of Polygraph research, the US National Research Council (NRC) concluded that the technology lacks validity and scientific

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5 *California* v. *Green*, 1970 SCC OnLine US SC 153: 26 L.Ed.2d 489: 399 US 149 (1970), 158 [quoting 5 John Henry Wigmore, Evidence in Trails at Common Law § 1367 (3rd Edn. 1940)].

6 Bennett L. Gershman, "Lie Detection: The Supreme Court's Polygraph decision", NY St BJ Sept/Oct 1998 at p. 34. Available at:http://digitalcommons.pace.edu/lawfaculty/622/.

7 Andrew Balmer, Lie Detection and the Law: Torture, Techology and Truth, Routledge

8 J.A. Larson, G.W. Haney, and L. Keeler, "Lying and its Detection: A Study of Deception and Deception Tests" (Chicago, IL: University of Chicago Press, 1932) p. 99

9 Andrew Balmer, Lie Detection and the Law: Torture, Techology and Truth, Routledge

10 Andrew Balmer, Lie Detection and the Law: Torture, Techology and Truth, Routledge

11 *Frye* v. *United States*, 293 F 1013 (DC Cir 1923).

12 The Court of Appeals for the District of Columbia declared that "Numerous cases are cited in support of this rule. Just when a scientific principle or discovery crosses the line between the experimental and demonstrable stages is difficult to define. Somewhere in this twilight zone the evidential force of the principle must be recognized, and while courts will go a long way in admitting expert testimony deduced from a well-recognized scientific principle or discovery, the thing from which the deduction is made must be sufficiently established to have gained general acceptance in the particular field in which it belongs." Also see: *United States* v. *Scarborough*, 43 F 3d 1021, 1026 (6th Cir 1994).

13 L. Keeler, "Deception Tests and the Lie Detector", International Association for Identification Proceedings, 16, 186-193 (1930).

14 United States Congress, House Committee on Government Operations, Sub-committee on Government Information and Foreign Operations, (1965). Use of polygraphs as 'lie detectors' by the federal government (House Report No. 198). (Washington, DC: US Government Printing Office) p. 1.

rigour because it has failed to construct and refine a theoretical foundation.[15] According to reports, the Polygraph's accuracy ranges from 50 to 60%.[16] Individuals differ in their changes in psycho-physiological processes (cardio-vascular, respiratory, and electro-dermal) in response to various stimuli reportedly measured by the Polygraph.[17] As a result, the Polygraph exam suffers from a fundamental lack of objectivity and standardisation.[18] In the present era, brainwave reading (P300, also known as Brain mapping) is used in concert with CIT Polygraph to identify hidden information,[19] and the two procedures are compatible.[20] Although it is unlikely that the Polygraph can be improved to the level of a real lie detector, it has the potential to become one of the most useful instruments for assisting investigators in the detection of dishonesty.

1.2 Brain Mapping (Brain Imaging)

Advances in the field of neuroscience since the 1980's have furthered the possibilities of detecting deception using techniques to measure brain activities such as transcranial magnetic stimulation- TMS, functional magnetic resonance imaging-fMRI, positron emission tomography-PET and Brain Fingerprinting (EEG). Brain mapping, commonly known as the P300 Test, is a non-invasive procedure that combines cognitive neuropsychology and contemporary brain imaging. It was developed by neurologist Dr. Lawrence A. Farwell to uncover fraudulent responses during a criminal investigation. Various brain imaging modalities, such as functional magnetic resonance imaging (fMRI) and near infrared spectroscopy, are used in the procedure (NIRS).[21] The method used in this test involves interrogating the witness or the suspect on three kinds of questions, neutral words which are directly related to the case, probe words which attempt to elicit concealed information known by the accused, and target words which include findings relevant to the case of which the suspect is not aware of.[22] Unlike Narco-analysis and Polygraph, this test does not require the subject to verbally respond but to merely hear the words. As the words are spoken to the suspect, his/her brain interprets them and in case of any connection of stimulus to the words mentioned, the brain would emit P-300 waves, which are then registered by the sensors.[23] While fMRI is thought to be superior and more accurate than traditional Polygraphs for lie detection, the published evidence of fMRI's accuracy and reliability could not overcome admissibility issues in court.[24] Through neuroimaging signals on misleading response to an inquiry, Brain mapping may theoretically calibrate and collect many metrics like as blood flow and metabolic changes. Because the binding principle of reliability and legality is not beyond reasonable question, Brain mapping inputs have restrictions. As a result, the imaging inputs are not admissible in court as evidence in and of themselves. In order to evaluate guilt, brain imaging is also utilized to calibrate insanity.[25]

Despite its non-invasive nature, this approach has a number of drawbacks. Only the presence or absence of any information in memory is mapped or detected by the test. The exam may not be able to tell the difference between a witness and a criminal. If a participant is

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15 Committee to Review the Scientific Evidence on the Polygraph, Board on Behavioral, Cognitive, and Sensory Sciences, & National Research Council (US). Committee on National Statistics (2003), (The polygraph and lie detection. (Washington, DC: National Academies Press).

16 A. Vrij, "Detecting lies and deceit: The psychology of lying and the implications for professional practice" (Chichester, UK: John Wiley & Sons Ltd., 2000); S. Mann, A. Vrij & R. Bull, "Detecting true lies: Police officers 'ability to detect suspects' lies", (2004) 89 (1) Journal of Applied Psychology 137; C.F. Bond & B.M. DePaulo "Accuracy of Deception Judgments", (2006) 10 (3) Personality and Social Psychology Review 214

17 W.M. Waid & M.T. Orne, "Reduced electrodermal response to conflict, failure to inhibit dominant behaviors, and delinquency proneness", (1982) 43 (4) Journal of Personality and Social Psychology 769.

18 The British Psychology Society, "A review of the current scientific status and fields of application of Polygraphic Deception Detection". Final report from the BPS Working Party (Leicester, UK: British Psychological Society, 2004).
D.C. Raskin & J.C. Kircher, "Validity of polygraph techniques and decision methods (2014)". In D.C. Raskin, C.R. Honts, & J.C. Kircher (Eds.), "Credibility assessment, scientific research and applications", (London: Academic Press) pp. 65-132.

19 J.P. Rosenfeld, E. Labkovsky, M. Winograd, M.A. Lui, C. Vandenboom & E. Chedid, "*The Complex Trial Protocol (CTP): A new, countermeasure-resistant, accurate P300-based method for detection of concealed information*", (2008) 45 (6) Psychophysiology 906

20 W.G. Iacono, "Effective policing understanding how polygraph tests work and are used". (2008) 35(10) Criminal Justice and Behavior 1295.

21 Marcus E. Raichle, "A brief history of human brain mapping, Trends in Neurosciences (2008)". Available at:https://www.cell.com/trends/neurosciences/fulltext/S0166-2236(08)00265-8.

22 Subhojyoti Acharya, Is Narco Analysis a Reliable Science, The Present Legal Scenario in India, available at http://ezinearticles.com/ Is Narco Analysis a Reliable Science-The Present Legal Scenario-in India&id=991046

23 George Iype, Just what is the Brain-Mapping Test? available at http://www.rediff.com/ news/2006/jul/19george.htm

24 *Wilson* v. *Corestaff Services LP*, 28 Misc 3d 425: 900 NY S 2d 639 (NY Sup Ct 2010); *United States* v. *Semrau*, 693 F 3d 510 (6th Cir 2012). Also see: Daniel D. Langleben, "Using Brain Imaging for Lie Detection: Where Science, Law and Research Policy Collide, (2013) 19(2) Psychol Public Policy Law 222-234; and Jeffrey Bellin, "The Significance (If Any) For the Federal Criminal Justice System of Advances in Lie Detector Technology", 80 Temp L Rev 711-727 (2007).

25 Susan E. Rushing, "Relative function: Nuclear brain imaging in United States Courts", 39/Winter Journal of Psychiatry & Law 567 (2011).

mentally ill, under the influence of narcotics, or lacks a basic understanding of investigative work, the test will be limited. The P300 test is a good indicator of recognition, although it is an indirect indicator of deception. The test is based on memory, which is not a passive archive of images. Furthermore, there is no epistemological link between how memory is produced during a crime and how it is formed. As a result, the results of Brain mapping do not qualify as proof beyond a reasonable doubt in criminal proceedings. BEOS (Brain Oscillation Signature Profiling) is a new non-invasive truth-finding technology that looks at variations in brain electrical activity in response to an aural or visual stimuli. BEOS, like P300, has its own set of constraints.

1.3 Narco-analysis or Truth Serum Test

In the year 1922, Robert House coined the phrase "Truth Serum." However, J.S. Horseley developed the name Narco-analysis in 1935, taken from the Greek word "Narke," which means torpor or anaesthesia.[26] This technique entails the use of specific medicines, primarily barbiturates,[27] to induce a "twilight state" in order to ostensibly limit man's reasoning and imaginative abilities while preserving his memory and speech. It is assumed that when a person is under the influence of a drug, he enters a trans-mental state, where he is allegedly deprived of his ability to control his response; as a result, he (presumably) speaks freely and is more likely to reveal truthful information that is within his exclusive domain of knowledge. A team of experts conducts a narcotics test at a government laboratory after getting court's permission based on the subject's competent and informed consent.

Narco-analysis has been criticised by many people around the world for being intrusive and stifling the right to refuse testimonial compulsion. The subject's revelations during the exam are captured in both audio and video format. The approach, however, has a number of drawbacks and obstacles.[28] There is no proven theory to determine whether or not the "reveal" made during the Narco-test is necessarily a true narrative. Here it is imperative to mention that the utility of truth serum is constructed around the idea that use of drugs on an innocent suspect will not cause an adverse effect. However, the truth lies in the fact that a person who has been administered the drug are quite suggestible and may even confess to committing crimes which they haven't, if the questions they are subjected to are ill framed.[29]This not only subject the innocent suspect to unwarranted scrutiny, but also derails the investigation often at a crucial point and might even lead to the actual criminal to escape the hands of law.[30] Another shortcoming of using this technique lies in the experience that shows that the criminals who respond favorably to the interrogation under narcosis are more often than not are likely to confess as a result of just clever and skillful interrogation in itself.[31] This hypothesis raises a pertinent question as to how many criminals are subjected to Narco-analysis as a last resort, just before the criminal was about to confess to the interrogator, thus rendering their confessions inadmissible in the court.[32] It is argued that the test report may be considered as inculpatory as well as exculpatory evidence to corroborate in proving guilt or innocence. But, in absence of epistemological validation and scientific accreditation beyond reasonable doubt, the technique is a dangerous fallacy particularly if employed in criminal courts.

2. Deception Detection System's (DDT) Acceptability

It's crucial to understand the admissibility of behavioral science-based psycho-physiological testing that could aid in legal decision-making. DDTs are designed to handle the difficulty of exploring the information stored in the brain of a suspect offender in order to learn the "truth" about the dynamics of crime, especially when other techniques of evidence collecting are unavailable. The Daubert[33] standards indicate that the admissibility of DDT results in court be judged on the basis of "reliability" and "validity."[34]

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26 J.S. Horsley, "Narco-analysis", The Lancet, (1936) 227 (Issue 5862) p. 55.

27 Truth serum is not serum but various drugs of barbiturate group [sedative-hypnotics or central nervous depressants: such as Sodium Pentothal (thiopental), Sodium Amytal (anobarbital), Hyoscine, Seconbarbital (Seconal), etc.]. It is believed that these drugs when administered intravenously can make the subject hypnotised, garrulous and confessional.

28 Zaheeruddin and Asma Sultana, "Testing the Validity of Narco-analysis on Touchstone of Article 21 of the Constitution", (2015-16) 23 ALJ 65.

29 John M. Macdonald, The Journal of Criminal Law, Criminology, and Police Science, Jul. - Aug., 1955 , Vol. 46, No. 2 (Jul. - Aug., 1955), pp. 259-263

30 John M. Macdonald, The Journal of Criminal Law, Criminology, and Police Science, Jul. - Aug., 1955, Vol. 46, No. 2 (Jul. - Aug., 1955), pp. 259-263

31 5 F. E. INBAU. SELF INCRIMINATION, Springfield: C. C. Thomas, 1950. p. 6

32 John M. Macdonald, The Journal of Criminal Law, Criminology, and Police Science, Jul. - Aug., 1955, Vol. 46, No. 2 (Jul. - Aug., 1955), pp. 259-263

33 *Daubert* v. *Merrell Dow Pharmaceuticals Inc.*, 1993 SCC OnLine US SC 104: 509 US 579 (1993).

34 Four considerations articulated for making court gate-keeping functions in Daubert, 1993 SCC OnLine US SC 104: 509 US 579 (1993): (i) testability or falsifiability, (ii) error rate, (iii) peer review and publication, and (iv) general acceptance. The US Supreme Court ruled that under US Federal Evidence Rule 702, "expert scientific testimony" is admissible, if it constitutes: "(1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue." (Daubert, 509 US at p. 592)

The term "reliability" refers to the procedure's reproducibility or replicability, which is a necessary requirement for proving admissibility. Validity, on the other hand, emphasizes conceptual or theoretical generalization, making calibration and estimation more challenging. Reliability, however, does not guarantee that a test is valid, as identical "incorrect" findings may be produced by similar tests given by different examiners. A scientific test may be trustworthy, but it is not "legally" valid.

Despite a lengthy history of interest in deception detection, no hypothesis has yet been able to link deceit to physiological changes. To differentiate physiological changes caused by deception and the fear of detection process, a new scientific pathway must be established. There is no one-size-fits-all physiological response to deception.[35] The scientific criteria are relative rather than absolute, and they are dependent on demographics and other factors. Furthermore, the Frye[36] or Daubert[37] requirements are far too complex scientific principles to use in a legal framework that primarily deals with behavioral feedback. Subjects' reactions to any deception detection test are not intrinsic in nature, and so amount to self-incrimination, similar to a witness giving testimony under oath.

The debate over the admissibility of Polygraphs has gotten increasingly acrimonious and heated between proponents and opponents.[38] Scientific standards are relative rather than absolute. The theoretical belief on which Polygraph tests are based contains two fundamental assumptions: the first being a regular relationship between lying and certain emotional states and the second, a regular relationship between these emotional states and changes in the body. As for the first assumption, the psychological literature does not indicate towards any regular relationship between lying and emotional states. This lack of relation stems from the fact that the act of lying may stimulate a multitude of responses in different subjects. Lying can evoke a sense of satisfaction in some, and excitement in others, humour in some, sadness in others, boredom, sadness or hatered or guilt, fear or anxiety in others. Some pathological individuals might even be absolutely unconcerned while being put on test as they start believing in their lies. As for the second assumption relating to relation between emotional states and resulting physiological/autonomic changes in the body, psychophysiologists have not found even a fairly regular relationship. Moreover, the test results found that the intercorrelation is surprisingly low. For one subject rise in pulse rate may indicate his emotional state, whereas in another, the pulse rate is pretty unaffected while the soaring blood pressure might indicate the changed emotional state. Due to this variability in the autonomic responses, total reliance of the lie detection practitioners on physiological responses of the body seems unjustified.[39] If deceit is not specifically tied to physiological responses, and no theory exists to explain the nature of the relationship, predicting the circumstances in which Polygraph test results will be accurate or incorrect is impossible. Brain mapping too, like Narco-analysis and Polygraph has not been able to effectively avoid criticisms and has failed to merit the trust of the courts of law. In State v. Zimmerman[40] the decision of the trial court was upheld by the Arizona Court of Appeals, wherein the court excluded the evidences of Brain mapping. The court concluded that the test lacked the general acceptability in the neurological community. Similarly in Ross v. Schrantz[41] the results of the test were excluded by the trial court citing the lack of scientific literature to prove that the test was reliable and has acceptability in clinical applications. The court also opined that it is merely a research tool and thus cannot be accepted.[42] The Bombay High Court held in Ramchandra Ram Reddy v. State of Maharashtra[43] that during Brain mapping, the test result is a mapping of brain reactions to particular queries, not a statement, and that such a response simply informs whether the individual has information of crime or not. According to the court, no statement is made during Brain mapping or lie detector tests, but a statement is recorded during Narco-analysis after serum is administered. As a result of the obvious testimonial compulsion and invasive character of the treatment, Narco-analysis generates increasing criticism.

Also see: *United States* v. *Scheffer*, 1998 SCC OnLine US SC 33: 523 US 303 (1998). The US Supreme Court ruled that per se court refusal (exclusion) of polygraph results does not infringe constitutional rights under the Sixth Amendment. Thomas, J. recorded observation for the majority, "there is simply no consensus that polygraph evidence is reliable".

35 L. Saxe, D. Dougherty & T.P Cross, Scientific Validity of Polygraph Testing (OTA-TM-H-150, 1983). Report for the US Congress of Technology Assessment (Washington, DC: US Government Printing Office).

36 *Frye* v. *United States*, 293 F 1013 (DC Cir 1923).

37 *Daubert* v. *Merrell Dow Pharmaceuticals Inc.*, 1993 SCC OnLine US SC 104: 509 US 579 (1993).

38 Leonard Saxe and Gershon Ben-Shakhar, "Admissibility of Polygraph Tests: The Application of Scientific Standards Post-Daubert", Psychology Public Policy and Law (1999).

39 Jerome H. Skolnick, "Scientific Theory and Scientific Evidence: An analysis of Lie Detection", The Yale Law Journal (April 1961) PP. 700, 702.

40 43802 P.2d 1024 (Ariz. Ct. App. 1990)

41 1995 WL 254409 (Minn. Ct. App. May 2, 1995).

42 1995 WL 254409 (Minn. Ct. App. May 2, 1995).

43 Criminal Appeal No. 1924 of 2003, decided on 5-3-2004 (Bom).

3. Global Legitimacy of DDTs

DDTs have evolved and been used for a variety of purposes around the world over the last century, receiving both praise and criticism. However, to better understand legislative and judicial responses to DDTs, the legal context in several jurisdictions has been examined below.

3.1 The United States

In 1923, the US Supreme Court issued the Frye[44] rules, which prohibited the use of Polygraphs in criminal cases. A series of cases followed Frye which reiterated the inadmissibility of Polygraph evidence. In State v. Lowry[45] the Kansas Supreme Court raised some specific objections on the controversial issue of Polygraph evidence. The Court overturned the decision of the trial court which allowed the Polygraph evidence stating, that even though the examiner of the test can be cross examined in the court, but the instrument cannot be put on stand for cross examination. The court further commented on the inability of the instrument to correctly take into account the physical abnormalities that the subject might be prone to like nervousness or unresponsiveness.[46] In 1951, the Oklahoma Criminal Court of Appeals again held the Polygraph evidence inadmissible and commented on the difference in nature of Polygraph evidence and expert testimonies on handwriting, fingerprinting and x-ray reports. The court held that those devices "Reflect demonstrable physical facts that require no complicated interpretation predicated upon the hazards of unknown individual emotional differences, which may and often times do result in erroneous conclusions."

The Miranda[47] warnings under the Fifth Amendment to the US Constitution[48] were plucked out by the U.S Supreme Court to protect an accused against testimonial compulsion in his confession of guilt. In reality, the US Constitution ensures that evidence obtained by breaking the authorised processes would be excluded at the trial stage. However, in 1983, President Ronald Reagan signed the National Security Decision Directives 84, which authorised all federal agencies to perform Polygraph tests on its personnel to discover alleged secret information leaking.[49] Within three months, the US government revoked the Directive. On 4-2-2015, a similar Directive was issued once more.

The Federal Rules of Evidence 702, 704, 801, 807, and 403 are applicable to scientific evidence. Military Rule of Evidence 707(a), adopted by the US President in 1991, prohibits the admitting of Polygraph results. The United States Court of Appeals, in United States v. Scheffer,[50] declared the Rule unlawful as an unconstitutional restriction on the defendant's right to use exculpatory evidence in violation of the Sixth Amendment, clearing the way for restricted acceptance of Polygraph evidence.[51] Under strict rules and precautions, Scheffer[52] favours a balanced and flexible approach to using Polygraph evidence. A competent expert may testify if the testimony assists the trier of fact in determining the fact in question and is based on (i) sufficient data, (ii) reliable principles and methodologies, and (iii) proper application of methods and principles to arrive at a logical conclusion.

The National Research Council (NRC) of the United States undertook a comprehensive evaluation of Polygraph research in 2003 and found it to be deficient in validity and scientific rigour. Despite the objections, Polygraph research has persisted, and the US government has supported significant funding in the field following the terrorist events of September 11, 2001.[53] The Indiana Supreme Court recently found in Katelin Eunjoo Seo v. State of Indiana[54] that forcing a person to provide her phone's password violates her right to self-incrimination. The Fifth Amendment's Self-Incrimination Clause protects a person from being "compelled in any criminal case to be a witness against himself," according to the Court. Passwords fall into the category of "personal knowledge" that is unknown to the State, and thus fall within the ambit of protection under the Fifth Amendment's Self-Incrimination Clause.[55] As a result, unlocking a phone entails supplying information based on the accused's personal knowledge and is testimonial in nature, and thus is not as harmless as providing a fingerprint. Furthermore,

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44 *Frye* v. *United States*, 293 F 1013 (DC Cir 1923).

45 163 Kan. 622, 185 P.2d 147 (1947).

46 Ronald H. McLean, "The Admissibility of Lie Detector Evidence", North Dakota Law Review (1974), Vol 51, No. 3P. 685

47 *Miranda* v. *Arizona*, 1966 SCC OnLine US SC 112: 16 L.Ed.2d 694: 384 US 436 (1966).

48 The Fourth Amendment (Protection Against Unreasonable Search and Seizures) and the Fourteenth Amendment (the Due Process Clause) of the US Constitution.

49 US Executive Order 12356. Available at:<https://www.hsdl.org/?view&did=463004>.

50 41 MJ 683 (1996).

51 D.L. Faigman, D.H. Kaye, M.J. Saks, J. Sanders, Modern Scientific Evidence (2010) § 40.1 Polygraph tests, legal issues.

52 41 MJ 683 (1996).

53 Jeffrey Kluger & Coco Masters, "How to Spot a Liar", Time (28-8-2006) p. 46; Steve Silberman, "Don't Even Think About Lying", Wired (Jan 2006) pp. 142, 147.

54 Supreme Court Case No. 18S-CR-595, decided on 23-6-2020 (Ind SC). Also see: *Commonwealth of Pennsylvania* v. *Joseph J. Davis*, 2019 Pa Super 365 (Pa Super Ct 2019).

55 *Hiibel* v. *Sixth Judicial District Court of Nevada, Humboldt County*, 2004 SCC OnLine US SC 55: 542 US 177 (2004), 189.

the State can compel an accused to provide testimony evidence if it is previously known independently, based on the notion of "foregone conclusion"[56] as an exception to the norm of self-incrimination.

3.2 United Kingdom

The "Unfair Operation Principle" is recognised in the United Kingdom for evidence gathering under Section 78(1) of the Police and Criminal Evidence (PCE) Act, 1984.[57] The court has the authority to refuse evidence under Section 82(3) of this act. The court has broad authority under Section 78 to exclude prosecution evidence if it "would have such an adverse effect on the fairness of the proceedings that the court ought not to allow it."

Fenell v. Jerome Property Maintenance Ltd.[58], the court in England and Wales rejected the admissibility of evidence gathered through any 'Truth' seeking drug, as it would arrogate the role of a trial judge. In the year 1981, the Phillips Commission attempted to introduce the DDT based evidences at the trial stage, however, the effort met with criticism again pointing towards the lack of certainty from an evidential point of view.[59]

However, in the U.K, the Government has taken small and cautious steps towards accepting Polygraph test as a means to resolve certain specific crime related issues. Deception Detection Tests results as evidences in the criminal justice system are not acceptable in the U.K courts. In general, these evidences are also excluded in criminal cases in most of the European courts of law. However, after successful piloting of voluntary Polygraph testing on sex offenders by the University of Newcastle, the Ministry of Justice ran a three year long mandatory Polygraph test to evaluate the disclosures made by the offenders under supervision. The Polygraph Rules 2009[60], allows the Secretary of State to impose mandatory Polygraph testing on the sex offenders to be released on licence so as to improve offender management and monitor compliance with the terms of the licence. In 2014 the Pilot was successfully concluded and since then the Polygraph tests have been used in the National Probation Service in the management of sexual offenders. The information disclosed by the offenders during these examinations are used other than to monitor licence conditions and dynamic risk factors, to also help the Offender Managers to better the risk management plans[61]. Head of the Sex Offender Management Unit for Greater Manchester Police stated "There have been a significant number of cases where information gained through Polygraph testing has led to children and vulnerable people being safeguarded. Overall, the benefits of Polygraph allow our joint resources to better manage the risk posed by registered sex offenders, to concentrate on those who pose the most harm in our communities."[62]

In July 2021, the Ministry announced the plan to commence with a similar three-year piloting of mandatory Polygraph test on domestic abuse perpetrators who are released on licence and are recognized at being high risk of causing serious harm.[63] The provisions in the Domestic Abuse Act are such that the Secretary of State for Justice can impose mandatory Polygraph examinations on very-high and high-risk domestic abuse perpetrators. However, the information gained during the Polygraph testing cannot be admitted in the criminal courts against the released individuals and in civil courts it may be used at the discretion of the judge.[64]

3.3 India

Despite the widespread usage of truth machines in criminal investigations, there are no provisions in Indian law for using DDTs as evidence. The Central Government might, however, notify additional government scientific experts for this purpose under Section 273(g) of the Criminal Procedure Code. The Indian Statute Commission has proposed that a law be enacted to ensure procedural fairness. The Commission recommended in its 94th Report that Section 166-A be added to Chapter 10 of the Indian Evidence Act to deal with evidence gathered "illegally" or "improperly."[65] The Indian courts however, in many

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56 *Fisher* v. *United States*, 1976 SCC OnLine US SC 69: 48 L.Ed.2d 39: 425 US 391 (1976). The foregone conclusion doctrine explains that if the Government already knows the testimony implicit in an Act, then the Fifth Amendment of US Constitution does not bar the Act. Also see: *Grand Jury Subpoena to Sebastien Boucher, In re*, No. 2:06-mj-91, dated 19-2-2009: 2009 WL 424718 (D Vt).

57 *A.* v. *Secy. of State for Home Deptt.*, (2006) 2 A.C. 221: [2005] 3 WLR 1249 (HL). Also see: *Allen* v. *R.*, 2003 SCC OnLine Can SC 18: (2003) 1 SCR 223.

58 *Fennell* v *Jerome Property Maintenance Ltd*, The Times, (26 th November 1986) QBD.

59 Royal Commission on Criminal Procedure (1981) Report, Cm. 8092 (London: HMSO) at Para 4.76

60 Available at: www.dwp.gov.uk/docs/vra-evaluation.pdf

61 Available at: https://www.gov.uk/government/publications/domestic-abuse-bill-2020-factsheets/mandatory-polygraph-tests-factsheet

62 Available at: https://www.gov.uk/government/publications/domestic-abuse-bill-2020-factsheets/mandatory-polygraph-tests-factsheet

63 Available at: https://www.gov.uk/government/publications/domestic-abuse-bill-2020-factsheets/mandatory-polygraph-tests-factsheet

64 Available at : https://www.gov.uk/government/publications/domestic-abuse-bill-2020-factsheets/mandatory-polygraph-tests-factsheet

65 Law Commission of India Report titled "Evidence obtained illegally or improperly: Proposed Section 166-A, Indian Evidence Act, 1872". It suggested to introduce Section 166-A in Evidence, "In a criminal proceeding, where it is shown that anything in evidence was obtained by illegal or improper means, the court, after considering the nature of the illegality or impropriety and all the circumstances under which the thing tendered was obtained, may refuse to admit it in evidence, if the court is of opinion that because of the nature of the illegal or improper means by which it was obtained its admission would tend to bring the administration of justice into disrepute."

judgments have given certain important instructions regarding the use of DDTs for interrogative purposes. The Indian judiciary seems to not have a unified front in these decisions. While in cases relating to Narco-Analysis like Santokben Sharma Bhai Jadeja v. State of Gujarat[66] opining on the risk factor involved in Narco-Test the court commented that risk is involved in every activity of life and one cannot condemn the test when it is being conducted by the professionals with due care and precision. In Dr. Rajesh Talwar and Another v. Central Bureau Investigation,[67] famously known as 'Arushi murder case', the court allowed the conduction of Narco, Polygraph and Brain Mapping tests against the will of the accused persons. The results of the test ultimately played a crucial role in uncovering the truth. In Dinesh Dalmia v. State[68] the court stated that the investigative agencies resort to Narco-analysis tests in situations when the accused has not allegedly come forward with the truth and such measures will not be amounting to testimonial compulsions. The above-mentioned cases draw attention to the inclination of the judiciary towards the use of Narco-analysis for investigation in not completely towards the acceptance of evidences in the court of law. However, in the landmark judgment of Selvi v. State of Karnataka,[69] commenting on the right of the accused against self-incrimination enshrined under Art 20(3) of the Indian Constitution, the Court said that certain guidelines need to be followed before enabling Polygraph analysis tests and the informed consent of the accused needs to be taken before the conduction of such analysis. The court declared that forcibly subjecting the accused to a Polygraph is a clear infringement of Art. 20 (3) of the Constitution. Thus, it can be concluded that in the absence of any legislating framework about the legitimacy of the DDTs, the attitude of the Judiciary in India has seemed to be more accommodative of these tests provided the due process is followed.

4. Application of 'doctrine of Poisonous Tree Fruits' on Evidence Extracted through DDTs

The "Fruits of the Poisonous Tree" doctrine[70] has a direct influence on the procedural probity of evidence collection;[71] this rule is meant against arresting police wrongdoing, and a Judge is entitled to remove damning evidence if it was acquired through unlawful tactics during trial processes. The early common law perspective on admission of evidence can be observed in R. v. Leathem,[72] where Compton, J. argues, "It doesn't matter how you got it; it would be acceptable in evidence even if you stole it." The use of illicit tactics in gathering evidence did not influence its admission, according to Lord Goddard in the Privy Council's Kuruma case.[73] "Undoubtedly, in criminal cases, the judge always has the discretion to exclude evidence if the rigid criteria of admissibility would act adversely against an accused," Lord said. The Scottish approach to the issue demands ongoing court review of police tactics and places the burden of proof on police for evidence collection procedures. In Australia and New Zealand, a judge can exclude improperly obtained evidence from a criminal trial if it is in the public interest.[74]

Prior to 1914, in the United States, illegally obtained evidence was always admissible, regardless of the procedural probity of the search and seizure.[75] The case of Fremont Weeks v. United States[76] established an exclusionary rule prohibiting the admissibility of evidence obtained through illegal means. Various subsequent judicial decisions in the United States expanded the exclusionary principle to include the "fruit of the deadly tree."[77] The Supreme Court ruled in Wolf v. Colorado[77]

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66 2008 CriLJ 68

67 2013 (82) ACC 303

68 2006 CriLJ 2401

69 2010(7) SCC 263

70 The doctrine of "Fruits of Poisonous Tree" was propounded by Frankfurter, J. in *Nardone* v. *United States*, 1939 SCC OnLine US SC 151: 84 L.Ed. 307: 308 US 338 (1939). This doctrine holds that the evidence (fruit) emanates from an illegal search or seizure (tainted source - Tree) is also tainted, hence not admissible.

71 Bharat Chug and Taahaa Khan "Rethinking the 'Fruits of Poisonous Tree' Doctrine: Should the 'Ends' Justify the 'Means'?", 2020 SCC OnLine Blog OpEd 76. Also see: Talha Abdul Rehman "Fruits of Poisoned Tree: Should illegally obtained evidence be admissible?", (2011) PL May S-38.

72 (1861) 8 Cox CC 498. Also see: *Kuruma* v. *R.*, 1955 A.C. 197; *Kyllo* v. *United States*, 2001 SCC OnLine US SC 61: 533 US 27 (2001).

73 *Kuruma* v. *R.*, 1955 A.C. 197. Also see: *R.* v. *Sang*, 1980 A.C. 402: [1979] 3 WLR 263, 288 (HL); Rosemary Pattenden, "The Exclusion of Unfairly Obtained evidence in England", (1980) 29 ICL 666.

74 *Bunning* v. *Cross*, (1978) 19 ALR 641 (Aust).

75 *Boyd* v. *United States*, 1886 SCC OnLine US SC 58: 29 L.Ed. 746: 116 US 616 (1886).

76 1914 SCC OnLine US SC 61: 58 L.Ed. 652: 232 US 383 (1914).

77 The requirements of the Fifth and Fourteenth Amendments that the Federal or a State Government shall not "deprive any person of life, liberty or property, without due process of law" may lead to exclusion of evidence obtained by procedures which "do more than offend some fastidious squeamishness or private sentimentalism about combating crime too energetically", by a method which "shock the conscience". Also see: Loewenthal, "Evaluating the exclusionary rule in search and seizure" (1980) 9 (3) Anglo-American Law Review 238. Christopher Slobogin, "A Comparative Perspective on the Exclusionary Rule in search and seizure Cases" Vanderbilt Public Law Research Paper No. 13-21, Public Law and Legal Theory (2013).

78 1949 SCC OnLine US SC 102: 93 L.Ed. 1782: 338 US 25 (1949).

that the States were bound by the Fourth Amendment. Frankfurter, J., partly echoing Cardozo's "weighty testimony" about the possibility of numerous alternatives to the exclusionary rule,[79] said:"most of the English speaking world does not regard as vital … the exclusion of evidence thus (illegally) obtained." "The Judge must hesitate to accept this remedy as an essential part of the right," the court said. Frankfurter, J. advised that evidence obtained through criminal invasion of privacy be "remanded to the remedies of private litigation and such protection as the internal discipline of the police, under the eyes of an attentive public opinion, may give."[80] Mapp v. Ohio[81],a major US Supreme Court decision, holds that the Fourth Amendment's due process clause requires procedural probity in evidence collecting. It also safeguards the right to privacy guaranteed by the Fourth Amendment, and so overrules Wolf v. Colorado.[82]

Initially, Indian courts recognised procedural fairness,[83] and R.M. Malkani v. State of Maharashtra[84] is considered a recognition of the exclusionary rule. Later, the Indian judiciary adopted the "end justifies the means" theory.[85] "If the evidence is acceptable, it doesn't matter how it was obtained," the general rule continues, "the Indian Evidence Act does not require procedural morality during evidence gathering."[86] The Supreme Court of India's two recent judgements on the right to privacy[87] have reignited the debate in India's legal landscape about how to incorporate the right against testimonial coercion and the right to privacy in the acquisition of evidence for criminal adjudication. "The tendency in judicial pronouncements is that evidence collected unlawfully or improperly is not inadmissible per se."[88] "The frequent reliance on such "short cuts" will impair the diligence required for conducting effective investigations," the Supreme Court stated in the Selvi case.[89] Despite the best intentions of the courts, the issue of procedural probity of evidence is far from resolved and requires immediate attention.

5. DDTs: An Effective solution to interrogative torture or an infliction on right to silence?

In order to extract "truth" behind a fact in issue relating to a crime, police exhort to use illegal tactics, namely "torture" during interrogation, which is the basis of and culminates in "compelled testimony." Torture has since long been one of the prominent practices as a mode of knowledge production and central to projects of control within the government and law. Pain through torture was not only a form of punishment but also a means to wrest out the truth. The use of violence during a criminal inquiry is sometimes referred to as "third degree," and it is illegal in many jurisdictions and under numerous human rights agreements.[90] Despite the condemnation on the grounds of it being inhuman and authorities frequently denying any such charges, third-degree methods, continue to be common in the worldwide landscape. In common parlance, asking general questions during a police interrogation is referred to as "first-degree" stress, but confrontation with contradictory facts is referred to as "second-degree" torture, and Michel Foucault has argued that torture can enshrine the sovereign's power and deter people from committing crimes.[91] During questioning, confronting facts in order to disclose the truth reinforces scientific temper in oral evidence collection. First and second degrees of "mental stress or torture" are legally sanctioned during fact-finding. Scientific investigation, particularly the use of forensic inputs, may not only increase evidence collecting transparency but also lessen the employment of various third-degree procedures by the police to achieve disclosure through coerced testimony.

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79 Id., SCC OnLine US SC: US at p. 29.

80 Id., SCC OnLine US SC: US at p. 31.

81 1961 SCC OnLine US SC 136: 6 L.Ed.2d 1081: 367 US 643 (1961).

82 1949 SCC OnLine US SC 102: 93 L.Ed. 1782: 338 US 25 (1949).

83 *Ukha Kolhe* v. *State of Maharashtra*, AIR 1963 SC 1531. Also see: *Nazir Ahmad* v. *King Emperor*, 1936 SCC OnLine PC 41: (1935-36) 63 IA 372. It was held, "… where a power is given to do a certain thing in a certain way the thing must be done in that way or not at all. Other methods of performance are necessarily forbidden."

84 (1973) 1 SCC 471.

85 *R.M. Malkani* v. *State of Maharashtra*, (1973) 1 SCC 471. Also see: *Poorna Mal* v. *Director of Inspection (Investigation)*, (1974) 1 SCC 345; *State of M.P.* v. *Paltan Mallah*, (2005) 3 SCC 169, the Court held that "unless there is an express or necessary implied prohibition in the Constitution or other law, evidence obtained as a result of illegal search or seizure is not liable to be shout out"; *Vinit Kumar* v. *CBI*, 2019 SCC OnLine Bom 3155.

86 *Umesh Kumar* v. *State of A.P.*, (2013) 10 SCC 591.

87 *K.S. Puttaswamy (Privacy-9J.)* v. *Union of India*, (2017) 10 SCC 1; *K.S. Puttaswamy (Aadhaar-5J.)* v. *Union of India*, (2019) 1 SCC 1. Also see: *Carpenter* v. *United States*, 2018 SCC OnLine US SC 60: 201 L.Ed.2d 507; *Vinit Kumar* v. *CBI*, 2019 SCC OnLine Bom 3155; *PUCL* v. *Union of India*, (1997) 1 SCC 301.

88 *State of M.P.* v. *Paltan Mallah*, (2005) 3 SCC 169, 182, para 31.

89 *Selvi* v. *State of Karnataka*, (2010) 7 SCC 263, 320, para 103.

90 Edwin R. Keedy, "The Third Degree and Legal Interrogation of Suspects", (1937) 85 (8) University of Pennsylvania Law Review 761.

91 Michel Foucault, Discipline and Punish: The Birth of Prison, trans. Alan Sheridan (New York: Vintage Books, 1977).

The Latin phrase "nemo tenetur seipsum tenetur,"[92] which simply means "no one need accuse himself," gave rise to the concept of "compelled testimony." This law held sway in Rabbinic courts and was codified in the Talmud (no one can incriminate himself). Later followed the Star Chamber history and Anglo-American repulsion in this context. The right against self-incrimination is a common law principle that protects a suspect from police assault and physical torture in order to extract a confession or the "truth" behind a fact. Imperial Britain incorporated some of this thinking into the Indian Code of Criminal Procedure. The Indian Constitution, on the other hand, was motivated by Anglo-American sources' high-minded restriction against self-incrimination." [93]

V.R Krishna Iyer stated, "Article 20(3) is a human article, a guarantee of dignity and inviolability of the person and refusal to turn an adversary system into an inquisitorial scheme in the antagonistic ante-chamber of the police station,". Speaking about the right against self-incrimination Justice Iyer said "And, in the end, the inquiry that uses the fewest stratagems is the finest; the cop who allows his fists rest and his thoughts rest deserves praise."[94] Article 20(3), which guards against incriminating questioning and the inadmissibility of a statement taken by the police under Section 161 of the Criminal Procedure Code, depicts procedural compliance with the constitution's anti-testimonial compulsion provisions. As a result, Article 20(3) guarantees the right of the accused, suspects, and witnesses to choose between speaking and remaining silent during police interrogation and judicial procedures. In the case of DDTs, the Supreme Court stated in Selvi:[95]

"262. In our considered opinion, the compulsory administration of the impugned techniques violates the "right against self-incrimination". This is because the underlying rationale of the said right is to ensure the reliability as well as voluntariness of statements that are admitted as evidence. This Court has recognised that the protective scope of Article 20(3) extends to the investigative stage in criminal cases and when read with Section 161(2) of the Code of Criminal Procedure, 1973 it protects accused persons, suspects as well as witnesses who are examined during an investigation. The test results cannot be admitted in evidence if they have been obtained through the use of compulsion. Article 20(3) protects an individual's choice between speaking and remaining silent, irrespective of whether the subsequent testimony proves to be inculpatory or exculpatory. Article 20(3) aims to prevent the forcible "conveyance of personal knowledge that is relevant to the facts in issue". The results obtained from each of the impugned tests bear a "testimonial" character and they cannot be categorised as material evidence."

Section 161(2) of the Criminal Procedure Code has two essential ingredients: (i) a witness under police examination "shall be bound to answer truly all questions to such case put to him by such officer"; and (ii) "other than questions the answer to which would have a tendency to expose him to a criminal charge, penalty, or forfeiture." As a result, in the author's opinion, the right to silence guaranteed by this article does not provide blanket protection to anyone, even an accused person, during criminal interrogation, but simply protects him from implicating questions.

Only spoken testimony is protected under Article 20(3), not physical evidence such as fingerprints, writing, signatures, papers, biometrics, blood samples, and so forth. In State of Bombay v. Kathi Kalu Oghad,[96] the Supreme Court of India declared that "to be a witness" under Article 20(3) means "to offer proof of intimate knowledge," and thus thumb impressions, specimens of handwriting, or displaying a part of the body for identification are not inherently illegal. Selvi[97] has, however, expanded the extent of the right to self-incrimination beyond oral testimony if the evidence is based on personal knowledge. As a result, any coercion, even a deed leading to the manifestation of an individual's thought content, would be protected under Article 20. (3). The Indian Supreme Court's decision echoes and is consistent with the US Supreme Court's judicial interpretation in Doe v. United States. The Supreme Court declared in Nandini Satpathy v. P.L. Dani[98] that no one can forcibly extract information from an accused during questioning and that he has the right to remain silent. In India, an accused person's right to quiet is routinely violated because it is rarely recognised by police officers on the ground. Truth identification mechanism violently invade into one's thinking, nullifying the right to silence's validity and legality.

6. Consent in relation to legal presumption

Regarding the admissibility of DDT evidences, the courts in the United States showed a trend of digression from the Frye rationale in cases where a written stipulation is

92 Mark A. Godsey, "Rethinking the Involuntary Confession Rule: Towards a Workable Test for Identifying Compelled Self-Incrimination", (2005) 93 California Law Review 465. Also see: Article 14(3)(g) of the International Covenant on Civil and Political Rights provides the rights, "not to be compelled to testing against himself or to confess guilt".

93 *Nandini Satpathy* v. *P.L. Dani*, (1978) 2 SCC 424, para 30.

94 *M.P. Sharma* v. *Satish Chandra*, AIR 1954 SC 300.

95 (2010) 7 SCC 263.

96 AIR 1961 SC 1808.

97 (2010) 7 SCC 263.

98 *Nandini Satpathy* v. *P.L. Dani*, (1978) 2 SCC 424, para 53.

obtained from both the parties admitting the evidence. LeFevre v. State[99] being the first appellate case that dealt with admissibility on signed stipulation of the defendant to prove his innocence. Though the Wisconsin Supreme Court gave no effect to the stipulation and again held the Polygraph evidence inadmissible. However, in the case of People v. Houser[100] where the defendant and his counsel signed a written stipulation with the prosecution the admissibility of the Polygraph results. After the unfavorable result of the test the defendant was convicted, and on appeal the California Court of Appeals held the stipulation significant and binding on the parties. This decision is credited to be an exception to the general exclusionary rule. The trend of admitting Polygraph on obtaining the stipulation has been founded on some conditions. Such stipulations have been considered insignificant where the examiner of the test is not present for cross examination,[101] where the defendant lacked counsel,[102] where the defendant had a limited education,[103] where mutual consent is lacking[104] and where the stipulation does not cover the qualification of the examiner of the test.[105]

In India, despite several rulings that referenced DDTs are in violation of the Constitution and other aspects of Indian law, the Supreme Court of India in Selvi[106] allowed these tests to be conducted after obtaining the subject's informed consent. Several legal conundrums arose as a result of this contradictory judicial attitude. To begin with, the Court determined that these practices are a flagrant violation of the right to self-incrimination. Second, the Narco-test is inhumane, as it violates the subject's bodily integrity. Third, expert opinion based on DDT has no evidential value in and of itself, and criminal adjudication requires evidence beyond a reasonable doubt. The Latin proverb "Quando aliquid prohibetur ex directo, prohibetur et per obliquum", which clearly illumines that if legal provisions are adverse to an act, consent cannot justify or overlook the legal restrictions, may not be justified. Furthermore, if the person refuses to grant consent to be exposed to DDTs, "adverse presumption" under Section 114(g) of the Indian Evidence Act may be drawn against the suspect in regular circumstances, such as in DNA. Even if the presumption is legally withdrawn or annulled by the legislation or the court, it may cause "adverse suspicion" against the suspect in the minds of the investigator and the Judge.

7. The future of deception detection techniques

The National Academy of Sciences of the United States conducted an empirical investigation that revealed the dangers of accepting unverified scientific evidence in the United States. The judiciary is also "utterly ineffective" in ensuring the veracity of forensic conclusions, according to the NRC Report, leading in unjust convictions.[107] DDTs are neither credible nor tenable under the legal framework of numerous jurisdictions, including India, according to the factum. The Indian procedural laws make no mention of these tactics. Furthermore, DDT test inputs are neither "trustworthy" nor "qualified" by a theoretical framework for use as evidence, especially in criminal cases. These instruments, on the other hand, have a high rating for building perspective among those who may be utterly hostile to reality if they believe science is infallible. Furthermore, even in cold cases, faulty procedures cannot be used in criminal court. Such irrational experiments have the potential to result in the conviction of innocent people, which is not uncommon in the worldwide legal system.

However, one field that still remains relatively unexplored, is the tap into the potential of the three traditional approaches (Psychophysiological in lie detector, non-verbal in Brain mapping and verbal content in Narco-analysis) in a combined experiment. Psychologists have suggested that the development of the traditional DDTs has mostly remained independent of each other. According to Aldert Vrij, the research on the deception detection techniques is still divided into camps. However, the possibility of improving the veracity of the DDTs, can be explored by combining different cues, especially verbal and non-verbal cues. As noted by Aldert Vrij, various research shows that is it easier to detect deception if one is paying attention to more that just one cue for instance, paying attention to both speech content and vocal aspects. Much, research still is required in this field to assess whether combining of the DDTs yield higher rates of detection of guilt and eliminated the chances of faults while gathering evidence.[108]

Conclusion

In the global legal landscape, the law surrounding the admissibility of evidence gathered through unfair or illegal

[99] 242 Wis. 416, 8 N.W.2d 288 (1943).
[100] 85 Cal. App. 2d 686, 193 P.2d 937 (Dlst. Ct. App. 1948).
[101] People v. Zazzeta, 27 Ill. App. 2d 302, -, 189 N.E.2d 260, 264 (196).
[102] Conley v. Commonwealth, 382 S.W.2d 865 (Ky. 1964).
[103] United States v. Rid]ling, 350 F. Supp. 90 (E.D. Mich. 1972).
[104] State v. Walker, 37 N.J. 208, 181 A.2d 1 (1962).
[105] Colbert v. Commonwealth, 306 S.W.2d 825 (Ky. 1957)
[106] (2010) 7 SCC 263.
[107] Daniel D. Langleben and Jane Campbell Moriarty, "Using Brain Imaging for Lie Detection: Where Science, Law and Research Policy Collide", (2013) 19(2) Psychol Public Policy Law 222.
[108] Par Anders Granhag, Leif A. Stromwall, The Detection of Deception in Forensic Contexts, (Cambridge University Press, 2004).

means is hazy and in need of clarification. If the court accepts the illegally obtained evidence during judicial proceedings, the court indirectly implicates itself in the illegality and so becomes a party to a procedure that could develop insolence for the law and judicial system. Propriety necessitates that courts be given the right to exclude evidence collected through illegal means and to cross-examine police officers in order to ensure procedural fairness during the investigation.[109] The rule of exclusion in the realm of evidence may aid the symmetry of law and it's just growth by, among other things, revealing new dimensions to evidence jurisprudence. However, in order to defend human dignity and societal values, a delicate balance must be struck between the court's "collateral inquiry" into the exclusionary rule and the protection of public interests. The idea of "truth must triumph" - the hallmark of justice — is the essence of "fairness" under the rule of law. In the light of the dilemma of striking the fine balance between fairness and public good, the courts have time and again faced the tedious question relating to the acceptability and admissibility of the evidences extracted via DDTs. Where, on one hand is the argument that the use of DDTs for interrogative purposes does eliminate the possibility of use of third-degree measures, thus adhering to the Due Process principles, the other side of the coin raises questions relating to their accuracy and veracity. Where the Due Process model of crime control strictly prohibits the use of physical force against an accused for interrogative purposes, the model also forbids the use of improperly obtained evidences in the court of law against the accused. While the use of evidence obtained through DDTs does confirm with the former precept of the model, the later is for the time being considered legally in contradiction to the acceptability of such evidence in the court.

In India, there is a great deal of skepticism about the evidentiary value of various forensic data, and DDTs are the embodiment of a legal problem. Humans are skilled at lying but bad at detecting lies, according to social and behavioural science research, aiding the ongoing search for a technology-based objective technique of truth verification or lie detection.[110] DDTs, it is believed, give a level playing field for the accused, allowing him to prove his innocence in an adversarial setting. DDTs have the potential to replace custodial violence and the use of the third degree for criminal questioning, and they are also likely to disclose the truth. Scientific experimentation, on the other hand, cannot be subjected to criminal charges. If authorised, these procedures could be used in civil cases when the majority of probability is sufficient for evidentiary purposes.

Truth machines are a developing science with enormous promise for exposing dishonesty, but unless they pass the Daubert[111] test, their employment may cause more harm than benefit. In order for the judiciary to deliver justice with more accuracy, the forensic medical community, in collaboration with legal specialists, must conduct focused research with appropriate funding to develop robust and trustworthy deception exposing technologies. The Indian legislature may explore giving courts more power by adding an exclusionary principle or an unfair operation concept that allows evidence gathered by unfair means to be excluded. In this case, procedural probity may incentivize the police to improve their investigation tactics. The accused has little input in evidence collection, and the State becomes the suo moto owner of the scene of the crime and the investigator becomes the master of evidence gathering. Equitable justice begins with a "fair and scientific" investigation in which both the victim and the offender have a say in the gathering of evidence. Indeed, someone accused must be allowed to face truth machines by the court as a matter of right in order to prove his innocence. To develop trust in governance and the judicial system, equity necessitates procedural fairness. To preserve judicial transparency, the truth behind crime must be studied through the lens of science.

Thus, it is concluded that India, like other countries, must stop using Narco-tests since they are a kind of torture and a harsh, inhumane, and demeaning approach.[112] Non-invasive procedures such as the Polygraph and the P300 may be utilised in the courts with extreme caution solely for the resolution of civil disputes. This caution is warranted to ensure the sanctity of the constitutional right of "right to remain silent". Dilution of this fundamental right is foreseeable under circumstances where the suspect is exercising its rights, but his brain and physiological responses are responding to the investigating officer.

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[109] *United States* v. *P. Calandra*, 1974 SCC OnLine US SC 2: 38 L.Ed.2d 561: 414 US 338 (1974), 347. Powel, J. speaking for the US Supreme Court observed, the primary purpose of the exclusionary rule is to deter future unlawful police conduct and thereby effectuate the guarantees of the Fourth Amendment against unreasonable search and seizure."

[110] A. Vrij, Detecting Lies and Deceit: Pitfalls and Opportunities (2nd Edn., Chichester, England: John Wiley & Sons Ltd. 2008).

[111] *Daubert* v. *Merrell Dow Pharmaceuticals Inc.*, 1993 SCC OnLine US SC 104: 509 US 579 (1993).

[112] S. Vijay Kumar, "Parliament Must Be Persuaded to Permit Polygraph, Brain Mapping" Hindu (30-5-2010). Also see: Jinee Lokaneeta, The Truth Machines: Policing, Violence, and Scientific Interrogations in India (University of Michigan Press, Orient BlackSwan: New Delhi, 2020)

Protection of Domain Names In India: A Brief Study

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ABSTRACT

The impetuous evolution of information technologies, and, in particular, the use of Internet has presented some significant challenges, which aimed to adapt to the new demands that technology brings. Information and communication technology law is a new branch of the law in comparison to other laws and it comprises of the great number of issues that still demand detailed examination. The most important and challenging issue to be solved is fair and successful resolution of the disputes relating to domain names. A domain name is an addressing construct, used for finding and identifying computers on the Internet. According to final report of the WIPO Internet Domain Name Process, "a domain name is an IP address in a human-friendly form".[1] Therefore, when described human-friendly form corresponds to a company name or a trademark, it turns into important and valuable asset. And when domain name is associated with a trademark, it becomes a powerful commercial tool. Consequently, businesses emphasize the necessity to own a domain name that connects to its trademark. Before the Internet domain names, the trademarks performed the role of goods or services identifier. Invention and development of the Internet lead to increased growth of conflicting issues. Particularly, conflicts take place in the area of trademarks and domain names application. Therefore available means gives rise to the practice of registration trademarks as domain names. Trademark owners are desperate to protect their legal rights. Consequently, all of the disputes which might occur regarding trademark registration and protection could be resolved within the jurisdiction of the trademark's holder country. Disputes relating to domain names involve trademarks, accordingly, for the resolution of a relevant dispute courts have been governed by traditional legislation, namely trademark law, passing off , unfair competition and other similar laws. The expansion of the Internet and incontrollable character of cyberspace caused problems in applying the traditional legislative means while deciding domain name disputes.

Keywords: Domain Names, Trademarks, IP Address , Internet and IPR

Introduction

With the commercialization of the Internet, more and more users want their own cites, and each of them will require a distinct identifier. Therefore, a key issue is the name by which organization, company or entrepreneur will be known by online users. Domain names serve as humanly memorable names for Internet participants, like computers, networks, and services. A domain name represents an Internet Protocol (IP) resource. Individual Internet host computers use domain names as host identifiers, or hostnames. The general definition of the term "domain name" can be described as a mean of defining IP (Internet Protocol) address to which it is ascribed. Technically, the domain name has the subordinated character under the relation to the so-called IP-address which possesses any information resource in the Internet.

An Internet Protocol Address is the numerical address of the form by which a location in the Internet is identified. Computers on the Internet use IP addresses to route traffic and establish connections among themselves. E.g. when a request for a Webpage is sent from a client computer system to a Web server, the client computer includes the IP address of the Web server. To keep the identification of communicating gadgets simple and mnemonic, Domain Name System (DNS) has been developed. This system enables use of globally unique and easy-to-remember names for Web pages and mailboxes called domain names, rather than long numbers or codes (IP addresses), e.g. www.bbau.ac.in instead of 14.139.228.229.

The Domain Name System (DNS) is hierarchical system of domain names which is technically supported by DNS-servers which by means of special databases

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[1] See World Intellectual Property Organization (WIPO), The Management of Internet Names and Addresses: Intellectual Property Issues, Report of the WIPO Internet Domain Name Process (30 Apr 1999), *available at* http://www.wipo.int/export/sites/www/amc/en/docs/report-final1.doc(accessed on 06/04/2022).

of domain names automatically create for them equivalents in the form of digital IP-addresses, and which serves as a source for placement of information resources on the Internet. If we see from point of view of Intellectual property right the IP-address has no value, and from this point of view, it carries out a secondary role in relation to the domain name. Thus from this it can be concluded that the DNS was brought in order to assist Internet users with easily remembered domain name, in other words, the domain name system was designed to make the Internet accessible to human beings.[2]

Structurally domain name consists of two or more parts; each of them is characterized by certain level:

1. Top level domain (TDL) which comes from the right part.
2. Second-level domain and,
3. Sub-domains

Top-level domains are of following types:

a) generic top-level domains (gTDLs) point to special kind of activity of domain name owner, in particular, covers the following types:

   I. **.com** - for the commercial organizations,

   II. **.net** - for the subjects which primary activity is connected with information networks,

   III. **.gov** - for governmental structures,

   IV. **.org** - for the non commercial organizations,

   V. **.edu** - for educational institutions,

   VI. **.int** - for the international organizations,

   VII. **.mil** - for military (power) structures and etc;

b) Country code top-level domains (ccTLD) which are defined by the country of the domain name registration. For instance, for India - .in, for Russia - .ru, for United States of America - .us etc;

Second-level domain names are often created based on the name of a company (e.g., microsoft.com), product or service (e.g., gmail.com). Below these levels, the next domain name component has been used to designate a particular host server.[3]

How to get a domain name?

There are two main ways you can get a domain name. You can either register your domain name yourself or you can get your web host or ISP (Internet Service Provider) to register it for you.

To register a domain name yourself you will need to choose a Registrar. A Registrar is an ICANN accredited domain registration company. There are hundreds of Registrars on the Internet nowadays. The market is becoming increasingly competitive, which means that you can purchase domains names for a low yearly fee.

Most web hosting companies will offer domain registration services to their clients. When you register a domain name through a web host they will register your domain name for you through their own approved registrar.

Today, the Internet Corporation for Assigned Names and Numbers (ICANN) manages the top-level development and architecture of the Internet domain name space. It authorizes domain name registrars, through which domain names may be registered and reassigned.

International Rules and Procedures

(A) Internet Corporation for Assigned Names and Numbers (ICANN)

An international Non Profit Corporation, Internet Corporation for Assigned Names and Numbers (ICANN) formed in 1998 is the internet's naming system and technical coordinator, responsible for developing the policy for the internet's unique identifiers and addresses. ICANN oversees the distribution of unique technical identifiers which are used in the Internet's operations and also delegates Top-Level Domain names (such as .com, .info, etc) resulting in universal resolvability.

In order to register a domain name, one must first contact the ICANN authorized administrator of the desired TLD through a service provider. As long as the desired name has not been assigned to any prior applicant, the requested name will be approved without any requirement towards proof of ownership, trademark registration or any other form of evidence. However once a domain name has been registered in the above manner, the same does not ensure trademark status. A domain name is not itself a trademark. In order to attain trademark status various factors such as date of use, distinctiveness of the domain name with respect to goods or services, manner of use etc. will contribute after ensuring that no-one prior existing identical/ deceptively similar trademark is being violated. ICANN has also provided guidelines for domain name registration, working towards bonafide registrations. Since ICANN is the international core of the internet, it is but practical that it provide a dispute resolution mechanism for domain name disputes in association with The World Intellectual Property Organization (WIPO). The World Intellectual Property Organization has numerous countries as signatories and international dispute resolution is a workable solution.

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2 See <http://www.icann.org/en/participate/what-icann-do.html>

3 See <http://en.wikipedia.org/wiki/Domain_name>

(B) Uniform Domain Name Dispute Policy (UDRP)

ICANN implemented the Uniform Domain Name Dispute Policy (UDRP) in 1999, which has been used to resolve more than 20,000 disputes over the rights to domain names. The UDRP is designed to be efficient and cost effective. In 2010 alone around 2696 cybersquatting cases were filed with the WIPO Arbitration and Mediation Centre under this Policy involving 4370 domain names across 57 countries, according to WIPO's official website.

In cases of cybersquatting, cyber piracy or bad faith registration, the complaining party can invoke a special administrative procedure before the WIPO Administrative and Mediation Centre to resolve the dispute. Under this procedure, neutral persons selected from panels established for that purpose would decide the dispute. The procedure takes approximately 45 days.

Indian Perspective on domain names

Name scenario way back in 2004 stating that-

"As far as India is concerned, there is no legislation which explicitly refers to dispute resolution in connection with domain names. But although the operation of the Trade Marks Act, 1999 itself is not extraterritorial and may not allow for adequate protection of domain names, this does not mean that domain names are not to be legally protected to the extent possible under the laws relating to passing off." [4]

The Information Technology Act, 2000 of India addresses numerous cybercrimes and has set up a special cybercrimes cell however the Act oddly ignores the problem of domain name disputes and cybersquatting. The only saving grace for victims of such offences is that domain names may be considered trademarks based on use and brand reputation and so fall under the Trade Marks Act, 1999. However not all domain names are trademarks.

In May 2004, the Supreme Court in, M/s Satyam Infoway Ltd v. M/s Sifynet Solutions Pvt. Ltd[5], has laid down that Indian courts shall protect domain names on the legal principle applicable to trademarks and trade names.

In India, the Trademarks Act, 1999 provide protection to trademarks and service marks respectively. A closer perusal of the provisions of the Act and the judgments given by the Courts in India reveals that the protection available under the Act is stronger than internationally required and provided.

Protection under the Trademarks Act, 1999

The Act covers remedies peculiar to Indian legal framework and also the surely understood common law standards of passing off. At the same time it is in conformity with the recognised global principles and norms. Thus, the protection gave under the Act is more dependable and secure. The following provisions are significant in this regard:

(a) A registered trademark under the Act has the backing of the infringement and passing off remedies. An unregistered trademark is not ensured by the Act, but to the degree of benefiting of passing off remedy.[6] The meaning of the expressions "mark" and "trademark" is so generally given that it advantageously covers domain name.[7] It must be noticed that a mark is utilized, properly or wrongly, on the off chance that it is utilized as a part of printed or other visual representation.[8] It can't be questioned that a domain name comparing a mark is certainly utilized both as a part of the printed structure (electronic structure) and by visual representation. Subsequently, the provisions of the Act can securely be invoked to settle the liability in those cases.

(b) A passing off action is viable in law even against the registered proprietor of the trademark, especially if the trademark has a trans-border reputation.[9] This, rule perceives the order of securing the well-known trademarks, as required by the TRIPS Agreement and the Trademarks Act, 1999.[10] Thus, regardless of the possibility that a domain name is registered in compliance with common decency and without guilty intention, the passing off action is viable against the registrant.

(c) The registration of domain name with the Registrars perceived and endorsed by the ICANN might not have the same outcomes as registration under the Trademarks Act, 1999. For example, a registration under the Act conveys with it a presumption of validity.[11]

(d) The Act considers even an unintentional infringement or passing off as wrong against the right holder, dissimilar to domain name where mala fides must be proved. Therefore, it doesn't make a difference whether the individual culpable the privilege does as such falsely or otherwise.[12]

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4 available at m.isaserver.org/articles-tutorials/articles/2004domainnamesets.html (accessed on 04/06/2022).
5 (2004) 6 SCC 145.
6 The Trademark Act,1999,s. 27
7 The Trademark Act,1999, ss. Sections 2(1) (m) and Section 2(1)(z) respectively.
8 The Trademark Act,1999, s. 2(2) (b).
9 N. R. Dongre vs. Whirlpool Corporation, 1996 (16) PTC 583.
10 M/s Satyam Infoway Ltd v M/s Sifynet Solutions Pvt. Ltd, (2004) 6 SCC 145.
11 The Trademark Act, 1999, s. 31.
12 Lakshmikant v Chetanbhat Shah, JT 2001 (10) SC 285.

(e) The Act will have abrogating impact over whatever other law, which is in conflict with it. Further, since it is in conformity with the TRIPS Agreement, it is similarly in conformity with the very much acknowledged worldwide standards. It must be noticed that Rule 4 (k) gives that the procedures under the UDNDR Policy would not anticipate either the domain name proprietor/registrant or the complainant from presenting the case to a court of competent jurisdiction for independent resolution, either before continuing under ICANN's approach or after such continuing is concluded. This demonstrates that there is a concurrent and twofold security accessible under the Act.

(f) The provisions of the Act are in conformity with the TRIPS Agreement and the W.T.O provisions. These provisions are mandatory in nature unlike the provisions of W.I.P.O, which are persuasive and optional in nature. The UDNDR Policy is formulated under the provisions of W.I.P.O; hence it is not binding on parties whose rights are following out of the Act. The distinction is important since if there is an occurrence of contention between the Policy and the Act, the later will prevail and will govern the rights of the parties falling inside its ambit.

(g) The Act permits the making of a "Worldwide application" bringing about automatic protection in assigned nations mentioned in it.[13] This gives a more extensive and solid protection to the trademark and makes its misappropriation harsh and punitive.

Beside the above mentioned remedies under the act courts in numerous cases including that of Yahoo,[14] Rediff[15] and Satyam[16] have laid down the following guidelines regarding the protection of domain names -

1. The defendant should have sold/ offered its goods/ services in a manner that deceives the public into thinking that the goods/ services of the defendant are in fact the plaintiff's.

2. Misrepresentation by the defendant to the public should be established.

3. Loss/ likelihood of it should be established.

Judicial case laws have acknowledged the domain name problem and have tried to address it with injunctions, domain name transfers and damages under the laws of passing off; however legislature regarding the same has gaping holes which need to be filled in with specific amendments.

Important Case laws

1. Benett & Coleman Ltd. v. Steven S. Lalwani,[17]

Wherein the two domain names www.theeconomictimes.com and www.thetimesofindia.com were being used by the respondents 1998 onwards in bad faith to redirect Internet surfers to www.indiaheadlines.com providing India related news and articles. Bennett Coleman and Co. Ltd., the complainant, publishes The Economic Times, and "The Times of India", which are both widely read in India and also holds the domain names, www.economictimes.com and www.timesofindia.com, using them for the electronic publication of their respective newspapers. The complainant had already registered in India, the marks "The Times of India" and "The Economic Times" in 1943 and 1973 respectively.

The complainant contended that the respondent had no right or legitimate interest in respect of domain names which were registered in bad faith in order to attract, for commercial gain, Internet users by creating confusion in their minds. Even though the respondent contended that the complainant had no relevant trademarks registered in USA and that there is no likelihood of confusion between the parties' respective sites, the WIPO Panel found that the titles "The Economic Times" and "The Times of India" are used to identify the producer of the newspapers and sites and are not merely descriptive of content. The only difference between the domain names of either party is incorporation of the article "the" in the beginning and so the public will be misled as the reputation of the complainant is substantial. The WIPO Panel thus ordered the transfer of both domain names back to the complainant.

2. Rediff Communications Ltd. v. Cybertooth & Another[18]

The Bombay High Court while granting an injunction restraining the defendants from using the domain name 'RADIFF' or any other similar name, held that when both domain names are considered there is every possibility of internet users being confused and deceived into believing that both domain names belong to one common source and connection although the two belong to two different persons. Again the website using the domain name, 'Naukari.com' was held to be confusingly similar to that of the plaintiff, 'naukri.com', with a different spelling variant establishing prima facie inference of bad faith.

3. M/s Satyam Infoway Ltd v. M/s Sifynet Solutions Pvt. Ltd[19]

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13 The Trademark Act,1999,ss. 154&155.
14 Yahoo! Inc. v Akash Arora,78 (1999) DLT 285.
15 Rediff Communication Ltd. v Cyberbooth, AIR 2000 Bom. 27.
16 M/s Satyam Infoway Ltd v. M/s Sifynet Solutions Pvt. Ltd, (2004) 6 SCC 145.
17 available at http://www.wipo.int/amc/en/domains/decisions/html/2000/d2000-0014.html
18 AIR 2000 Bom. 27.
19 (2004) 6 SCC 145.

In this case the appellant registered several domain names like www.sifynet, www.sifymall.com etc. in June 1999 through ICANN and WIPO, based on the word "Sify", coined using elements of its corporate name, Satyam Infoway, which earned a wide reputation. The respondent registered www.siffynet.net and www.siffynet.com with ICANN is 2001 and 2002 respectively as it carried on business of internet marketing. On the respondent's demand to the appellant towards transfer of the domain name failing, the City Civil Court granted a temporary injunction against the respondent on the ground that the appellant was the prior user of the trade name "Sify" which had built up solid goodwill overtime in relation to the internet and computer services.

On appeal the High Court held that the balance of convenience between both the parties should be considered and the respondent had invested huge sums of money in the business. It held that customers would not be misled or confused between the two parties as the two businesses were different altogether. On further appeal The Supreme Court found that both the lower courts agreed on the principles of passing off actions in connection with trademarks being applicable to domain names.

The Supreme Court held that in order to claim passing off and restrain the defendant from passing off its goods/ services to the public as that of the plaintiff's, the test of deceiving the public with respect to the identity of the manufacturer/ service provider, misrepresentation and loss or likelihood of it should be applied and established. The appellant's claim to being one of the largest internet service providers in India was not challenged and the words "Sify" and "Siffy" are both visually as well as phonetically similar to quite an extent, with or without the addition of "net" to "siffy". The Supreme Court did not accept the respondent's explanation of the word "Siffynet" being derived from a combination of the first letter of the five promoters of the Respondent. The Court held that there was an overlap of identical or similar services by both parties and confusion was likely, unlike claimed by the defendant.

As for the balance of convenience issue, the Court was convinced of the appellant's evidence of being the prior user and having a reputation with the public with regard to "Sify". The respondent would not suffer much loss and could carry on its business under a different name. The Supreme Court ignored the High Court's finding that no prejudice would be caused to the appellant as it had another domain name, since this would be important only if the case was one where the right to use was co-equal to both parties. In this case, the respondent's adoption of the appellant's trade name was dishonest and so the High Court's decision was set aside while that of the City Civil Court was affirmed.

Conclusion

There is no direct law dealing directly with domain names under the Indian legal framework when contrasted with a simple right under the UDNDR Policy. The need of the present time is to harmoniously apply the standards of the trademark law and the provisions concerning the domain names. It must be noticed that the moment a decision is given by the Supreme Court and it attains finality, then it gets to be authoritative on all the individual or organizations in India.[20] It can't be challenged by showing any "statutory provision" to the contrary. This is so because there is no statutory provision which can abrogate "constitutional provision" and if there is an occurrence of a contention, the former must give way to the later. This settled legitimate position gets to be significant when we consider the decision of the Supreme Court in Satyam case[21] in the light of the above discussion. The various land mark judgments of the Supreme Court have given the "most grounded and strongest protection" to the domain names in the world. The main prerequisite to assert the same is that we should value them in their actual point of view and apply them in a purposive and upgrading way.

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[20] The Constitution of India, Art, 141.
[21] Supra note 17.

Steps Taken by India to Protect Its Wetlands and Why its Protection Is Necessary?

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Devang Mishra**

ABSTRACT

In this research paper I would be covering various topics that is starting from the basic and then going deep into subject of the research paper. In this paper I will be throwing light on the definition of what a wetland is, its definition in statues. Then covering the international convention India is a part for protection of these wetland and then telling the importance that why a wetland is to be protected the reasons behind protecting the wetland and how these wetlands contribute to our ecosystem. Then the recent guidelines which the Central government has come up with in protecting the wetland through its recent notification.

Keywords: Wetland, Climate Change, Role of International Conventions and Regulations of Central Government.

Meaning of Wetland

Wetlands are locations which are recognised primarily by the presence of water in that area, which might be permanent or seasonal.

The U.S. defined wetland as "Wetlands are lands transitional between terrestrial and aquatic systems where the water table is usually at or near the surface, or the land is covered by shallow water. Wetlands must have one or more of the three characteristics listed below:

1) At least on occasion, the land is dominated by hydrophytes.
2) the substrate is primarily undrained hydric soil; and
3) the substrate is saturated with water or covered by shallow water at some point throughout each year's growing season."[1]

Whereas the other definition where wetlands are defined as "areas of marsh,fen, peat, and or water, whether natural or artificial, permanent or temporary, with water that is static or flowing, fresh, brackish or salt, including areas of marine water the depth of which at low tide does not exceed six meters.2" This Ramsar definition of wetland is the broadest definition among all the definition which is given by various agencies present across the world which states that what are included in a wetland. "Wetlands therefore include the following:

- marine—coastal wetlands such as coastal lagoons, rocky shores, and coral reefs
- estuarine-for example, deltas, tidal marshes and mangrove swamps
- lacustrine wetlands associated with lakes
- riverine wetlands along rivers and streams
- palustrine-marshes, swamps, and bogs
- human-made wetlands such as reservoirs, fish ponds, flooded mineral workings, saltpans, sewage farms, and canals"

The Article 2.1 of the Ramsar Convention states that 'wetlands may include riparian and coastal zones adjacent to the wetlands, and islands or bodies of marine water deeper than six meters at low tide lying within the wetlands.[3]

Types of Wetlands in India

The major type of wetland which are there are as follows:[4]

- **Wetlands made by Man**

These wetlands are created to serve a specific purpose, such as to hold the water for the purpose of irrigation in agriculture and using that water for drinking, producing fish, or providing recreational opportunities. Human-made wetlands include water reservoirs, aquacultural ponds, salt pans, dams, barrages, and the impoundments.

- **Lakes**

Lakes and ponds (are also known as lentic systems) which is a diversified range of freshwater ecosystems in the Inland

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1 The U.S. Fish and Wildlife Service defined wetlands as follows in 1979
2 Article 1.1 defines wetland under The Ramsar convention on wetland
3 Article 2.1 under The Ramsar convention on wetland
4 Ministry of Environment, Forest and Climate Change (https://indianwetlands.in/wetlands-overview/wetland-types) visited on 15 March 2022

which are found all over the world that gives essential supplies and habitat for both terrestrial and aquatic creatures.

- River Floodplains

These are properties which are found or created near a river or stream that are periodically inundated by water overflowing the channel. As The Yamuna floodplains are Delhi's principal supply of water is one of the best examples of it.

- Ox-bow Lakes

Oxbows are framed when the wander of a stream is sliced off because of sediment testimony, or waterway taking an alternate route, secluding a sickle formed waterbody. The bowls of Ganga and Brahmaputra streams have large amounts of oxbows. In Mahanadi Delta, Ansupa is an oxbow situated at delta summit.

- Marshes

These are overwhelmed by herbaceous plants and took care of by water sources other than direct precipitation, like surface spill over, groundwater, or flowing stream. Kanwar Jheel (Kabar Taal) is a swamp in the Burhi Gandak floodplains of Bihar.

- Estuaries

An estuary is a to some extent contained waterfront collection of saline water that gets water from at least one waterways or streams and has a free admittance to the vast ocean. Estuaries fill in as a change zone among waterway and ocean living spaces. A beach front tidal pond is a bar-fabricated estuary created when seaward obstruction sand islands transcend ocean level and structure a chain that is hindered by at least one bays. Chilika is an Odisha tidal pond separated from the Bay of Bengal by an extended sand obstruction.

- Swamps

Swamps are wetland ecosystems whose most of the area is covered by trees. The drainage of water is not so efficient in this wetland ecosystem and has a sufficient water supply to maintain the ground wet, as well as a level of minerals to drive organism breakdown and avoid organic material accumulation. Mangroves are coastal marshes that border the country's major deltas. The world's biggest single contiguous mangrove swamp, stretching between India and Bangladesh is The Sundarbans.

Need to protect wetland[5]

There are various reasons which exist and tell that why a wetland is needed to be protected nd these reasons can be seen after the close study of the topic therefore among those reasons some of the reasons are as follows:

Wetland as a source of water

The primary source from where freshwater is taken comes from a variety of wetlands. Aquifer-stored groundwater it accounts for more than ninety-five percent of accessible freshwater and is the most important source of drinking water and irrigation. Several wetlands aid in the absorption of rainwater and the recharge of groundwater.

Wetlands as flood and storm buffers

Wetlands go about as a flood cradle and a dry spell cushion. Wetlands go about as wipes in the upper pieces of a bowl, retaining precipitation and snowmelt and permitting water to tenderly permeate into the dirt. Waterway floodplains go about as normal stockpiling repositories, permitting overabundance water to fan out over a huge region, diminishing profundity and speed. Beach front wetlands like mangroves, coral reefs, mudflats, and estuaries can work as actual boundaries to decrease the staggering impacts of tempest floods and tsunamis. Mangroves and seaside wetlands help to balance out the coastline and forestall disintegration. The super tempest Kalinga, which hammered Odisha in 1999, unleashed devastation in general shoreline. It was found that towns with protected mangroves had less setbacks than those with next to zero mangroves.

Products gained from Wetland

The Wetland which are well-managed can supply a variety of flora, animals, and mineral products. Coastal wetlands provide about 2/3rd of fish, the key sources of animal protein. Wetlands produce more than three-fourths of Asia's rice. Many mangrove swamps, especially the Sundarbans, produce honey. Several wetlands' plants are medicinal in nature. Wetlands are also a reason for generating income for a larger population, particularly the people who reside along the shorelines.

Wetlands as water purifiers

Wetlands help in water refinement by catching pollutants in their residue and vegetation. Wetlands can definitely bring down elevated degrees of supplements, for example, phosphorus and nitrogen, which are much of the time related with rural overflow. Numerous wetland plants are fit for eliminating unsafe synthetic substances transmitted by pesticides, modern waste, and mining. Water hyacinth, duck weed, and Azolla tissues can store iron and copper from wastewater. Nonstop rubbish release over the conveying limit of wetlands, then again, could bring about ecological fiascos.

Wetlands for recreation and tourism

Wetlands are good relaxation and tourism sites due to their natural beauty also biodiversity of species of plant and

[5] https://indianwetlands.in/wetlands-overview/values-and-benefits visited on 16 March 2022

animal. However, irresponsible tourism can put a strain on wetlands.

Wetlands for education and research

It provides great chances for aquatic environment research and education. Because of the biodiversity of habitats, the difficult of ecological processes, and the breadth of social and cultural ties, they are well-suited for multidisciplinary studies on nature-society interactions.

Wetlands relation with Climate change

Wetlands, in the same way as other different biological systems, are undermined by environmental change. These environments, then again, can help moderate and adjust to environmental change. A few wetlands, like mangroves and salt swamps, work as carbon sinks, holding risky ozone harming substances back from entering the air. As the fluctuation of water supply is supposed to fill from now on, the capacity of wetlands to ingest and store water, as well as alleviate floods and tempests, is basic for relieving the impacts of environmental change. Wetland protection is especially basic for guaranteeing the living space of amphibian species undermined by environmental change.

Wetlands act as habitats for the migratory birds

Almost 2000 bird species fly 1000 kilometres between breeding and non-breeding places to avoid the severe winters of the polar and temperate regions. Wetlands are used by migrating birds as a stopover for feeding, resting, and breeding. Wetlands in India link the Central Asian and East Australasian flyways.

Wetlands as Biodiversity Hotspots

A few wetlands are home to an assortment of native and fundamentally imperilled to approach undermined species. Chilika has a strong populace of and is one of just two tidal ponds on the planet that is home to the jeopardized Irrawaddy Dolphin (Orcaella brevirostris). The main known regular home of the worldwide imperilled Brow-antlered Deer is Keibul Lamjao, a drifting public park south of Loktak (Rucervus eldii). The best leftover populaces of fundamentally jeopardized Gharial (Gavialis gangeticus) might be found in Central India around the streams Son, Girwa, and Chambal. More than 70% of the world's weak Great Indian (Rhinoceros unicornis) populace is restricted to the prairies and swamps of Assam's Kaziranga National Park.

The various threats which exist for Wetland[6]

Changes in natural hydrological regimes

Wetland diverseness and ecological services are governed by water regimes. Natural hydrological regime changes frequently which result in reduction in the availability of water, changed hydro-period, decrease in linkage with biodiversity habitats, hampered nutrient exchange, and various processes that greatly accelerate their degradation.

Catchment degradation

Wetlands' water holding capacity is critical in deciding their capacity to oversee stream systems, cycle supplements, and backing biodiversity. Wetlands, because they are depositional in nature, operate as sediment traps, which in the long term play an important part in their progression. Anyway, watershed corruption speeds up sedimentation rates,, putting ecological processes and services at risk. Similarly, runoff from the catchment's cropped area loads nutrients, producing in eutrophication.

Pollution

Growing urbanisation has resulted in wetlands coming within urban and semi–urban areas becoming waste dumping yards due to the lack in the suitable waste management infrastructure. Agricultural intensification and greater usage of chemical fertilisers have had a severe influence on quality of the water in the wetlands which are in the rural areas. For example, the majority of Gangetic flood-plain wetlands have progressed eutrophication as a result of untreated sewage flow and agricultural runoff.

Invasive species

The majority of India's inland wetlands have been encroached by the foreign species, which have been taken on annoyance proportions, significantly impacting the native biota and ecological state. Water hyacinth, which had been imported in our country India around a century ago, is found practically everywhere. Salvinia, Ipomoea, and Alternanthera are the other prominent species that have steadily infected various wetlands. In the instance of Tilapia, adverse effects of invasive fish on local biodiversity have been observed (Oreochromis mossambicus).

Over-harvesting of resources

Because of their significant reliance on natural resources, wetlands are frequently exposed to over harvesting and modification in order to improve the various services like wood, fish, and water, at the expense of regulating and cultural services. Harmful fishing methods, such as the use of mesh size nets which are small, are common among the majority of inland wetlands. The sustainable output of a specific wetland is frequently unknown and, at times, ignored by stakeholders. Wetland biodiversity and wider food webs are also threatened by catch loss. Various inundation regimes are frequently changed to accommodate agricultural and aquaculture applications.

Unregulated tourism

Tourism is a significant economic growth engine. Wetlands, which are an important feature of many the

[6] https://indianwetlands.in/wetlands-overview/threats-and-management/visited 20 March 2022

travel industry encounters, are expected in witnessing a extend in tourist coercion in the future. Over one million tourists visit Kerala's backwaters each year, for example. As a result, the tourism business provides a living for almost 85,000 households. Wetland ecosystem traits and functioning are sometimes overlooked while designing tourism infrastructure and recreation amenities.

Climate change

Globally the climate change has come out as a significant importance of wetland misfortune and corruption, especially in high elevation and seaside wetlands. According to modelling estimates, a one meter rise in sea level threatens approximately 84 percent of India's coastal wetlands. Inland wetlands are vulnerable to changes in hydrological regimes, eutrophication, and algal blooms caused by rising temperatures.

The International Convention India is a part of protecting The Wetland

India became a party to the Ramsar Convention on February 1st, 1982[7]which is known to be a convention on wetland. As a contracting party, India is committed to fair use of wetlands and designates sites under the Ramsar convention which India is a party. It are the only habitat with its own worldwide environmental pact. The 'Convention on Wetland,' was signed in the city named Ramsar, which is in Iran in 1971, is a convention between the governments which establishes a structure for both national and as well as international action to conserve and wisely utilise wetlands and their resources.[8]

The Convention's aim is that "the conservation and wise use of all wetlands through local and national actions and international cooperation, as a contribution towards achieving sustainable development throughout the world". [9]

Under the "three pillars" of the Convention, the Contracting Parties commit to Work to make better use of all of their wetlands.[10] Assign proper wetlands for consideration on the Ramsar List of Wetlands of International Importance and guarantee their powerful administration.

Worldwide coordinated effort on transboundary wetlands, shared wetland frameworks, and shared species is supported.

Recent guideline by the Central Government for protecting the Wetland

The Wetlands (Conservation and Management) Rules, 2010 were the first specific guidelines for the wetlands in India, enacted in accordance with the concept of the Environment Protection Act, 1986. The MoEF&CC (Ministry of Environment, Forests, and Climate Change) drafted these regulations. Irrespective of the guidelines made, the degradation of wetland was there, and therefore they are unable in serving their intended objective.[11]

To address the shortcomings of the previous guidelines, the Government in the centre created the Draft for the Wetlands (Conservation and Management) Rules, 2016. Following a review of all public suggestions and comments, the Wetlands (Conservation and Management) Rules,2017 went into effect on 29 September 2017. The 2010 rules were replaced by the 2017 guidelines.[12]

The key features of the "Wetlands (Conservation and Management) Rules, 2017" are as following:[13]

Setting up of State Wetland Authority

As per the Rule 5(1) and 5(2), every state or union territory are obliged under the rule to set-up an authority named as State Wetland Authority or a Union Territories Wetland Authority respectively. This Authority will be headed or lead by their state's environment minister accordingly, with the help of other government officials who will be serving as members in the authority. There will be at least one expert among the members from each of the fields such as: wetland ecology, hydrology, fisheries, landscape ecology, and socioeconomics. These experts will be selected by the governments of the individual states.

Functions of the State Wetland Authority which they have to perform are as follows-

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7 https://testbook.com/question-answer/in-which-year-did-the-convention-on-wetlands-the--5facee666454214a16366a80#:~:text=The%20Convention%20entered%20into%20force,came%20into%20force%20in%201975. Visited on 21 March 2022

8 https://www.awe.gov.au/water/wetlands/ramsar visited on 21 March 2022 published by Australian government (Department of climate change)

9 https://sustainabledevelopment.un.org/index.php?page=view&type=30022&nr=1884&menu=3170 visited 22 March 2022 published by United Nations (Department of sustainable development)

10 https://leap.unep.org/content/treaty/ramsar-convention visited 22 March 2022 published by UNEP (UNITED NATIONS ENVIRONMENT PROGRAMME)

11 https://www.indiawaterportal.org/articles/wetlands-conservation-and-management-rules-2010-notified-moef visited on 26 March 2022 written by ministry of environment and forest.

12 https://sandrp.in/2016/05/31/reject-draft-wetland-rules-2016-designed-to-destroy-wetlands/ visited on 30 March 2022 written by SANDRP

13 http://moef.gov.in/wp-content/uploads/2020/01/final-version-and-printed-wetland-guidelines-rules-2017-03.01.20.pdf visited on 3 April 2022 a document of rules uploaded by ministry of environment and forest.

14 https://www.jagranjosh.com/current-affairs/new-wetland-conservation-rules-notified-by-centre-government-1578544462-1 an article written by Gorky Bakshi in Jagran josh visited on 6 April 2022

- The whole list for the identification of wetlands shall be refreshed as well as updated in every 10 years.
- In a list, the projects or activities that can be undertaken by individuals on or near wetlands must be specifically indicated.
- Depending on the circumstances, the state government may restrict activities other than those listed in the recommendations in regions under its control.
- Steps should be taken to raise the awareness among the people about the importance of wetlands, also their protection between residents and among other important stakeholders shall be implemented.
- A substructure and rules must be developed to allow for the judicious use of wetlands. (According to Rule 5(4)(g))
- To provide ad hoc advise on the any topic as directed/ordered by the state or federal governments.

National Wetlands Committee[14]

The Committee shall be set up according to the Rule 6(1) of Rules of 2017. This committee head is the Secretary of MoEF&CC. The various functions which the National Wetlands Committee perform are as follows: -

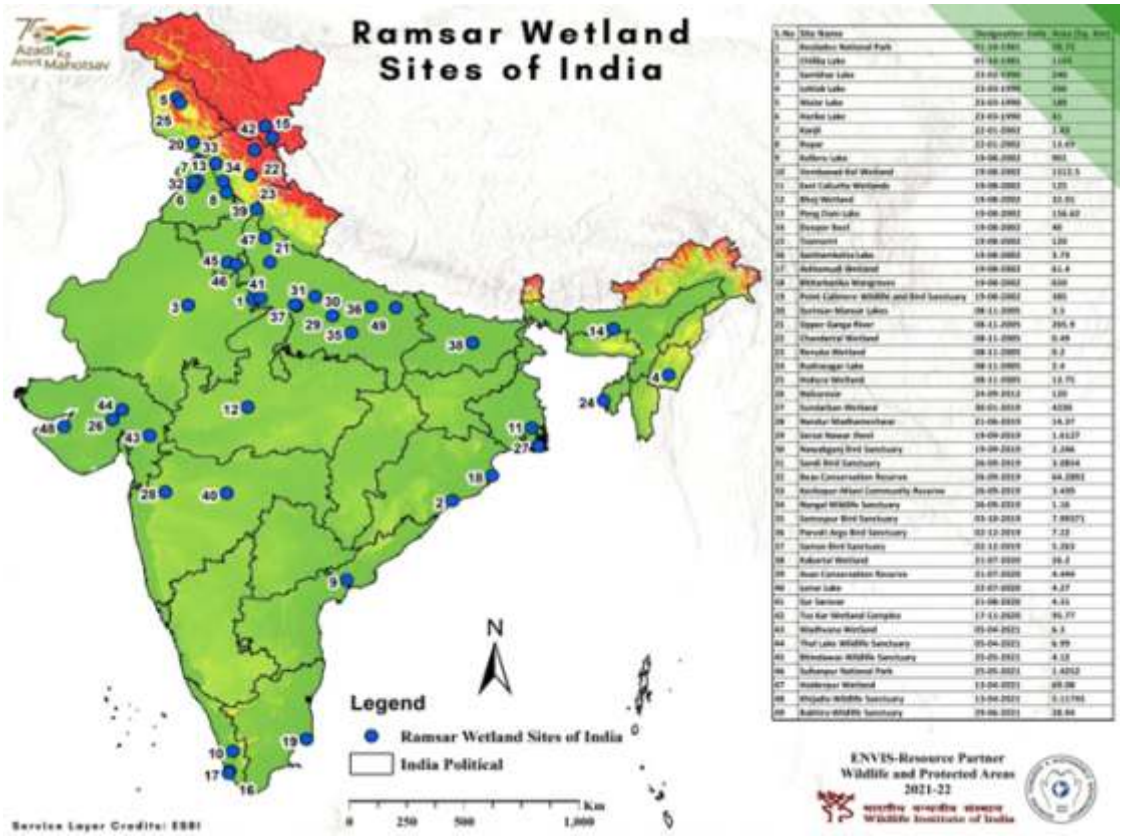
- The supervision and regulation of all the state authorities regarding their working.
- To ensure proper implementation of the rules in each state.
- To act as the advisor for the Central Government on the matter related to conservation and wise use of wetlands.
- Develop the policies on the basis of wise use of the wetlands.
- Advice on collaboration with the international agencies for the conservation of wetlands.

Suggest names of wetlands to be designated as Ramsar sites.

Prohibition of activities

Doing certain activities which is explicitly banned under the guidelines on the notified wetlands are as follows: -

- The formation or expanding any industry
- Converting Wetland for non-wetland activities is



[15] http://moef.gov.in/wp-content/uploads/2019/09/NPCA-MOEFCC-guidelines-April-2019-Low-resolution.pdf guidelines of 2019 regarding wetland uploaded by ministry of environment and forest visited on 8. April 2022

likewise forbidden, as is intrusion that may affect the wetland's ecology.

- Use of wetlands as a solid waste disposal site.
- The release or dumping of untreated chemical wastes and sewage into the wetland from industries, dwellings, villages, and so on.
- The development of any permanent infrastructure, with the exception of boat jetties.
- Trespassing and poaching.

Penalties

If any individual or organization does any act which violates the rules set up by the Authority, then the action against such a party may be taken as per the Environment (Protection) Act,1986.

National Plan on Aquatic Ecosystems (NPAC)[15]

The National Plan for Conservation of Aquatic Ecosystems was authorized in the year 2015 after the combination of the National Lake Conservation Plan and the National Wetlands Conservation Program. This arrangement works for the security of the two wetlands and lakes. The Act is controlled by the Union Ministry of Environment and Forests.

The main objectives for coming up with this plan are: -

- The principal objective is the comprehensive protection of the wetlands.
- It additionally centres around other related viewpoints like enhancing water quality, biodiversity, and so on Accordingly, this arrangement guarantees the protection of wetlands.

Several Indian sites comes under RAMSAR

The number has gradually increased from 47 to 49 by recent inclusion of 2 more sites in Ramsar Sites in India, which puts our country in lead as the most of any South Asian country. Ten of the 49 sites are in Uttar Pradesh, six in Punjab, four are present in Gujarat and one is there in the region Jammu and Kashmir, three are there in H.P. (Himachal Pradesh) and one in Kerala, two in the states of Haryana, Maharashtra, Odisha, West Bengal, and Rajasthan each, and one in the states of Andhra Pradesh, Assam, Bihar, Ladakh, Manipur, Tamil Nadu, Tripura, Uttarakhand, and Madhya Pradesh respectively.[16]

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[16] https://www.edudwar.com/list-of-ramsar-sites-in-india-ramsar-convention/ an article by simeran jit containing list of RAMSAR sites in India visited on 10 April 2022

[17] http://www.latinamericanpost.com/ visited on 12 April 2022

[18] https://pendulumedu.com/general-awareness/list-of-ramsar-sites-of-india visited on 12 April 2022

Hegemonic Politics and Egalitarian transition: With reference to Legal Protection for Women in India

Dr. Vinita Singh Chhetri*

ABSTRACT

The 21st century has inherited the unfinished agenda of globalizing democracy in a more vibrant form. In many instances there is a feeling of unease about the achievement of representative democracy because of the ongoing tendency of democratic nations to exclude or marginalize large sections of society. This is particularly the case for women right across the world. For democracy to be truly representative and inclusive all citizens must have equal opportunities to participate within democratic processes. If these conditions are not present the benefits of democracy for social and economic development will be severely limited, as such genuine democracies cannot allow for inequality or discrimination based on an archaic patriarchal mind set. Yet, after 71 years of freedom and democracy India's democratic structures continue to be restricted by their patriarchal foundations and women still fail to enjoy full and equal citizenship right across the country. This paper is concerned with fundamental processes that unfold over long periods of time and which influence political change in underlying rather than in proximate ways. It should also be clear that we will be concerned with the practical realization of modern democracy, rather than with its existence as an idea.

In view of the broad research background, the main research objective was to explore the impact of the transition to democracy on women's role and status in Indian politics. It is a timely opportunity to explore the stories of half of unexplored population's stories and include their views on women's place in the public sphere. This is an attempt to be a voice for women and to contribute in small ways to advance women's genuine empowerment. Hence, it is fundamental to examine whether women have been able to be part of the public life of India and not remain restricted to the domestic realm.

Keywords: Gender, Marginalized Group, Legal Provisions, Democracy.

Introduction

Transitions to democracy nourish expectations among a range of stakeholders, from individuals to the international community, for an expansion of space for political liberalization, redistribution and recognition. The empowerment of women and the establishment of gender equality are crucial to democracy. Democracy is as much about citizenship rights, participation and inclusion as it is about political parties, elections, and checks and balances. The quality of democracy is determined not only by the form of institutions, but also by the extent that different social groups participate in these institutions. Participatory democracy cannot be imposed as a set of principles coming from above. It must start within the will of people's dreams and desires. New social movements and the people that compose them are not just refashioning private spheres and private identities, but are contributing to the transformation of public's spheres, democracy and, citizenship. Democratization and women's rights movements have emerged more or less in tandem. These processes are closely intertwined and indeed mutually dependent: the fate of democratization is bound to the fate of women's rights and vice versa. Separating the two is conceptually muddled as well as politically dangerous. This is because women can pay a high price when a democratic process is launched without strong institutions and without firmly-established principles of equality and the rights of all citizens. In such situations, a party based on patriarchal norms can come to power through free elections and then move to relegate women to second-class citizenship.

Marshall's[1] seminal work 'Citizenship and Social Class' which was published by Cambridge University press in 1950 and Janosky's[2] work which was published in 1998 suggests that legal rights come first and, followed by political and social rights, participatory rights are the final stage of this sequence. The well-established distinction between political liberalisation and democratisation stresses how a process of liberalisation, or reduction of state repression and extension of civil liberties, tends to precede a democratic transition that allows for the organisation of political associations and regular, competitive elections for important governmental posts.[3]

Historical Overview:

In a sense the link between women's representation and democracy should be self-evident, since women account

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1 T. Marshall, *Citizenship and social class*, Cambridge, Cambridge University Press,1950.

2 T. Janosky, Citizenship and civil society, Cambridge, Cambridge University Press,1998.

3 G. O'Donnell and P.C. Schmitter, *Transitions from authoritarian rule: Tentative conclusions about uncertain democracies,* Baltimore, MD:Johns Hopkins University Press, 1986.

for over half the population of most societies: if the majority doesn't have full political rights, the society is not democratic. But for much of history, this proposition did not seem at all self-evident; until well into the 20th century, women did not even have the right to vote. Winning the vote meant overcoming traditional norms that varied from culture to culture but nearly always excluded women from politics. Thus, women attained suffrage by 1920 in most historically Protestant countries but not until after World War II in most Catholic ones, and still later in other cultural zones.[4] Even after being admitted to the electorate, women continued to be excluded from most political leadership roles until the last few decades, and they are still heavily under represented in parliaments and cabinets.[5] Historically, men gained civil liberties, the vote and so on before women.[6] For example, men gained the right to vote in Greece in 1864, yet women only in 1952. However, during transitions to democracy, it is not only possible to observe a public sphere with multiple conflicts and contentions among its disparate actors, but also the rapid expansions and contractions this domain experiences within a brief amount of time. These expansions and contractions are in part a result of emerging socio-political and socio-cultural dynamics that have a remarkable impact on the various groups that emerge during transitions as 'publics' and on those which will be designated as 'peripheral'. Such dynamics also affect the designation of the hierarchy of concerns for the transition to democracy within the public sphere, a catalogue of priorities that is articulated and re-articulated regularly. Therefore gender can also become peripheral as an issue by virtue of its distance to mainstream socio-political issues. One reason is that women have a stake in strong and sustainable democracies, but they can be harmed by weak or exclusionary political processes. Women can pay a high price when a democratic process that is institutionally weak, or is not founded on principles of equality and the rights of all citizens, or is not protected by strong institutions, allows a political party bound by patriarchal norms to come to power and to immediately institute laws relegating women to second-class citizenship.

Is there a connection between the advancement of women's rights and the transitions in democracy? Traditional approaches to democratization found a strong relationship between economic development and democracy, or between the presence of a large middle class and democratic development.[7] Today, feminist social scientists argue that a polity is not fully democratic when there is no adequate representation of women.[8] A worldwide comparison of 180 nation states by Reynolds[9] (1999) found that the greatest contrasts were between dominant Christian countries (whether Protestant or Catholic) and all other religions including Islamic, Buddhist, Judaic, Confucian and Hindu, all of which had lower proportions of women in legislative and Cabinet office. Political culture has therefore commonly long been suspected to be an important determinant of women's entry into elected office, but nevertheless so far studies have been unable to examine direct survey evidence of attitudes towards women in public life across a wide range of nations worldwide to examine this proposition more systematically. In India, the next step towards gender justice varies, depending on one's location. In some parts, it is ending female foeticide and getting girls into schools. In some circles, it is progressing to paternity leave. In some religions, it is ending bias rooted in personal law, in others, it is bringing tradition and practice in line with reformed laws. In a place like Nagaland, customary law precludes women from political leadership, putting it at odds with the basic spirit of the Constitution. Unlike in countries with a relatively more even spread of social development, in India, the relative liberation of working women, especially those in the organised sector, from the drudgery of unpaid, unrecognised domestic work comes at the expense of less fortunate women, who are still redeemed from abject poverty by the menial jobs they perform at other people's homes. For the past twenty-five years, there has been a rapid increase in the number of women who are politically mobilized, a trend that has coincided with the so-called Third Wave of democratization. These "notes for discussion" address two basic questions: what is the impact of women's mobilization on the process of democratization? And, how has the process of democratization affected women's movements and agendas? Women's rights and women's political participation were negatively associated with communist authoritarianism, not with new democratic prospects. Women felt that they had been politically exploited rather than marginalized and men, newly able to act

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4 Inter-parliamentary Union, *Participation of Women in Political Life*. IPU Reports and Documents No 35, Geneva, IPU, 1999.

5 UN, The World's Women 2000, Trends and Statistics, New York, United Nations, 2000.

6 F. Ramirez, Y. Soysal, and S. Shanahan, 'The changing logic of political citizenship: Cross-national acquisition of women's suffrage rights, 1890–1990,' published in *American Sociological Review Vol.*62, (1997), pp. 735–745.

7 Seymour Martin Lipset, "Some Social Requisites of Democracy: Economic Development and Political Legitimacy" *American Political Science Review.* Vol.53, No. 1, (1959),pp 69-105.

8 Anne Phillips, *Engendering Democracy*. University Park, PA: University of Pennsylvania Press, 1991.

9 Andrew Reynolds, "Women in the Legislatures and Executives of the World, Knocking at the Highest Glass Ceiling," *World Politics* Vol.51. No.4, (1999), pp- 547-572.

independently in the political arena, argued that politics was a male game, and that the communist effort to incorporate women had been misguided and unnatural.[10] Even though women's groups have strongly opposed religious politics and religious patriarchies in all communities, they have nevertheless had to contend with minority vulnerability, which has often pushed women's rights aside.[11]

Legal Rights To Women in India: In order to ameliorate the condition of women in India Legislature enacted the large volume of enactments. Following various legislations contain several rights and safeguards for Women.

1. Protection of Women from Domestic Violence Act 2005.
2. Immoral Traffic (prevention) Act 1956.
3. Indecent Representation of Women (prohibition) Act 1986.
4. Commission of Sati (prevention) Act 1987.
5. Dowry Prohibition Act 1961.
6. Maternity Benefit Act 1961.
7. Medical Termination of Pregnancy Act 1971.
8. Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition of Sex Selection) Act 1994.
9. Equal Remuneration Act 1976.
10. Dissolution of Muslim Marriage Act 1939.
11. Muslim Women (Protection of Rights on Divorce) Act 1986.
12. Family Courts Act 1984.
13. Indian Penal Code 1860.
14. Code of Criminal Procedure 1873.
15. Indian Christian Marriage Act 1872.
16. Legal Services Authorities Act 1987
17. Hindu Marriage Act 1955.
18. Hindu Succession Act 1956.
19. Minimum wages Act 1948.
20. Mines Act 1952 and Factories Act 1948.[12]

The following other legislation's also contain certain rights and safeguards for Women.

1. Employees' State Insurance Act 1948.
2. Plantation Labour Act 1951.
3. Bonded Labour System (Abolition) Act 1976.
4. Legal Practitioners (Women) Act 1923.
5. Indian succession Act 1925.
6. Indian Divorce Act 1869.
7. Parsi Marriage and Divorce Act 1936.
8. Special Marriage Act 1954. 9. Foreign Marriage Act 1969.
10. Indian Evidence Act 1872.
11. Hindu Adoptions and Maintenance Act 1956.
12. National Commission for Women Act 1990.
13. Sexual Harassment of Women at Workplace (Prevention, Prohibition, Redressal) Act the 2013.[13]

In spite of having so many enactments dealing with women and judgments of the Supreme Court protecting women the downtrodden and poor, conditions of women has not been improved and she still faces all types of atrocities and legislature and judiciary some what fails to provide respect to women in society. After independence the founder father of the nation, wanted to reform the society and were keen to establish an egalitarian society. To achieve this end they used law as an instrument to check the gender discrimination, number of laws, were enacted to meet this end but due to strong patriarchal mentality and unfavourable social environment they failed to accomplish their goal. The social engineering through law was not fully achieved, while some rights enshrined under the enactments were enjoyed and accepted by the society most of them remained only in papers due to lack of public support.

Political Transitions and Rights of Women: Political transitions can offer unique opportunities to address violations of women's rights and promote the transformation of traditional and societal norms that promote a subordinate position of women. Recognizing that electoral democracy does not itself mean democratization, and that simply holding elections and achieving an alternation of parties in power do not themselves provide sufficient evidence that a country is achieving democracy, I think it is nonetheless important that activist women experienced a high level of disenchantment with the way the newly installed democratic governments dealt with them and their issues. The solidarity and oppositional strategies of social movements were no longer as useful under democracy; parties reasserted themselves as the representative institutions responsible for "interest articulation and

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[10] Jane.S. Jaquette, "Women and Democracy: Past, Present, Future", presented in *Democracy Seminar*, Stanford University, May 25, 2000.

[11] Zoya Hasan, Gender, Religion and Democratic Politics in India, *Third World Quarterly*, Vol. 31, No. 6, (2010) pp- 939- 954.

[12] Florence, K., Women Empowerment And Role Of Law In India, *Journal Of Positive School Psychology,* Vol. 6, No. 4,(2022),pp 5657 – 5665

[13] Florence, K., Women Empowerment And Role Of Law In India, *Journal Of Positive School Psychology,* Vol. 6, No. 4,(2022),pp 5657 – 5665

aggregation," displacing social movements who had seen themselves as powerful and independent forces during the transitions; and the goal of getting the military to return to the barracks, which had provided a basis for unity among women's groups, could no longer keep women together. Groups differed on priorities and strategies. To be successful, they needed to be organized in ways that could put pressure on parties and the executive to pass laws, and able to follow through to monitoring the effects of that legislation and ensure that the executive and the courts implemented the laws that were passed.[14] There were some important successes: women were able to organize to get some of their issues into rewritten constitutions and to change some of the legislations. Besides Indian laws granting equal rights for sons and daughters, other measures have been put into practice to improve the situation and opportunities for women, and to raise their participation in the political life. A general opinion seems to be that only women can understand what is important for other women, and only they have the ability to fight for themselves. Allocation of quotas is a common method used to raise the number of participating women, for example, one third of the seats in parliament are set aside for women. Joti Sekhon[15] writes in an article about women's participation in politics that their participation has increased but there are still many obstacles that have to be overcome. Sekhon concludes that women in India are: '.. limited by a variety of social, cultural, economic, and political factors, such as traditional gendered expectations of the role and position of women in the family and community, caste and class inequalities, lack of education, and lack of knowledge of the laws.'[16]

As a result of several factors, including the frustration of women's groups, the recognition of the importance of the women's vote, and the unwillingness of parties to risk backlash by taking controversial positions on women's issues, the political dilemma represented by women's mobilization is increasingly being met by the adoption of electoral quotas. Despite concerns that men would run their wives for office or that political bosses would exploit women candidates, the view seems to be that this experiment is working and that it is justified both on the grounds of equality and on the view that women should be elected because they bring a different perspective to bear. The outcome was one of the most progressive constitutions for women in the world; the democratic state included a constitutional commitment to gender equality and numerous mechanisms to facilitate women's access to areas of political decision making. Undoubtedly progressive legislation and inclusion in policies is vital for advancing gender equality. Shireen Hassim[17] argues that formal political rights are an imperative pre-requisite for advancing social change. However representation of women in legislation is not an end in itself; it is a necessary means to create a tangible redistribution of social and economic power to improve women's lives.[18] For democracy to be truly representative and inclusive all citizens must have equal opportunities to participate within democratic processes. If these conditions are not present the benefits of democracy for social and economic development will be severely limited, as such genuine democracies cannot allow for inequality or discrimination based on an archaic patriarchal mind set.[19] Yet, after 65 years of freedom and democracy India's democratic structures continue to be restricted by their patriarchal foundations and women still fail to enjoy full and equal citizenship right across the country. The participation of women in Indian politics can be dated back to the freedom movement from the 1920's - 1940's when women became actively engaged in the Independence struggle and contributed significantly to the establishment of a free and independent India. The spirit of the freedom movement was captured within the Constitution of India, which guarantees equality with non-discrimination to all Indian women. It stipulates equal opportunities and equal pay for work. It also advocates for affirmative action for women and children by the state. The law renounces cultural practices, which are derogatory to the status of women, by ensuring a humane environment for work and maternity relief. Equality before the law is a principle that seeks to promote gender inclusiveness and Articles 14 and 15 of the Indian Constitution explicitly state this. Thus Article 14 holds that the state shall not deny to any person equality before the law or the equal protection of the law. Article 15 prohibits state discrimination on grounds only of religion, race, caste, sex, place of birth, or any of them. Other rights that are extremely relevant to gender equality include Article 13 (invalidating all laws inconsistent with the Fundamental Rights); Article 16 (equality) of opportunity in public employment); Article 19 (protection of freedom of speech and expression, freedom of association, freedom of travel, freedom of residence, and freedom to form

[14] Jane S. Jaquette, "Women and Democracy: Past, Present, Future."

[15] Joti Sekhon, "Engendering Grassroots Democracy: Research, Training, and Networking for Women in Local Self-Governance in India," *NWSA Journal*, Vol. 18, No. 2, (2006),p101.

[16] Joti Sekhon, "Engendering Grassroots Democracy: Research, Training, and Networking for Women in Local Self-Governance in India," p101.

[17] S. Hassim, "Voices, Hierarchies and Spaces: Reconfiguring the Women's Movement in Democratic South Africa," *Politikon: South African Journal of Political Studies* Vol. 32, No. 2,(2005), pp-175-193.

[18] S. Hassim, "Voices, Hierarchies and Spaces: Reconfiguring the Women's Movement in Democratic South Africa," pp-175-193.

[19] Ranjana Kumari, *Reign She Will: Women's Strife for Political Space*, New Delhi, Har Anand Publications, 2011, p.27.

labour unions); Article 21 (stating that no citizen shall be deprived of life or liberty except according to the procedure established by law); Article 23 (prohibition of traffic in human beings and forced labour); and Article 25 (freedom of conscience and religion). India's constitution is a milestone for women's advancement; the right to nondiscrimination on the basis of sex is guaranteed in the list of justiciable fundamental rights, as also protection under the law and equal opportunity in public employment.[20] The increased number of women in formal political institutions, particularly local government, is an area where very significant advances have occurred. The 73rd Amendment to the constitution in 1992 sought to democratize local governance and provide one-third reservation for women in all village, block, and district level bodies, and in the posts of chairperson and vice-chairperson across all these institutions. The 74th Amendment extended the same provisions to municipal corporations in urban areas. Official thinking and policies changed very significantly in the 1980s with the emergence of a cohesive women's movement and the recognition that the socio – economic status of women has remained much the same, or even declined. The most striking change that came about was the acknowledgement that women are equal participants in the development process for which they need to be empowered, and women's interests and participation could not be discounted or ignored. This marked a shift in approach from protectionism and welfare to active participation in development programs and empowerment.

In spite of the progressive nature of the Constitution, after India gained independence traditional social structures that restricted women's social participation were quickly reinforced. Women were once again relegated to the domestic sphere and marginalised from decision-making processes at the family and community level. Politics in particular was promoted as the domain of men and over the last six decades of democratic rule, Indian women have continued to be excluded from participating fully in this democracy. Whilst the Constitution guarantees women the right to vote, they have largely been excluded from political dialogue. Further, traditionally women have not made informed voting choices but have been influenced by the preferences of male family members or have voted along caste lines. Women are extremely under-represented within all major parties and the patriarchal nature of party structures excludes and discriminates against women who choose to defy social expectations and actively participate in politics. Women's exclusion from policy-making bodies has led to inappropriate responses to women's issues and gender insensitive policy-making more broadly. Since the gang rape and murder of a 23-year-old woman in Delhi on 16 December 2012, women's safety and security has come onto the political agenda. However, the approach taken by the government has been extremely patriarchal and patronising. Rather than highlighting women's rights to live in a safe and secure environment without any fear of violence, the government has presented women as defenceless, weak and in need of protection. This regressive approach focuses on the female victims rather than the male perpetrators and exemplifies the patriarchal and insensitive nature of India's parliament to women's issues. Women are often assumed to be a proxy for male family members who are not able to contest the seat due to the reservation system and their capacity to complete their role and to make independent decisions is constantly questioned. The violent nature of politics, in which political actors often experience physical and emotional violence, can also have a negative impact on women's political participation. Female political actors are particularly vulnerable to violence and women who are active within politics often face harassment, character assassinations and even threats of or actual physical violence. This violence can reduce women's capacity to carry out their role as elected leaders as well as their will to engage with politics more broadly.

The marginalisation of women from governance structures is representative of a larger imbalance between men and women throughout the country. The prevalence of conservative and patriarchal mindsets amongst elected representatives and the community at large is a key reason for the continued resistance towards women's political empowerment. Women's engagement in governance threatens the status quo in two key ways. Firstly, women's participation in politics enables women's voices to be more prominent and influential within governance processes. This in turn leads to more gender sensitive policies and service provision and to a more gender just society. The realisation of gender equality inevitably involves a reduction in men's power in society and over women. As such, for many men this is not a desirable outcome. Secondly, the majority of India's leaders are men and their position as leaders gives them power and prestige within their communities. The elevation of women leaders, particularly through political reservations, threatens this position of power. In India's current political scenario the reservation of 33 percent of seats in governance bodies for women would result in almost 33 percent of male leaders losing their seats, their jobs and their influence in destiny making. As such, for male leaders, the promotion of women's political empowerment is often directly counter to their personal and professional interests, which can go a long way in accounting for the lack of political will for addressing women's political marginalisation.

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[20] Martha Nussbaum, *Women and Human Development: The Capabilities Approach*, Delhi, Kali for Women, 2000.

Conclusion

Women's full empowerment cannot be achieved until and unless they have the opportunity to contribute equally in all the spheres of the society including the political domain. While women continue to be excluded from leadership positions, issues concerning women will also continue to be neglected. The Constitution grants equal opportunity to women to participate in the political discourse, to contest elections, and to take up leadership positions in local, state or national level governments. The full and equal participation of women in politics is also essential to the achievement of gender equality in our society. The increase in women's representation will lead to women's issues being raised more often and it will bring meaningful change to the way elected bodies govern, particularly in the issues they prioritise. Women's full participation in national and local politics, in the economy, in academia and the media is fundamental to democracy and essential to the achievement of sustainable development and peace in all contexts — during peace, through conflict and post-conflict, and during political transitions. If a political system neglects women's participation, if it evades accountability for women's rights, it fails half of its citizens. Indeed, true democracy is based on the realization of human rights and gender equality. If one of these falters, so do the others. Weak democracy remains a major barrier to the enjoyment of human rights. Likewise, the failure to respect human rights is an impediment to effective democracy.[21] Moreover, true democracy must be based on checks and balances and accountability of institutions that allow women to seek redress when their rights are violated. The judiciary, parliamentary oversight processes, and other institutions must act as guarantors of the rule of law and of women's enjoyment of their human rights. Ensuring that avenues of redress are open to women's needs and protect their rights is a major step towards the realization of equality. We have seen women all over the world use the courts to get justice and obtain decisions that benefit themselves and millions of other women in relation to citizenship, inheritance, sexual harassment and other issues.[22]

Gender equality and women's empowerment are a matter of justice and human rights, but they are also essential for the achievement of all human rights for all, for the development of all societies and for our collective global future. We must ensure that we capitalize on the potential and talents of all citizens, not just of one-half of the population. We need the best leaders we can find to confront our challenges — poverty, hunger, disease, environmental degradation, violence — and many of these leaders are women. Women bring their own insights and perspectives, and this improves decision-making.[23] Throughout India men's dominance in politics must be challenged. It is women leaders who hold the keys to our future.

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[21] Excerpts from the remarks by Ms. Lakshmi Puri Deputy Executive Director of UN Women at High Level Human Rights Conference Sakharov Prize Network Public Event "Role of women in democratic transition Panel on "Women's Rights in Times of Change European Parliament. Brussels, Belgium, 23 November 2011.

[22] Puri, Lakshmi, ibid.

Laws for the Protection of Aged Persons in India: An analytical Study

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ABSTRACT

India is the fifth biggest nation in terms of its population incorporating amongst others one-third of the world's poor and one-eighth of the world's aged persons and the modality in which the State or government provides for managed savings to the aged persons is of worldwide intrigue. The Population as well as problems of aged persons are ever-increasing in India. They are facing many problems like lack of proper personal care, deficit financial support as well as emotional support from their children. However, on the contrary, Indian traditional culture promulgated immense respect for parents and considered them to be equivalent to God rendering a moral duty to maintain the aged persons. Now, the main cause that is identified for such fading values especially towards the aged parents has been predominantly the lack of adequate legal mechanism, sensitivity and increased materialistic approach to life aggravated by the technological advancements and robust industrialisation that has further aggravated the challenge.

Key words- population, government, aged persons, legal mechanism, technological advancements, industrialisation

Introduction

India is the fifth biggest nation in terms of its population incorporating amongst others one-third of the world's poor and one-eighth of the world's aged persons and the modality in which the State or government provides for managed savings to the aged persons is of worldwide intrigue. The Population as well as problems of aged persons are ever-increasing in India. Aged persons were loved and held in the most elevated position amidst the social strata in the olden days of Indian human progress. Ashram system shows and it is plentifully obvious that an exemplary treatment was given to the elderly persons when they achieved the phase of Vanaprastha and Sannyasa, which was called the Nivritti period of life.

With the beginning of the influence of the British empire and the impact of western culture, the position of the older persons changed. The aping of Western culture and traditions made individuals overlook the fundamental regard of older persons. The youthful followed up on their desires without the assent or counsel of the aged persons. This period saw the most noticeably bad position of the seniors in the Indian culture. Now, the new generation began to realize that Hindu culture had much of permanent value and that the slavish intimation of Western culture could not solve the problems faced by India.[1]

The aged persons are a valuable resource of a country who are considered to be the storehouse of rich experience and intelligence. They offer moorings to society and go about as a problem solver when the prudence and cumulative learning of the elderly is needed. With the improvement in elderly survival and reception of little family standards and expanded future, a noteworthy component of statistic changes in total population including India is the dynamic increase in the population of old people.[2]

Legal Mechanism for Aged Persons Under Indian Constitution

India has made fruitful progress from colonial status to freedom in 1947. While the reception of British parliament framework and another has been chief of federalism started by the government of India Act of 1935 which sets up a quasi-federal constitution of self-ruling regions. The division of power among state and union governments has been provided in three lists under the Seventh Schedule of Indian Constitution. Subjects falling under Union list give power to the Central Government to make the law. Central Government has authority over 97 subjects mentioned in the list. State has power to make the law on those subjects which have been mentioned under state list. It gives authority over 66 matters, such as, wellbeing, training, welfare provided by government with specific significance to elderly and their families'.[3]

After independence, India has been recognized as a welfare state and to fulfil the goals of welfare state, members of the constituent assembly introduced Part IV of Indian constitution consisting of Articles 36 to 51. For this

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1 Publishing Company,2003).

2 P.E. Gottfried, *Humanities and Civic Life: 132-133(Volume 32*. Routledge,2018)

purpose, Part IV of constitution provides many articles for the welfare and social security of aged persons.

Article 41 of the Indian Constitution provides that "The State shall within the bounds of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want."

Article 46 of the Indian Constitution states that "The State shall promote, with special care, the education and economic interests of the weaker sections of the people, and, especially of the Scheduled Castes and Scheduled Tribes, and shall protect them from social injustice and every sort of social exploitation."

It necessitates the promotion of instructive and monetary interests of marginalized people: "The state will advance with uncommon consideration the instructive and financial interests of the elderly persons of the overall population and can shield them from social prejudice and all sorts of abuse."

Entry 9 of state list provides- "Relief of the disabled and unemployable". Old aged persons are physically weak and considered to be unemployable, thus under this Entry state legislature can enact law for the relief of old aged persons.

Entry 20 of concurrent list provides- "Economic and social planning." Both Centre as well as state legislature can make law for economic and social planning. Under this entry laws can be made for the social security and welfare of aged persons.

Entry 23 of concurrent list provides "Social security and social insurance; employment and unemployment."

Entry 24 concurrent list states "Welfare of labour including conditions of work, provident funds, employers' liability, workmen's compensation, invalidity and old age pensions and maternity benefits."

Due to the existence of these entries of seventh schedule Indian Parliament as well as State legislatures have power to give protection to the elderly by enacting various laws and schemes.

Legal Mechanism for the Aged Persons Under Code of Criminal Procedure, 1973

In India, helpful arrangements for support of aged persons are given under different Acts. Target of such arrangements is to accomplish a social security and to forestall vagrancy and dejection and to give straight forward, cheap and rapid system for offering help and support to aged persons.

The section 125(1)(d) of the Code of Criminal Procedure,1973 provides that "If a person having sufficient means neglects or refuses to take care of his father or mother, unable to take care of himself or herself, a magistrate of the primary class may, upon proof of such neglect or refusal, order such person to form a monthly allowance for the take care of his wife or such child, father or mother, at such monthly rate not exceeding five hundred rupees within the whole, intrinsically Magistrate thinks fit, and to pay an equivalent to such person because the Magistrate may from time to time direct".

Legal Mechanism Under Maintenance and Welfare of Parents and Senior Citizens Act, 2007

The Maintenance and Welfare of Parents and Senior Citizens Act, 2007 hereinafter referenced as the Act of 2007, comprises of seven chapters and thirty-two Sections. The First Chapter is the fundamental part comprising of Section 1-3 and manages the starting definitions, Second Chapter of the Act comprising of Sections 4-18 covers the provisions related with the Maintenance, Section-19 of the Third Chapter gives some provisions regarding the establishment of old age homes, Chapter four encompasses Section 20 which is related with the provisions for health facilities and care of senior citizens, Chapter five comprising of Section 21-23 provides the provisions associated with the insurance of the body and property of senior citizens, Chapter 6 comprising of Section 24 and 25 concern with offences and procedure for trial and Chapter 7 comprising of Sections 26-32, is related with different miscellaneous details.

This Act is pertinent to all Indians who are domiciled in the nation and furthermore, Indians domiciled outside India. It will come into existence in a state on the date; the respective State Government will publish it in the official gazette. In spite of the fact that it is a Central Act the execution of the Act is vested with the State Governments and subsequently the State Governments are likewise engaged to outline the principles under Section 32(1) of the Act, to appoint Maintenance Officers under Section 18(1), and to establish Maintenance Tribunal under Section 7(1) and Appellate Tribunals under Section 15(1) of the Act to guarantee legitimate execution of the Act in their respective States.

Merits of the Maintenance and Welfare Of Parents And Senior Citizens Act 2007

1. Under this Act the youngsters are bound to maintain their parents and senior citizens and will also provide them food, shelter, clothes and medical facilities, if they are not able to maintain themselves from their own income or property.
2. Senior citizen or parent has a right to apply before tribunal to issue an order for the payment of regular monthly allowances against their children and relatives whatever the case may be.
3. Tribunal has the power to revised monthly allowances time to time and may issue an interim order for the same.
4. All the cases must be disposed off within 90 days; in exceptional cases it may be extended for thirty days by the tribunal.
5. Under this Act public interest litigation is allowed, if aggrieved person is not capable to go to the tribunal for relief, then any other person as well as any NGO

has a right to file an application for relief. Apart from its tribunal has the power to take Suo Moto action.

6. The Maintenance officer will be the Social Welfare officer in the district and he will also represent the senior citizens before tribunals and may apply for maintenance if they request.
7. This Act also provides the provision regarding the appointment of a conciliation officer who may talk to both parties for an amicable settlement.
8. This Act imposed a legal duty on the children to take care of parents and senior citizens if they fail to do it then they will be penalized. Under the penal provision of this Act, the person at fault will be trailed as an offender and punished with the imprisonment of three months or fine which may extent for 5000 Rs or both and it will be a cognizable offence but bailable.
9. After the decision of the tribunal senior citizens and parents have the right to go for an appeal before the appellate tribunal for further relief.
10. The Act gives provisions related to the establishment; maintenance and administration of old age homes for the parents and senior citizens, who do not have sufficient means to survive their life.
11. This Act also states some provisions related to the services, which are providing in old age homes. State Government has the power to enact some rules to maintain the standard of services such as medical care and resources for entertainment.
12. This Act imposes the responsibility on the State government to make some rules to ensure the security, protection and safety of property of senior citizens.
13. The state governments are empowered to make the rules regarding establishment of counselling centres, circulate toll free help line numbers and organize conferences and seminars, awareness programs to aware parents and senior citizens.

Critical Analysis of The Act

1. The central government enacted a good law with a very good intention in December 2007 but maximum state governments enforced it at least three or four years later, it shows that the state governments are not serious and did not make serious efforts to implement it while this Act provides many rules, to control the functioning of NGOs and Old Age Homes.
2. According to provisions of this Act the Sub Divisional magistrate will be appointed as a presiding officer of the tribunal and the appellate powers will be conferred to District Magistrate. It means both of the officers are from revenue department and not law experts. Consequently, they may not be able to adjudicate the issue as per the procedure followed by Civil Courts if issue is related with the title of the property.
3. Both the presiding officers are from the revenue department and already overburdened, so they may not have sufficient time to work under this Act.
4. Under this Act civil court has no jurisdiction to decide the disputes between parents and their children.
5. According to the provisions of this Act the legal professionals are totally disallowed.
6. State Government is empowered to appoint maintenance officer for the proper representation of senior citizens if they want but the other party does not have such right and it is against the Principles of Natural Justice.
7. Under this Act maximum responsibilities are given to the State Government, i.e., formation of tribunal and enactment of the rule etc. But if the State Government does not fulfil its responsibilities than there is no mandatory provision to compel and it is totally based on discretion of State Government.
8. Under this Act if senior citizens do not have the children, then the liability will go to the relatives because it is the presumption that they may inherit their property. It is neither logical nor reasonable because senior citizens may sell out their property before death and it is not sure that the relatives will get the property of senior citizens because relatives may not be interested to accept the property.
9. Under this Act appeal may be filed only by the senior citizens and parents. There is no right to other party and it is a violation of right to equality.
10. Without the effective provisions regarding establishment and functioning of old age homes, the intention of the legislature will frustrate.
11. This Act provides the maximum financial relief up to ten thousand Rupees. If a person is residing in urban area and suffering from many diseases then this amount will not be sufficient to fulfil the needs of the aged persons.
12. No law can achieve the goal of the legislation without effective machinery, so state government should establish a cell for the help of senior citizen at every police station.

Amendments Required in Maintenance and Welfare of Parents and Senior Citizens Act, 2007

1. Section 5 of the Act provides for filing the application by a person on behalf of the old person if they are 'incapable' for filing the application themselves. The word 'incapable' is also left unclear as far as the provisions of this Act are concerned. It is suggested that this word should be substituted 'with the permission of the aged persons.
2. Tribunal constituted under this Act must be presided over by a legal professional, preferably a retired judge as he is more suitable for providing justice effectively and swiftly. The very purpose of the Act is to provide

effective and speedy attention to the grievances of the old and senior citizens. So, a retired judge as the presiding officer of the tribunal will be in a better position to appreciate the facts of the case and apply the law in a better manner as well.

3. The Act provides for the setup of old age home by the State Government at their discretion. As a result, the State Governments are reluctant to establish the old age homes. It is suggested that it should be made compulsory for the State Governments that they must establish the old age homes at least in every district.
4. It is suggested that the right of parents and senior citizens to take care must be imposed on the children and it must be the legal duty of the children to maintain the parents and senior citizens in their own homes and not just provide them with maintenance amount, because beside the monetary assistance the emotional and psychological assistance is also necessary at this phase of life.

Conclusion

The significant increase in the aged population in terms of the total population of India, It is necessary that the rights of this community of the senior citizens be taken seriously by the State, authorities and the judiciary at large though the legal provisions are not sufficient to provide the required relief making it pertinent and an immediate concern to provide and enact effective, equitable, energized and enforceable provisions that protect the rights of the elderly which should be promoted through equally enthusiastic and efficient awareness.

A global phenomenon, the legislations for the protection of the rights of the aged persons have to be fine-tuned in tune with the increasing life expectancy and the consistently growing numbers, a major challenge & concern to be addressed by the world community that seems to receive a rather lethargic response.

Evolution, History and Need for Juvenile Justice System

Anjali*

ABSTRACT

The juvenile status of a victim as well as of an offender has always been a matter of concern. It is a age where a child is undergoing a lot of changes and he can neither be equated with a child or a fully grown man, therefore he requires a special care and protection and at the same time if he is a juvenile in conflict with law then also a law having a different and lenient approach is required to deal with him so that a child who is still trying to understand the world do not turn into a hardened criminal. The criminal law in India has always favoured into the reformation and restoration, therefore it is essential to have a special law to deal with juveniles. This paper deals with the historical background and the need for the Juvenile justice system in a country like India which has the maximum of young population.

Keywords: Juvenile, Hardened Criminals, Criminal Law, Reformative theory

Introduction

The most memorable time of a person's life is his childhood which is full of happiness. A life of health, proper nutrition, recreation and an environment; safe and conducive for wholesome growth, is a rosy picture of childhood. However, not all children are fortunate to enjoy such a favourable life. If one looks at the statistics most children in the world are undernourished, deprived and abused. Therefore, a world suitable for the happy growing up seems a distant dream. Children face a number of challenges all around, which impact their mind and body. This many a times leads to their deviance, thus pushing them to delinquency. A delinquent child is looked down by the society as well as the justice delivery system which has pre-conceived notions about its guilt.

The Need for Juvenile Justice System

It has to be remembered that a child though delinquent, is after all a child. It has to be given all those considerations which are given to children otherwise. A delinquent child can also be viewed as a child in need of care and protection as delinquency of the child is not solely attributable to its mind and conduct but more probably to the failure of the society and the State to prevent the child from deviating. At such a juncture, it is necessary to give a thought to the rights of a juvenile delinquent and the safeguards that need to be followed during the process of trial. Moreover, the process of administration of justice is a very unpleasant experience even for an adult. The extent of inconvenience and trauma it can cause to a child is definitely more. Though the protection to be given to the juvenile and its extent has been a matter of controversy at all times, minimising harm to the juvenile and maximising chances of his reformation, should be the goal of the Juvenile Justice system. This realisation exists at the National as well as International level as seen reflected through relevant International instruments[1] and municipal legislations.[2]

International Conventions on Juvenile Delinquency

To deal with juvenile delinquency and understanding the need for the separate laws for them, the UN has laid down few covenants such as

a. UN Standard Minimum Rules for Administration of Juvenile Justice ("The Beijing Rules") 1985

These Rules were framed with an object of strengthening of the juvenile[3] justice systems of all the member States. In its fundamental perspectives it states that the member states shall endeavour to create conditions suitable for personal development of the children and their education so as to ensure a meaningful life free from delinquent behaviour. It seeks participation of all relevant stakeholders including the State, the society, family as well as the non-governmental organisations etc., in promoting the well- being of the children.

According to the rules there are two important objectives of juvenile justice; vis. Well-being of juvenile and principle of proportionality.[4] It refers to fair and proportionate reactions to be given to the offence by the juvenile considering its age among other factors. The Rules also envisage the provision for allowing of discretion to authorities at all stages involving juvenile delinquents. This

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1 UN Standard Minimum Rules for Administration of Juvenile Justice ("The Beijing Rules") 1985; UN Guidelines for Prevention of Juvenile Delinquency (Riyadh Guidelines) 1990; United Nations Rules for the Protection of Juveniles Deprived of their Liberty, 1990; Guidelines for Action on Children in the Criminal Justice System, 1997

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

3 Rule 2.2 (a) A juvenile is a child or young person who, under the respective legal systems, may be dealt with for an offence in a manner which is different from an adult.

4 Rule 5.1 Commentary: The response to young offenders should be based on the consideration not only of the gravity of the offence but also of personal circumstances. The individual circumstances of the offender (for example social status, family situation, the harm caused by the offence or other factors affecting personal circumstances) should influence the proportionality of the reactions (for example by having regard to the offender's endeavour to indemnify the victim or to her or his willingness to turn to wholesome and useful life).

discretion is to be exercised along with accountability for the same. It provides for protection of basic rights[5] of the juvenile in the administration of justice process.

Another very important highlight of the rules is the procedural safeguards that it lays down for investigation[6] as well as trial of juvenile delinquents. It includes certain requirements like immediately notifying parents/guardians on apprehension of a juvenile, considering immediate release of such a child, avoidance of formal trial as far as possible, referring the juvenile to other services such as medical, psychological counselling, etc. police personnel need to be specially trained for this purpose. Also, the detention facility for the juvenile has to be well thought of and for a minimum duration. During such stay of the child in the detention facility, the juvenile should receive all required care and support.

The rules also provide for various disposition measures which can be undertaken by the member States to avoid institutionalisation to a great extent.[7] The rules also make mention of proper training of relevant actors in the system as well as mobilization of social organisations, etc. Provision is also made for treatment of juveniles in Institutions and their care and protection.[8]

b. United Nations Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines), 1990.

Popularly known as the Riyadh Guidelines, these guidelines have a very broad objective hitting to the root of juvenile delinquency through early intervention by building non-criminogenic attitudes among children from early childhood. It expects participation of the entire society for harmonious development of all juveniles. Child-centric approach is expected to be adopted in the interpretation and implementation of these guidelines. It requires that the member-States create opportunities to education and vocational training of juveniles for the purpose of development of their personality.[9]

There are certain prevention strategies which are proposed by this instrument which include mechanism through, programmes, and services to identify and analyse problem in relation to juveniles, involvement of qualified persons in this effort, coordination between government and non-governmental agencies, working towards reducing opportunity for committing crimes, youth participation for the purpose as well as complete coordination between various relevant stake-holders.[10] These guidelines identify responsibility of the important units in the society which influence the child's behaviour. It focuses on Family, Education, Community and Mass media. It lists out the importance of each such unit and their role in the development of a juvenile so as to prevent the juvenile from being delinquent.

c. United Nations Rules for the Protection of Juveniles Deprived of their Liberty, 1990

These rules basically deal with the juveniles who have been deprived of their liberty[11] as a matter of legal proceedings against them. The rules are sympathetic towards such juveniles are require that such deprivation should be the means of last resort and for minimum duration, that too in exceptional cases. These rules are meant to set up the minimum standards to be followed by the member-States for the purpose of dealing with such juveniles. It expects that the legal system should respect the rights of juvenile even if they have been deprived of liberty.

Where the juveniles are charged with commission of an offence, the presumption of innocence has to be raised and as far as possible alternatives to detention during trial have to be sought. At no cost should such juveniles be kept together with adult offenders. Other rights like seeking legal counsel, meeting parents/guardians, recreation and leisure should remain intact. All records of procedure, accommodation and steps taken in relation to the juvenile should be strictly maintained by the relevant authorities. Care has to be taken to make suitable arrangement for the accommodation of such juveniles whenever required. Also, the facility for education and vocational training has to be made available to juveniles in detention with access to library and other required study material.

d. Guidelines for Action on Children in the Criminal Justice System, 1997.

These guidelines were framed keeping into consideration all the three instruments discussed above along with the Convention on the Rights of the Child 1989. It requires that all the rights guaranteed to the child as basic human rights are adhered to even when the child is part of system of justice administration or has been found guilty. It envisages the establishment of separate courts for juvenile offenders with a simple and informal procedure for trial. Placement of children in closed institution is to be avoided. Also, that the persons involved in juvenile justice administration should be trained in human rights and special procedures

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5 Rule 7.1: Procedural safeguards such as the presumption of innocence, the right to be notified of the charges, the right to remain silent, the right to counsel, the right to the presence of a parent or guardian, the right to confront and cross-examine witnesses and the right to appeal to a higher authority shall be guaranteed at all stages of proceedings. See also Rule 8: Protection of privacy.

6 Rules 10 to 13.

7 Rule18.

8 Rule 26

9 Discussed in the Fundamental Principles of the Guidelines.

10 Strategy found under the heading 'General Prevention'.

11 11 (b) The deprivation of liberty means any form of detention or imprisonment or the placement of a person in a public or private custodial setting, from which this person is not permitted to leave at will, by order of any judicial, administrative or other public authority.

involving children. This includes police, prosecutors, other enforcement agencies, judges and prosecutors, prison administration, etc.[12]

The guidelines make special mention of the need for undertaking review of existing laws relating to juveniles. All measures discussed in the previous instruments seem to be combined in these guidelines. It also seeks cooperation and coordination between all bodies in field of child rights protection nationally as well as internationally. The guidelines give special focus on child victims and witnesses of crime and abuse of power.

Juvenile Delinquency Laws in India

Juvenile delinquency has always been a major concern throughout the world and so in India. There was no specific law to deal with juvenile delinquency in India during independence. Juvenile delinquents received no special treatment in terms of their prosecution, trial nor detention. This kind of incarceration would lead to further harm to such juvenile with nil chances of their reformation. In 1960, the Children Act was enacted for Union Territories, which provided for care and protection of juvenile delinquents as well as those in need of care. This Act was an attempt to implement the expectation of the International instruments as existed at that time. The Indian Penal Code exempted child below the age of 7 years from criminal responsibility totally. A child between 7 to 12 years would incur liability based on its maturity. Over all the law made categorisation among children in terms of imposing liability for an offence.[13]

Overview of 1986 and 2000 Act

Following the adoption of the United Nations Minimum Rules for Administration of Juvenile Justice of 1985, the act of 1986 was formulated by India to deal with delinquent juvenile. The Juvenile Justice Act 1986 was applied throughout the country, to bring uniformity at the national level. The Juvenile Justice Act, 1987 was nothing more than a copy of the Children's Act, 1960 which made only minor and valueless changes here and there to the act.

The Indian legislator later on made a sincere effort in adopting the 2000 Act to inculcate the principles set out in the UN Conventions, such as the Child Rights Convention, the Beijing Rules and the 1990 Rules. The rehabilitation of the minor was the main objective of the Juvenile Justice Act, 2000 and not the adversarial procedure to which the courts are generally accustomed.

Later, the country witnessed the enactment of the Juvenile Justice Act of 1986 and the later Act of 2000. However, due to the increase in crime rate among juveniles, it was felt that the existing juvenile delinquency laws were not very effective in tackling the juvenile delinquency issue. Then after the most heinous of the cases reported and highlighted in the history of juvenile delinquency matters which was the Nirbhaya Gang Rape Case of Dec 2012, which shook the conscience of the nation and made the system wonder as to where the youth of the country are heading. One of the accused was just 17 years and 6 months old and was tried under the Juvenile Justice (Care and Protection of Children) Act of 2000. The case was an eye opener and brought to light several lacuna's existing in the juvenile justice law in India, initiating the discussion about the reduction in the age of criminal responsibility.

As a result of this the Parliament enacted the Juvenile Justice (Care and Protection of Children) Act 2015 which repealed the 2000 Act.

Overview of the 2015 Act

The Act provides for two categories of children, the one in conflict with law and those who are in need of care and protection. It envisages a person who is below 18 years[14] of age.

The Act makes provision for the procedure and mechanism in dealing with juveniles in conflict with law, with an underlying understanding that such juveniles should not be subjected to rigours of the regular criminal justice structure. It also recognises the need for reformation of the juveniles by use of appropriate means and methods. The Act provides for the constitution of the Juvenile Justice Board in each district to exclusively deal with the cases of juveniles in conflict with law through an informal procedure.

The Act has a new provision added, which was not present in the earlier legislations. It has come to be enacted due to the discussion which ensued after the Nirbhaya's case. There is a categorisation which the Act makes among petty, serious and heinous offences committed by the juveniles. The new requirement is that if a juvenile between the age of 16 to 18 is charged with commission of a heinous offence, he would be required to undergo a preliminary inquiry by an assessment committee. The committee would after inquiry, submit a report based on which the decision would be taken whether to commit the Juvenile for regular trial before the Children's Court or to try him before the Juvenile Justice Board.

If the juvenile is tried by the Children's Court, he would be tried by the regular procedure. As a consequence, a regular form of punishment may be involved. Though the juvenile cannot be imprisoned upto the age of 18 years,he may be kept in observation home and then be required to serve the remaining part of the sentence. In no case can the juvenile be sentenced to death.

Overview of the 2021 Amendment Act

The Juvenile Justice (Care and Protection of Children) Act, 2015 was again amended in 2021. The 2021 amendment has made quite a few changes in the

[12] Part B, Specific Targets.

[13] Sec.82 & 83 Indian Penal Code, 1860

[14] Sec 2 (12).

important provisions of the Act, such as adoption, classification of offenses, designated courts, and eligibility criteria for members of Child Welfare Committees. Nevertheless, the changes made have been debated over due to the fear of disastrous consequences which they might have instead of the welfare and best interests of children, which is the penultimate goal of the juvenile justice system. For example the changes made to Section 86(2) has made certain serious offences from the category of cognizable to non-cognizable, The amended Section 86(2) now states that where an offence under this Act is punishable with imprisonment of 3 years and above, but not more than 7 years, then such offence shall be non-cognizable and non-bailable. The 2021 Amendment Act has also been challenged by the Delhi Commission for Protection of Child Rights in the Supreme Court of India for the changes made under section 86.

Chapter Nine of the Act deals with offences against children, like cruelty to a child, sale and procurement of child, child employment for begging, the penalty for giving intoxicated liquor or narcotic drug or psychotropic substance to a child, and exploitation of child employees, etc. By the amendment of 2021, the following previously cognizable offenses have become non-cognizable: Cruelty to children by CCI staff, Employing children for begging Giving intoxicating liquor or narcotic drug or psychotropic substance to a child Using a child for vending, peddling, carrying, supplying or smuggling any intoxicating liquor, narcotic drug or psychotropic substance, Exploitation of a child employee, Sale and procurement of children for any purpose, Use of Children by militant groups or other.[15]

Landmark Judicial Precedents

Sheela Barse v. Union of India and others[16] In this cases, Supreme Court held that:

- A child who has been accused of an offence punishable with imprisonment of less than seven years, the investigation has to be completed within three months from the lodging of the FIR and the trial to be completed in six months from filing of charge sheet.
- The juvenile should not be kept in jail.
- It is the duty of the state government to make remand homes, observation homes for the safe custody of juveniles and where no such homes have been made then the juvenile has to be released on bail.

Buzar Hossain @ Gulam Hossain v. State of West Bengal[17] The Supreme Court in this case held that the claim of juvenility can be raised even after the final disposal of a case and the mere delay in asking for the claim cannot be a ground of rejection. It is a beneficial legislation for a juvenile and benefit of it should be given to him, however the burden of proof will lie on the juvenile itself. The juvenile can prove his claim of juvenility by producing the documents as provided in the act and rules. The Court should not take hyper-technical view in such cases.

Parag Bhati (Juvenile) through Legal Guardian - Smt. Rajni Bhati v. State of Uttar Pradesh & Anr[18] The court held in this case that where the documents mentioned under the Rule 12 (3) (a) of the juvenile justice care and protection Rules are produced then they should be considered as a conclusive proof of the date of birth of accused. the court held that where any of the documents mentioned in Rule 12 (3) (a) (i) to (iii) of Juvenile Justice (Care and Protection of Children) Rules, 2007 are submitted in support of the claim of juvenility, then that must be considered to be conclusive proof of the date of birth of the accused. In case of any doubt or discrepancy the court has the power to order an inquiry and also call for medical examination of the accused.

Conclusion

The recent amendment made into the act in 2021, which are yet to be enforced should be revisited as the purpose of the law is the protection of the juvenile, any kind of dilution of the law will frustrate the goal with which the act was made, more than that a need is there to look into the correct implementation of the Act. The Act of 2015 is effective; however, considering the increasing rate of crimes by juveniles, it appears that this law does not really have a deterrent effect. Though it is true that juveniles need reformation as they are too young to be simply subjected to incarceration for the wrong, there is a need to also instil fear in their minds regarding the consequences of their offences. However, it is also true that a no uniform standard can be laid down to determine whether the child understood the consequences of his act and can be termed as a heinous offender that is why each case has to be decided based on its facts and circumstances. Though the laws related with juvenile delinquency in India are more or less in conformity with the international conventions and guidelines but still the number of youth involved in crime is increasing and we can say that the Act has failed to show a deterrent effect. The age criteria also needs to be re evaluated in the current scenario where the young minds have been exposed to technology they no longer remain innocent to the age of 18 years and there have been instances when they have involved specially into romantic affairs by themselves and the boy later have been prosecuted for rape offences, therefore a comprehensive legislation is the need of the hour wherein a concrete determination can be made on the prosecution and protection of the child.

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[15] Retrieved from <https://i-probono.com/articles/juvenile-justice-amendment-act-2021-a-critical-view/>(last visited on 30 December 2022)

[16] [1986 AIR 1773]

[17] Criminal Appeal No. 1193 of 2006

[18] Criminal Appeal No. 486 of 2016

Indecent representation of women on ott Platforms: A critical analysis

Dr. Aarushi Batra*

ABSTRACT

Modern India with its tremendous new technologies has immense potential for spreading awareness about social issues and for achieving growth of marginalised communities, especially women. In India, media has such a wide reach and impact that if used strategically, this medium can be used for not only development of women, but also for changing the ideologies of Indians towards women in general, and subsequently bridging the gender gap. However, unfortunately, of late, the media has been diminishing the growth opportunities for women and obliquely upholding patriarchy. Parliament enacted the Indecent Representation of Women Act to prevent any kind of indecent representation of women via any media. However, the objective has been a hit and a miss because, at the time when this law was enacted only print media, television and radio, were prevalent. Ever since the Act was brought in force in 1986, technological advancements and revolution has led to the emergence of new forms of communication, like internet, MMS, over-the-top (OTT) services such as Netflix, Prime, Hotstar, Voot, etc., and other innumerable applications like Skype, Viber, WhatsApp, Snapchat to name a few. In the light of the above, a need has off late been felt to widen the scope and ambit of this law to include such emerging forms of media and also to fortify the available safeguards to prevent indecent representation of women through any form of media. Through the medium of this paper therefore, the author has made an attempt to explain the lacunas in the existing Act, and the impending need to relook into the Act of 1986 in foresight of the technological advancements.

Keywords: OTT, Privacy, Obscenity, Indecent Representation, Media

I. Introduction

New India is equipped with state-of-the-art technologies in the domain of electronic as well as print media, which have transformative potential for spreading awareness about social issues and for achieving growth of marginalised communities. If used strategically, this medium can be used for not only development of women, but also for changing the ideologies of Indians towards women in general, and subsequently bridging the gender gap. Unfortunately, of late, the media has been slaughtering the growth opportunities for women and obliquely upholding patriarchy. Be it the advertisements, the TV serials, movies, web-series, all show content which in some way or the other, has been disparaging the image of women.

With the rise in the instances of misrepresentation of women in different forms of media, a need was felt by government to enact a law on the same. Parliament enacted the Indecent Representation of Women Act in the year 1986 to prevent any kind of indecent representation of women via any media. With the growth of technological applications like WhatsApp, Snapchat, Instagram, and the evolution of OTT services, a need has been felt to widen the scope and ambit of this law to include such emerging forms of media and also to strengthen the existing safeguards to prevent indecent representation of women through any form of media.

II. Misrepresentation of women in India

Media plays a very significant role in development of women. In ancient India, print media was the only form of media that existed. These included Vedas, Puranas, Smritis, and the like. During those times women were represented as a property which belonged to their fathers, then husbands, and finally their sons.[1] These books have defined our Indian culture and many Indians follow these books very strictly and obey the things and guidelines written in these books without questioning them. A verse in Brahma Purana says highest duty of a women is to immolate herself after the death of her husband.[2] However, there have been texts in ancient India which highlight equal rights of men and women. For instance, Patanjali, in his work suggested that women were educated in the Vedic era.[3] Similarly, according to Rig Veda, women in ancient India were married at a mature age and had the liberty to choose their husbands.[4] Thus, one can see there have been conflicting views regarding the status of women in ancient India.

These books have two sides; one side describes women as a goddess, and the other side dominates that goddess. Unfortunately, these books have shaped our Indian

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1 Manu Smriti VIII 371.

2 Brahma Puran 80.75

3 Nirupama Prakash, Status of Women in Indian Society: Issues and Challenges in processes of Empowerment (11th International Conference on Gender and Science and Technology (GASAT), Mauritius, 2003)

4 Women as Rishikas in the Vedas, Hindupedia - The Hindu Encyclopedia, *available at:* http://www.hindupedia.com/en/Women_as_Rishikas_in_the_Vedas (Last visited on 23rd June 2022).

culture, and have engraved patriarchy in our minds.[5] They have defined gender roles thousands of years ago, which are still followed in India.

With the advancement in technology, the definition of media has been widened to include television serials, web-series, films, advertisements, newspapers, and the like. Also, there has been a growing trend among media to portray women as victims. Many a study have shown how two factors, sex and sensation, are the primary motivation behind majority reporting.[6]

Modern India is equipped with state-of-the-art technologies- electronic as well as print media, which can be used for spreading awareness about social issues and for achieving development of millions of communities based in India especially, for the development of women, and changing the ideologies of Indians towards women. Instead, it is indirectly promoting patriarchy. Millions of examples can be listed about how Indian media hides the dark side of Indian culture. For example, during COVID-19 pandemic lockdown, acts of domestic violence against women increased, however, very little coverage was given to this issue.

In 2020, with almost 162 countries all over the world pronouncing "stay-at-home" orders, there were approximately 2.73 billion women, who were impacted by "stay-at-home" directions. Though the motive behind this decision of governments was to keep people safe, the reality proved otherwise and laid bare the truth that home may not be a safe place for women, after all.[7]

Hardly any news channel covered this important issue, because domestic violence is a very common thing in India and a part of day-to-day life. Millions of Indians have by and large accepted it.

To top it all, Indian TV Shows and movies have defined and are still defining the characteristics of an idol women. Also, these shows deeply influence the way a person judges a woman. According to these shows and movies, an idol sanskari bhartiya nari should be polite, well dressed, and obedient to her husband and her in-laws.[8] Many people say that these shows are for entertainment purpose only and not to be taken seriously but they subconsciously affect our mind.[9]

Similarly, advertisements too have engraved gender roles in our mind. An analysis of some famous advertisements has been given here. In Johnson's Baby product advertisements how many times have we noticed a man taking care of the baby? One will only find women promoting these products in every advertisement, indirectly defining that a woman is the one who must take care of the child. Also, if we look at one of the most watched ad, Harpic toilet cleaner, it has the same theme and defines that cleaning bathroom, toilet and kitchen is a women's job. Not to miss, all those commercials of deodorants and after shave lotions, where semi naked or bikini clad models run after the men who use them. On the contrary, ever seen an ad for a car, where women are driving, thus stereotyping the fact that driving is a man's job.[10] Thus, these ads play a vital role in defining gender stereotypes.

III. Laws Against Indecent Representation of Women In India

Our Constitution of India through various provisions under its Preamble, Fundamental Rights, Fundamental Duties, and Directive Principles not only grants equality to women but also enables the State to implement measures of positive discrimination for the advancement of women.[11] For instance, Article 15(3) of the Indian Constitution permits States to make special provisions for the development and advancement of women.[12] It is a fundamental duty of every citizen of India to prohibit practices which are derogatory to women.[13] Towards fulfilling the aim of being a democratic polity, our laws, policies, plans, and programs of development all aim at progress of women in different spheres. At the international level, there are several conventions which aim to secure equal human rights for women. India has also ratified various international conventions and human rights instruments engaging to advance rights for women. Principal among them is the Convention on Elimination of All Forms of Discrimination Against Women (CEDAW), which India ratified in the year 1993.

Another Indian law which has been put in place to check scandalous representation of women is the Indian Penal Code, 1860 (hereinafter IPC). Section 292, 293, and 294 of IPC explains and punishes anyone who does an

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5 Afsana A. Sama, Women Empowerment: Issues and Challenges, 4 *International Journal of Indian Psychology* 149 (2017).

6 Rajesh Kumar Sharma, *Representation of Women Issues in Print Media: A Cultural Study Approach* (2009) (PhD Thesis, Department of Journalism and Mass Communication, Himachal Pradesh University, Shimla).

7 Justice for Women amidst Covid-19, UNDP, *available at:* https://www.undp.org/publications/justice-women-amidst-covid-19 (Last visited on 23rd June 2022).

8 *Supra* note 6 at 70.

9 Portrayal of Women in Indian Cinema, WordPress, *available at:* Portrayal of women in Indian cinema and OTT platforms! – aspiretoinspire (wordpress.com) (Last visited on 28th June 2022).

10 Stacy L Graos & Yorgos C Zotos, "Gender Stereotypes in Advertising: A Review of Current Research", 35 *International Journal of Advertising* 764 (2016).

11 Article 14 of the Indian Constitution

12 Article 15(3) of the Indian Constitution

13 Article 51-A(e) of the Indian Constitution

obscene act. It has been observed that the terms obscenity, indecent, or vulgarity are not easy to define, as they are intricately associated with the moral values in society. Ind India, the test of obscenity is whether the content of the matter, charged with obscenity, is to degrade and abuse those, whose minds are open to such immoral influences and into whose hands a publication of this type may fall.[14]

How a woman is getting represented on any kind of media is the responsibility of government. Indian government have many laws to govern how mainstream media and print media is operated and what kind of content is getting published in it. For example, for monitoring what is getting published in print media Indian government has "The Press Council Act, 1978". For monitoring what type of content is being showed in films Indian Government has "The Central Board of Film Certification" (CBFC) which ensures that all the films which are getting released are suitable for public viewing. In short members of this board, watch the film before giving an approval for releasing that film in theatres. Few people who are on this board get to decide what is fit and unfit for the public. Now imagine if more than 50% of board members support patriarchy then films promoting patriarchy will get a certificate for releasing it and films which are spreading awareness about how patriarchy is not good will never get released.

Also, there is a voluntary organization named The Advertising Standards Council of India (ASCI) which makes sure that advertisements are not violating any rules or spreading wrong information about any product or mocking any race, cast, creed, gender, or nationality.[15] However, this organisation too has failed in its duty as we see hundreds of ads yearly flouting these guidelines. [16]

Despite several provisions under statutes and Constitution, there was growth in the offensive representation of women or references to women publications, especially in the advertisements that had the effect of belittling and denigrating women, thereby injuring them. Even though there was not any specific aim of these advertisements to harm women or to target them, but publications, etc. yet had an effect of depraving or corrupting persons.

Therefore, in 1986, the Indecent Representation of women (Prohibition) Act was tabled and passed by the Parliament to efficiently prevent and punish anyone who does indecent representation of women through any media, publication, or advertisement. The rationale behind this law was to stop the depiction of the figure, or body of women in any indecent form which is probably going to deprave, corrupt, and injure the morality or morals of the public. The Indecent Representation of Women (Prohibition) Act, 1986 (hereinafter IRWA) provides for the regulation of the representation of women in the print media. Under the Act, an indecent depiction of women in advertisements, writings, books, paintings, figures, and the like has been prohibited. Further, Section 4 of the IRWA, 1986 forbids the production, distribution, sale, hire, circulation, sending by post any books, pamphlets, slide, film, writing, drawing, painting, etc., which contain an indecent representation of women in any form. Nevertheless, advertisements indecently portraying women are aired day in and day out and hardly any legal action is taken. The National Commission of Women (NCW) has suggested amendments in the statute and has explained the ways to strengthen it and make it work so that the objectives outlined can be achieved. However, the bill has been rejected.[17]

In 1995, Cable Television Networks (Regulation) Act was enacted. The purpose of this Act was to prohibit the transmission of advertisements on the cable network which are not in consonance with the Advertisement Code. Rule 7 of the Cable Television Network Rules, 1994 establishes the Advertisement Code. Contravention of these provisions attracts liabilities. The Advertisement Code disallows any advertisement that ridicules any race, caste, colour, creed, and nationality. Further, Rule 7 (2) (vi) bans all those advertisements in which women are depicted indecently, and which, violates the Constitutional guarantee to all citizens. In conformity with the fundamental duty enshrined under Article 51 A(e) of the Constitution, it forbids any advertisement which portrays a disparaging image of women.[18] The objective behind it is that women must not be shown in a manner that emphasizes passive, submissive qualities, or objectifies them. Showcasing their submissive side often encourages them to play a subordinate, secondary role in family and society in real life.

Another important legislation in this direction is the Information Technology Act, 2000. Section 67 of the IT Act is one of the most pressing legal provision against pornography. The section reads as under: "Whoever publishes or transmits or causes to be published in the electronic form, any material which is lascivious or appeals to the prurient interest or if its effect is such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it, shall be punished on first conviction with imprisonment of either description for a term which may extend to five years and with fine

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[14] Richard Jochelson, "After Labaye: The Harm Test of Obscenity, the New Judicial Vacuum, and the Relevance of Familiar Voices", 46 *Alberta Law Review* 2 (2009).

[15] The Advertising Standards Council of India (ASCI), Indian Broadcasting Foundation, *available at:* https://www.ibfindia.com/advertising-standards-council-india-asci (Last visited on 3rd July 2022)

[16] *Ibid*.

[17] Ambika Pandit, "Government Withdraws Indecent Representation of Women Amendment Bill" *The Times of India*, July 26, 2021.

[18] *Ibid*.

which may extend to one lakh rupees and in the event of a second or subsequent conviction with imprisonment of either description for a term which may extend to ten years and also with fine which may extend to two lakh rupees.

However, the major problem with the IT Act is that it does not regulate the expression prior to its publication. Rather, it regulates it after the expression has been published.[19]

IV. Loopholes in the Indecent Representation of Women Act, 1986

One of the major loopholes in the Indecent Representation Act is that it is almost four decades old. It does not consider the technological advancements which has taken place in the society since then. The only form of media available at that time was print. However, today we can see there are many forms of media over which we can view content. This includes social media sites like Facebook, Whatsapp, Instagram, Snapchat, etc. Also, there are OTT (Over the Top) Platforms like Amazon Prime, Netflix, Zee5, Voot, SonyLiv, wherein one can see the content of one's choice. Indecent Representation of Women Act needs to cover these forms of media as well.

Further, we know that Section 2 of this act is dedicated towards definition of terms related with this act. This act only talks about printable material like product packaging, graphics designs, labels, etc. The important terms such as promoting patriarchy, promoting gender biased stereotypes, promoting gender roles etc. are missing from this act. Also, the term misrepresentation is defined like an umbrella term which is not clear – 'any act representing a women's body indecently is defined as indecent representation.'[20]

As we have seen above by not defining basic terms as well as by limiting itself to published material this act only tries to mislead people into thinking that it is prohibiting women from getting represented indecently. If we look properly, we notice that this act does not mention how it protects women from getting misrepresented. It only contains basic rules and punishments and powers of government agencies.

V. Indecent Depiction of Women in Ott Platforms

OTT (Over the top media services) or VOD (Video on Demand) platforms such as Netflix, Amazon Prime, Disney+ Hotstar, SonyLiv, Zee5, etc. are the buzzwords we have been hearing a lot from past four-five years. These online publishing sites are in trend for they directly stream web-series and movies. Video-on-Demand (VOD) is a streaming media service offered directly to audience via internet. This platform has overtaken the task done by television through cable, satellite, etc.

Many of the web series and movies streaming on these sites are questionable and represents women as a sexual object only. For instance, the web series named Rasbhari produced and released by Amazon Prime has many questionable scenes, such as, in an episode a girl child is shown dancing in front of drunk men, also students are made part of a sexual comedy. Gandii Baat is a web series featuring a separate erotic-themed story in each episode from rural India. The web series depicts that how people of rural India are deeply affected by their dark fantasies. Apart from men, the web series shows the rural women who would go to any degree for the sake of sex. Similarly, Mirzapur, a web-series which had taken the country by storm since its first season in 2018 has been in controversy for its violence, nudity, and profanity. There are many scenes in the series which have indecently represented women. Take for instance, sex scenes between male servant and lady of the house. Then there was a visual, where another female character of the show was seen masturbating in a public library.[21] Sacred Games is another web series on Netflix which has been making headlines since it first came for all the wrong reasons. Game of Thrones, an American fantasy drama web series has several scenes exhibiting incest including a one where a father does sex with his own daughters.[22]

Key thing to notice here is that how these kinds of scenes are getting published directly where anyone of any age (including young children) can watch it. Of all the viewers, it is the children on whom these web-series/movies have the worst impact. It has been observed that children remember the visuals of the motion pictures and try to imitate what they have seen.[23] The reason is that currently India has no law to monitor online content, so these websites can publish anything. These OTT/VOD platforms have no regulatory body above them to govern the content provided to its audience as against the presence of respective regulatory bodies for cinemas and televisions. Thus, they show every kind of content including the one which is harmful and corrupts the mind of people. Government can only take action if any porn content is published by these sites.

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19 Legality of Porn in India, Is it Illegal to Watch Porn in India?, LinkedIn, *available at:* https://www.linkedin.com/pulse/illegalwatchpornindiapranshuagarwal/ ?trackingId=j4B9iYvbRaCPK%2FzQRR65CQ%3D%3D (Last visited on 3rd July 2022)

20 Deepak Ranjan Sahoo, "Indecent Representation of Women: Role of Media and Law", *Odisha Review* 36 (2015).

21 Rohan Naahar, "Mirzapur Review: Even Pankaj Tripathi can't save Amazon Prime's Hyperviolent Anurag Kashyap Rip off" *Hindustan Times*, Nov. 17, 2018.

22 Refer to Season 4, Episode 1 – "The Daughter-Wives of Craster's Keep".

23 Movies, Media, and Children, American Academy of Child and Adolescent Psychiatry, *available at:* https://www.aacap.org/AACAP/Families_and_Youth/Facts_for_Families/FFF-Guide/Children-And-Movies 090.aspx (Last visited on 8th July 2022).

VI. Effect Test Vis-a-vis Control Test

One of the reasons why the VOD platforms argue that there should be no regulating authority over them is because they give sufficient control to the user/viewer. For instance, in the cable service platform, the viewer can at most change the channel when he wishes to skip the particular part of the motion picture, which he seems unfit for viewing or does not intend to watch. He can only jump the channel. He cannot skip that part and move forward. However, VOD platforms provide that sense of control to these viewers. On these platforms, the viewers have the option to skip/jump or forward to the next scene.

According to the author, the criteria for whether content given by a platform should be regulated is determined by the nature of the impacts that its content will have on its viewers, not by the feature of how much control that platform affords to its users.[24] In other words, the 'effects test' should be the only deciding factor and not the 'control test'.

Since these platforms have been receiving a lot of backlash from a segment of Indian population, for promoting nudity, abusive language and violence, they are advocating for self-regulation. In a bid to protect themselves from severe regulations, video-on-demand apps have recently signed a 'self-regulatory code'.[25] They have undertaken to not to show any type of content which is "disrespectful to national symbols and religions". Further, the players are required to ensure that they do not make available any content which shows "children engaged in real or simulated sexual activities" or promotes terrorism or has been prohibited for distribution by video services online by any court or under any law. It also provides a mechanism for consumer to file complaints in case of grievances.

VII. Regulating the Ott/vod Platforms

Like any other media, there should be some amount of regulation on OTT/VOD platforms. The reason for regulation is not to restrict artistic freedom or freedom of expression of producers and directors, but to ensure that such violent, obscene, scandalous, or offensive content should not reach children or corrupt the minds of its viewers. Just like the Central Board of Film Certification (CBFC), is responsible for issuing certificates for films like U(Unrestricted), UA (Unrestricted but with adult supervision), S (Restricted to specialized audiences like doctors or scientists), and A (Restricted only for adults),[26] there should be some classification of the content on OTT platforms as well.

Since, there is no regulatory authority for these media, and Cinematograph Act, 1952 does not seem to be appropriate regulatory authority for such platforms, there has been a proposal to include them under the Indecent Representation Act, 1986. We need to include them under this Act, so that violation by these sites can become punishable. Similarly, social media sites like Instagram, Snapchat, Facebook have lot of 'scandalous' content posted on them.

In June 2018, after looking at the observations of a parliamentary standing committee and suggested recommendations from the National Commission for Women an amendment was put forward in the IRWA, 1986 to broaden the scope of media. As a result, indecent representation on virtual messaging/texting platforms such as WhatsApp, Viber and Skype had been suggested to be made unlawful and illegal. As per the new amendment, a violator will be levied a heavy penalty of rupees two lakh and also a prison term as against the current fine of rupees two thousand. The redesigned draft bill also proposed an amendment in the definition of term 'advertisement' to include digital form or electronic form of ads or hoardings, or SMS, MMS, etc.[27]

However, this Draft Bill was recently withdrawn by the Central Government in July 2021. The reason for withdrawal was that it was felt that it was no more required as the concerns had been well addressed under the Information Technology Rules, 2021, the Cinematograph Act, 1952 and other provisions of law, keeping in view the new emerging realities.[28]

VIII. Conclusion and Suggestions

Since media is considered as a fourth organ of the democratic nation, therefore it's the responsibility of the media to stop showcasing the offensive version of journalism and spread positivity and help women earn status and bread without holding any sexually explicit remarks and without promoting any ad agency. Commodification and objectification of women for commercial interests needs to be stopped urgently. It is incumbent on the commercial industry to understand this and stop the indecent portrayal of women for their selfish gains. In this regard, the self-regulating agencies - Advertising Standards Council of India, Press Council of India, Central Board for Film Certification, etc. have a significant task to perform. They need to strictly abide by the guidelines regarding the indecent and scandalous representation of women. It is for these agencies to

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24 Editorial, "TRAI says no to Regulations for OTT Players" *The Economic Times*, Sep. 15, 2020.

25 Netflix, Hotstar, 7 other streaming platforms sign 'self-regulation code', The Week, *available at:* https://www.theweek.in/news/biz-tech/2019/01/18/netflix-hotstar-7-other-streaming-platforms-sign-self-regulation-code.html (Last visited on 10th July 2022).

26 How is a Film Certified by Censor Board?, CBFC, *available at:* https://factly.in/how-is-a-film-certified-by-the-censor-board-cbfc-film-certification-process-in-india/#:~:text=As%20far%20as%20possible%2C%20the,physically%20and%20mentally%20handicapped%20persons (Last visited on 10th July 2022).

27 *Supra* note 17.

28 *Ibid*.

formulate awareness generation programmes to spread awareness amongst various stakeholders involved like common people, publishers, writers, film makers, lyricists, internet and mobile service providers, advertisers etc. about such wrongful representations and also, about the consequences and penalties which could be imposed in case of violation of the IRWA.

With the passage of time, we need to recreate this legislation because sources of showcasing indecency are not limited, rather it has widened. In today's world with the development of various technologies, the need to review this Act is must. Adding, this statute needs to be revived and should be regulated adhering to the provisions of various OTT platforms such as NETFLIX, PRIME VIDEO, HOTSTAR etc which are showcasing the adult content which now have become difficult to be monitored because of the recent advancements in the tech world.

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Annexure I

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Example: M.C. Mehta v. Union of India, [1997] 2 SCC 353 [Taj Trapezium case] Subsequent references

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QUOTES FROM CASES

Per Subba Rao J., "a construction which will introduce uncertainty into the law must be avoided. It is conceded by the petitioner that the power to amend the Constitution is a necessary attribute of every Constitution". (Footnote original citation of case or shortened form as per rules stated above)

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> BP Singhal v. Union of India, W.P. (Civil) No.296 of 2004, Decided on May7, 2010(K.G. Balakrishnan C.J.I., S.H. Kapadia, R.V. Raveendran, B.S. Reddy and P. Sathasivam (JJ.) (Supreme Court of India).

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Case Concerning Right of Passage over Indian Territory (India v. Portugal) Judgment, 1957, ICJ reports, 12 (International Court of Justice)

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Art. 21, THE CONSTITUTION OF INDIA, 1950.

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Sec. 124, Indian Contract Act, 1872.

BILLS

Cl. 2, The Companies (Amendment) Bill (introduced in Lok Sabha on March 16, 2016).

PARLIAMENTARY DEBATES

Question/Statement by Name, DEBATE NAME, page no (Date) Example:

- Question by N.G. Iyengar, CONSTITUENT ASSEMBLY DEBATES 116 (August 22, 1947).

- Statement of V. Narayanaswamy, LOK SABHA DEBATES 5 (March 10,2010).

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  M.P.Jain and S.N. Jain, PRINCIPLES OF ADMINISTRATIVE LAW, 38 (Wadhawa, 2001)
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  D.J. Harris et al, LAW OF THE EUROPEAN COMMUNITY ON HUMAN RIGHTS, 69 (2nd Edn., 1999).
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Name of Author, Name of Article in Name of Collected Book Page No (Editor Name, Year of Publication)

M.S. Ramakumar, India's Nuclear Deterrence in NUCLEAR WEAPONS AND INDIA'S NATIONAL SECURITY 35 (M.L. Sondhi Edn., 2000).

REGILIGIOUS AND MYTHOLOGICAL TEXTS

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THE BHAGAVAD GITA, Chapter 1 Verse46

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LAW REVIEW ARTICLES

A.M. Danner, Constructing a Hierarchy of Crimes in International Criminal Law Sentencing, Vol. 87(3) VIRGINIA LAW REVIEW 415 (2001).

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- **Articles in print versions of magazines**
  Uttam Sengupta, Jack of Clubs and the Cardsharps, OUTLOOK 22 (June 11, 2016).
- **Articles published in a magazine arranged by volume**
  A. Bagchi, Sri Lanka's Experiment in Controlled Decentralization: Learning from India, 23(1) ECONOMIC AND POLITICAL WEEKLY 25 (January 2, 1988).
- **Articles in print versions of newspapers**
  Robert I. Freidman, India's Shame: Sexual Slavery and Political Corruption are Leading to an AIDS Catastrophe, THE NATION 61(New York Edn., April 8, 1996).

MAGAZINE ARTICLES ONLINE VERSIONS

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  Mehboob Jeelani, Politics stretches list of Smart Cities from 100 to 109, The Hindu (2 July 2016), available at http://www.thehindu.com/todays-paper/politics-stretches-list-of-smart-cities- from-100-to-109/article8799010.ece(Last visited on July 2,2016).

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REPORTS

LAW COMMISSION REPORTS

243rd Report of the Law Commission of India (2012)

ONLINE REPORTS

World Trade Organization, Lamy outlines "cocktail approach" in moving Doha forward, (2010), available at http://www.wto.org/english/news_e/news10_e/tnc_chair_report_04may10_e.htm (Last visited on May 10, 2016).

INTERNATIONAL TREATIES

Art. 5, UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), July12, 1998, ISBN No. 92-9227-227-6, available at: http://www.refworld.org/docid/3ae6b3a84.html (accessed July 2, 2016)

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- These connectors can only be used to refer to the original footnote and may not be used to refer to an earlier reference.
- The format for referring to the immediately prior footnote shall be one of the following:
- When the page number(s) being referred to are the same as in the previous footnote
- Id.
- When the page number(s) being referred to are different from the previous footnote
- Id., at 77-78.
- The last name of the author, when available, should be used before the supra. The format for referring to footnote earlier than the immediately prior footnote shall be: Seervai, supra note 6, at 10.

Introductory Signals

- No introductory signal to be used when the footnote directly provides the proposition.
- The signal 'See' shall be used when the cited authority clearly supports the proposition.
- All footnotes must not end in a period (fullstop).

QUOTES

- For quotations below fifty words in length, the quote should be in double inverted commas and should beitalicized.
- For quotations above fifty words in length, separate the text from the main paragraph, indent it by an inch from either side, and provide only single line spacing. If the main text has only single line spacing, the font size of the quote shall be reduced by1.

Ethics Policy for Journal

1. Reporting Standards

Authors of research paper should present an accurate account of the work performed as well as an objective discussion of its significance. Underlying data should be represented accurately in the paper. A paper should contain sufficient detail and references to permit others to replicate the work. Fraudulent or knowingly inaccurate statements constitute unethical behaviour and are unacceptable. Review and professional publication articles should also be accurate and objective, and editorial 'opinion' works should be clearly identified as such.

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3. Originality and Acknowledgement of Sources

The authors should ensure that they have written entirely original work, and if the authors have used the work and/or words of others, that it has been appropriately acknowledged, cited, quoted and permission has been obtained where necessary. Authors should cite publications that have influenced the reported work and that give the work appropriate context within the larger scholarly record. Information obtained privately, as in conversation, correspondence, or discussion with third parties, must not be used or reported without explicit, written permission from the source.

Plagiarism takes many forms, from 'passing off' another's paper as the author's own paper, to copying or paraphrasing substantial parts of another's paper (without attribution), to claiming results from research conducted by others. Plagiarism in all its forms constitutes unethical behaviour and is unacceptable. Plagiarism test of the content should not be more than 10% (Turnitin).

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An author should not in general publish manuscripts describing essentially the same research in more than one journal of primary publication. Submitting the same manuscript to more than one journal concurrently constitutes unethical behaviour and is unacceptable.

In general, an author should not submit for consideration in another journal a paper that has been published previously, except in the form of an abstract or as part of a published lecture or academic thesis or as an electronic preprint.

Publication of some kinds of articles (e.g. clinical guidelines, translations) in more than one journal is sometimes justifiable, provided certain conditions are met. The authors and editors of the journals concerned must agree to the secondary publication, which must reflect the same data and interpretation of the primary document. The primary reference must be cited in the secondary publication. Further detail on acceptable forms of secondary publication can be found from the ICMJE

6. Confidentiality

Information obtained in the course of confidential services, such as refereeing manuscripts or grant applications, must not be used without the explicit written permission of the author of the work involved in these services.

7. Authorship of the Paper

Authorship should be limited to those who have made a significant contribution to the conception, design, execution, or interpretation of the reported study. All those who have made substantial contributions should be listed as co-authors.

Where there are others who have participated in certain substantive aspects of the paper (e.g. language editing or medical writing), they should be recognised in the acknowledgements section.

The corresponding author should ensure that all appropriate co-authors and no inappropriate co-authors are included on the paper, and that all co-authors have seen and approved the final version of the paper and have agreed to its submission for publication.

Authors are expected to consider carefully the list and order of authors before submitting their manuscript and provide the definitive list of authors at the time of the original submission. Only in exceptional circumstances will the Editor consider (at their discretion) the addition, deletion or rearrangement of authors after the manuscript has been submitted and the author must clearly flag any such request to the Editor. All authors must agree with any such addition, removal or rearrangement.

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The practice of peer review is to ensure that only good research papers are published. It is an objective process at the heart of good scholarly publishing and is carried out by all reputable scientific journals. Our referees play a vital role in maintaining the high standards and all manuscripts are peer reviewed following the procedure outlined below.

Initial manuscript evaluation The Editor first evaluates all manuscripts. It is rare, but it is possible for an exceptional manuscript to be accepted at this stage. Manuscripts rejected at this stage are insufficiently original, have serious scientific flaws, have poor grammar or English language, or are outside the aims and scope of the journal. Those that meet the minimum criteria are normally passed on to at least 2 experts for review.

Type of Peer Review: *Our Policy* employs blind reviewing, where both the referee and author remain anonymous throughout the process.

How the referee is selected Whenever possible, referees are matched to the paper according to their expertise and our database is constantly being updated.

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Language correction is not part of the peer review process, but referees may, if so wish, suggest corrections to the manuscript.

How long does the review process take? The time required for the review process is dependent on the response of the referees. In rare cases for which it is extremely difficult to find a second referee to review the manuscript, or when the one referee's report has thoroughly convinced the Editor. Decisions at this stage to accept, reject or ask the author for a revision are made on the basis of only one referee's report. The Editor's decision will be sent to the author with recommendations made by the referees, which usually includes verbatim comments by the referees. This process takes one month. Revised manuscripts may be returned to the initial referees who may then request another revision of a manuscript or in case second referee the entire process takes 2-3 months.

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Editor's Decision will be final. Referees are to advise the editor, who is responsible for the final decision to accept or reject the research paper for publication.

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